



**Kangethe & another v Lwegado (Civil Appeal E253 of 2024)
[2025] KEHC 1639 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E253 OF 2024
RN NYAKUNDI, J
FEBRUARY 21, 2025**

BETWEEN

JOSEPH NGIGI KANGETHE 1ST APPELLANT

KAN TRAVELLERS LIMITED 2ND APPELLANT

AND

RONALD KIDIAVAI LWEGADO RESPONDENT

(Being an Appeal from the Judgement of the Honourable K. Gweno (SRM) in Eldoret CMCC No. E461 of 2023; Ronald Kidiavai Lwegado Vs Joseph Ngigi Kang'ethe & Kan Travelers Limited)

RULING

Representation:

Kimondo, Gachoka & Co. Advocates

Kimondo, Gachoka & Co. Advocates

1. What is pending before me for determination is a Notice of Motion Application dated 13th December 2024 premised upon Section 3A of the *Civil Procedure Act*, Order 42 Rule 6(2), Order 51 Rule 1 of the Civil Procedure Rules 2010 where the Applicant is seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That there be a stay of execution of the Judgement of Kshs. 209,550/= excluding costs and interest pending the hearing and determination of Eldoret HCCA No. E253 of 2024; Joseph Ngigi Kangethe & Kan Traveller Limited Vs Ronald Kidiavai Lwegado



- d. That this Honourable Court be pleased to allow the Appellants/Applicants to furnish the Court with security in the form of a Bank Guarantee from the Family Bank.
 - e. That the costs of this application be provided for
2. The Application is based on the grounds on the face of it among others;
- a. That Judgement was delivered herein on 13th November 2024 in favour of the Respondent in the following terms; -
 - Liability.....100% as against the Appellants/Applicants
 - Pain and suffering.....kshs. 200,000/=
 - Special Damages.....kshs. 9550/=
 - Net award.....kshs. 209,550/=
 - b. That the Appellants/Applicants have appealed against the said judgement and the orders of stay of execution are about to lapse.
 - c. That the Respondent's financial ability is unknown and is therefore unlikely to refund the judgement sum if paid out to him to the detriment of the Appellant/Applicant.
 - d. That the Respondent is likely to execute the judgement and decree and the Appellant/Applicant stands to suffer substantial loss.
 - e. That the Appellant's/Applicants' insurer is ready and willing to furnish the Honourable Court with a Bank Guarantee as security in due performance of the decree, within a stipulated period as directed by this Honourable Court
3. The Application is supported by the annexed Affidavit dated 13th December 2024, sworn by the said Joseph Ngigi Kangethe, the 1st Applicant herein, which contents I have read and understood.
4. The Application is opposed by the Respondent vide Grounds of Opposition dated 15th January 2025 on the following grounds;
- a. The application offends the Mandatory Provisions of Order 42 Rule 6 of the Civil Procedure Rules
 - b. No substantial loss to be suffered by the Appellants have been demonstrated
 - c. The Affidavit in support of the application is incompetent
 - d. The application is based on mere apprehensions
 - e. Without prejudice to a forgoing, the Respondent shall pray that as a precondition for stay pending appeal the Appellants pay to the Respondent half the Decretal Sum plus full costs and the remaining half of the decretal sum be deposited in a joint interest earning account as security for the appeal.
 - f. The Bank guarantee will not ensure due performance of the Decree as it's not good Security
5. The Application was disposed by way of written submissions.



Respondent's Submissions

6. The Respondent filed submissions dated 15th January 2025 on the application dated 13th December 2024.
7. The learned Counsel for the Respondent submitted that Order 42 Rule 6 of the Civil Procedure Rules provides that no order for stay of execution shall be made unless: -
 - a. The Court is satisfied that substantial loss may result to the applicant unless the order is made.
 - b. The application has been made without unreasonable delay
 - c. The Applicant has given such security for due performance of such decree or order as may ultimately be binding on him.
8. He submitted that the Insurance Company Direct Line Assurance Company Limited did defend the matter to its logical conclusion and it is upon them to settle the decretal sum and not the Appellants. He also submitted that the allegation of substantial loss by the Appellant would be a loss without any value or loss that will be merely nominal as the decretal dues are to be settled by the Insurance Company and that the appellants have therefore not demonstrated any substantial loss to be suffered and/or to be occasioned if the decretal sum is paid to the Respondent and the Application therefore fails to meet the pre-requisites of Order 42 Rule 6(1) of the Civil Procedure Rules.
9. Counsel further submitted that Order of Stay of execution are discretionary in nature and it is upon the Honourable Court to assess the facts of the case and make an Order and stated that if the application is allowed then the same should be in terms that half the Decretal Sum plus full costs be paid to the Respondent through his Advocate whilst the remaining half be deposited in a Joint Interest earning account within a period of Thirty (30) days in the names of the Advocates on Record.
10. Furthermore, counsel submitted that the Order would be fair and reasonable to both parties as it will safeguard both the Respondent as well the Appellants and that the amount in the joint interest earning account will be available to the Appellants should the appeal succeed as well as available to the Respondent should the appeal fail to succeed. He also stated that the Appellants financial ability is unknown and the Respondent has a judgement in his favour and as such the Honourable Court should allow the Respondent to enjoy the fruits of his judgement.
11. Counsel moreover submitted that the more the decretal amount stays in the hands of the Appellants the more the substantial loss the Respondent stands to suffer and that the prayer for furnishing of a Bank Guarantee should be disallowed. He argued that this is a money decree and a bank guarantee will not ensure the due performance of the decree and or ensure performance of the decree as it is not a good security. He also stated that the bank guarantee relates to several matters which might not satisfy the Decree and as it is a money decree, a bank guarantee will not ensure due performance of the decree or ensure performance of the decree and what will be the fate of the Respondent if the bank giving the guarantee goes under liquidation or Receivership. It was his final submission that it is within Public knowledge that Direct Line Assurance Company Limited is having wrangles and there would be no security for performance of the Decree if the Insurance Company is wound up.

Analysis and Determination

12. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -



1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
2. No order for stay of execution shall be made under sub rule 1 unless: -
 - a. The Court is satisfied that substantial loss may result to the 1st Applicant unless the order is made and that the application has been made without unreasonable delay;
 - b. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
13. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 - a. Substantial loss may result to him/her unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
14. Substantial loss was clearly explained in the case of James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR: -

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
15. The applicant in his affidavit explains on how he stands to suffer substantial loss. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show the manner in which execution will irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. The appellant has demonstrated substantial loss in my considered view.
16. Similarly, in Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR the Court of Appeal expounded on stay of execution stating:

In Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows: -

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the



application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter: -

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order.... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

Has the application has been made without unreasonable delay.

17. Judgment was delivered on 13th November 2024 and the applicant filed the instant application on 13th December 2024. It has taken the applicant one (1) month between the date of judgment delivered in the trial court and the time when he filed the instant application. It is therefore my considered view that the delay is not inordinate and inexcusable provided it is explained to the satisfaction of the court.

Security of costs.

18. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

19. From the foregoing decisions, it is evident that the issue of security is discretionary and it is upon the court to determine the same. Notably, in his application, the applicant stated that he is willing to offer security in the form of a bank guarantee if called upon by this Honourable Court to do so.
20. It is imperative that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits



of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

21. The court in granting stay has to carry out a balancing act between the rights of the parties. The issue that arises is whether there is a just cause for depriving the respondents their right of enjoying their judgment. Upon perusal of the grounds of appeal and without going into the merits of the appeal noted that they do raise arguable points of law.
22. Having found that the applicant has met the threshold for grant of stay pending appeal, I reach the conclusion that this application ought to be granted.
 - a. It is my finding that the Applicant herein shall deposit a decretal sum in the joint earning interest account of both counsels to be domiciled in a reputable financial institution within 30 days from today’s date.
 - b. In the alternative, a Bank Guarantee of the same security deposit within the same period which shall, be shared with the Deputy Registrar of the High Court.
 - c. The costs of this Application to abide the outcome of the appeal

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF FEBRUARY, 2025

.....

R. NYAKUNDI

JUDGE

