



**Maina & another v Oundo (Civil Appeal E1378 of 2024)
[2025] KEHC 1745 (KLR) (Civ) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1378 OF 2024

TW CHERERE, J

FEBRUARY 13, 2025

BETWEEN

JOSEPH KAGIRI MAINA 1ST APPELLANT

DAVID MBURU 2ND APPELLANT

AND

CHRISTINE OUNDO RESPONDENT

RULING

1. The Appellants have filed a Notice of Motion dated 2nd December 2024 under Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*, seeking an order of stay of execution of the judgment delivered on 30th October 2024 in MCCC No. E496 of 2021, pending the hearing and determination of their appeal.
2. The application is supported by the affidavit sworn on 02nd December 2024 by Joseph Kanyiri Maina, the 1st Appellant herein on his behalf and behalf of the 2nd Appellant. The deponent avers that the appeal is arguable and raises substantial issues. He contends that if a stay is not granted, the appeal will be rendered nugatory as the Respondent lacks the means to refund the decretal sum should the appeal succeed, thereby causing the Appellants substantial loss. He additionally avers that the Appellants are ready and willing to deposit the decretal sum with the court as security for the due performance of the decree.
3. The Respondent, Christine Oundo Opanja, opposes the application through her replying affidavit sworn on 06th February, 2025, arguing that the application is premature since no decree has been extracted, and thus, execution has not commenced. She asserts that the Appellants have not demonstrated the substantial loss they claim they will suffer. She further submits that if the court



is inclined to grant a stay, the Appellants should be ordered to deposit the decretal sum in court as security.

4. I have considered the notice of motion in the light of affidavits on record and the primary issue for determination is whether the Appellants have met the conditions for the grant of a stay of execution pending appeal as stipulated under Order 42 Rule 6(2) of the Civil Procedure Rules, which requires the applicant to demonstrate:
 - a) That substantial loss may result unless the order is made;
 - b) That the application has been made without unreasonable delay; and
 - c) That such security as the court orders for the due performance of the decree has been provided.
5. The impugned judgment was delivered on 30th October 2024, and this application for stay was filed on 2nd December 2024. Considering the circumstances, this duration does not in my considered view constitute an unreasonable delay.
5. Concerning substantial loss, the Appellants argue that they will suffer substantial loss if the stay is not granted, primarily because the Respondent may not be in a position to refund the decretal sum in the event the appeal succeeds.
5. It is trite that the burden of proving substantial loss lies with the Appellant, as established in *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the court stated as follows:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”
5. Although the decree in this matter has not been extracted, the Respondent has not provided evidence of her financial capability to refund the decretal sum, thereby justifying the Appellants' apprehension of substantial loss.
5. The Appellants concede as proposed by the Respondent that they are ready to deposit the total decretal sum as security for the due performance of the decree. In the case of *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* [2014] eKLR the Court held that:

“The security needed under Order 42 guarantees the due performance of such decree or order as may ultimately be binding on the Applicant...”
9. In order to ensure fairness for both parties, I find that the interest of justice favours the grant of the orders sought.
9. In the end, the Notice of Motion dated 02nd December 2024 is allowed on the following terms:
 1. There shall be a stay of execution of the judgment in MCCC No. E496 of 2021 on condition that the Appellants shall deposit the entire decretal sum with the court within 30 days from the date of this ruling.



2. Mention before the Deputy Registrar of this court on 20th March 2025 to confirm the filing of the record of appeal and for further orders
3. Costs shall abide the costs in the appeal

DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Appellants - Mr. Ngugi for C.N.Ngugi & Associates Advocates

For Respondent - Mr. Odhiambo for Gregory Ndege & Associates

