Thuo v Waliula (Civil Appeal E008 of 2025)
[2025] KEHC 2259 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2259 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E008 OF 2025

RN NYAKUNDI, J

FEBRUARY 14, 2025

BETWEEN

JOHN WAITHAKA THUO .... APPELLANT

AND

SUSSY KHAINDI WALIULA .... RESPONDENT

RULING

1. What is pending before me for determination is a Notice of Motion Application dated 20th January 2025 where the Applicant is seeking the following orders:
    a. Spent
    b. Spent
    c. That there be a stay of execution of judgement of Kshs. 320,392/= excluding costs and interests pending the hearing and determination of Eldoret Hcca No. E008 Of 2025; John Waithaka Thuo Vs Sussy Khaindi Waliula.
    d. That this Honourable Court be pleased to allow the Appellant/Applicant 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 as follows:
    a. That Judgement was delivered herein on 18th December, 2024 in favour of the Respondent in the following terms; -
        a. Liability..................100% as against the Appellants/Applicants
        b. Pain and Suffering.............kshs. 300,000/=

c. Special damages................kshs. 20,392/=

d. Net award..........................kshs. 320,392/=

b. That the Appellant/Applicant has appealed against the said judgement and the orders of stay of execution are about to lapse.

c. That the respondent's financial stability 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/Applicant's 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 20th January 2025 sworn by John Waithaka Thuo, the Applicant herein where he avers as follows:

a. That I am informed by my advocates on record which information I verily believe to be true that judgement was delivered o 18th December 2024 for kshs. 320,392/= exclusive of costs and interests.

b. That being dissatisfied with the aforementioned judgement, I instructed my Advocates on record to lodge an appeal against the whole judgement.

c. That the orders of stay in force are about to lapse; the judgement having delivered on 18th December 2024 and the Respondent is likely to execute the judgement and/or decree to my detriment whereas an appeal has been lodged against the judgement delivered.

d. That the Respondent's financial ability being unknown and the judgement amount being a substantial amount, the Respondent is therefore unlikely to refund the decretal sum if paid to him in the event the appeal succeeds and the Appellant/Applicant stands to suffer substantial loss.

e. That it is in the interest of justice that the orders of stay sought herein be granted so as to safeguard the interest of both parties herein as the Respondent's interests will be safeguarded by securing the decretal sum by way of a bank guarantee and the appeal will not be rendered nugatory.

f. That my insurer is ready and willing to furnish this Honourable Court with a Bank Guarantee as security in due performance of the decree, within a stipulated period as directed by this Honourable Court.

Analysis and Determination

4. I have carefully read through the application and the only issue I find for determination is whether the applicant has met the prerequisite for grant of stay of execution.

5. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates: -

> " 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.

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; and

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.

6. Therefore, 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 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.

7. These principles were enunciated in Butt vs Rent Restriction Tribunal [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Substantial loss

8. This limb requires the applicant to clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd vs Kibiru and Another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows: -

"The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal

does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts…."

The learned judge continued to observe that: -

> "It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

9. The applicant stated that he stands to suffer substantial loss as the respondent's financial stability is unknown and is therefore unlikely to refund the judgement sum if paid out to him to the detriment of the Appellant/Applicant. There must be reasonable grounds provided by the applicants to show that the respondent cannot make refund of the decretal sum after which the respondent will be called upon to discharge his evidential burden. The respondent in the instant case did not provide evidence to show his financial capabilities nor did he swear an affidavit of means. It is for that reason I find that the applicants have demonstrated substantial loss.

10. As to whether the application was made without reasonable delay, Judgment herein was delivered on 18th December 2024 and temporary stay for 30 days was granted. The instant application was filed on 20th January 2025 which in my opinion is within a reasonable period. As such, the application has been filed timeously.

11. The other element to be satisfied by the applicants is security is security of costs. The applicants ought to satisfy the condition of security. In the persuasive decision of *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* [2019] eKLR the court observed: -

> "The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.
>
> Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal….
>
> Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay

> execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

12. Similarly in *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & 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."

13. 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.

14. It is important to note 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 *Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR where the court upheld the decision of Portreitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1991 and stated that: -

> "That 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. There must be a just cause for depriving the plaintiff of that right."

15. From the above analysis, it is my considered view that on a balance of interests, since the applicant is willing to deposit the decretal sum, I am convinced that the fair balance would be for the applicant to provide a bank guarantee from a reputable bank and in which case they have proposed family bank.

16. In the end, the motion dated 20th January 2025 is allowed. Consequently, an order for stay of execution pending appeal is granted on condition that the appellant provides a bank guarantee from a reputable bank as security for the decretal sum pending the hearing and determination of the Appeal. In default the stay order shall automatically lapse.

17. Costs of the motion to abide the outcome of the appeal.

18. It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF FEBRUARY, 2025

R. NYAKUNDI

JUDGE