



REPUBLIC OF KENYA



KENYA LAW
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**Barasa v Nambale (Civil Appeal E135 of 2024)
[2025] KEHC 4986 (KLR) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E135 OF 2024**

**S MBUNGI, J
APRIL 23, 2025**

BETWEEN

JOSEPH OKIRING BARASA APPELLANT

AND

DAVID NAMBALE RESPONDENT

RULING

1. The Appellant/Applicant herein, filed the application dated 7th October 2024, seeking the following orders: -
 - a. That this application be certified urgent and heard ex parte in the first instance. (spent)
 - b. That this Honourable Court be pleased to stay the execution pending the hearing and determination of this application interparties.
 - c. That this Honourable Court be pleased to stay the execution pending the hearing and determination of this appeal herein.
 - d. The costs of this application are provided for.
2. The application is supported by the ground on the face of the said application and the supporting affidavit of the Applicant dated the same date as the application.
3. In his supporting affidavit, he avers that he was aware of the judgment delivered against him on 23rd July 2024 in Butali SRMCCC 50/2020 in David Nambale vs. Joseph Okiring Barasa.
4. He states that the Respondent filed a bill of costs amounting to Kshs. 184,845/= for which he claims he is at risk of suffering execution before the appeal is heard and decided on merits.
5. He claims that he is unable to settle the decretal sum on his income and holds that the appeal has triable issues and is in the process of being determined.



6. He prays that he is allowed to deposit a log book of his motor vehicle as security for the performance of the decree.
7. The Respondent who filed their undated replying affidavit in response to the application avers that the application is frivolous and an abuse of the court process since it has not met the threshold to grant orders for a stay of execution.
8. He holds that the decree is monetary compensation that is capable of restitution hence the Applicant will suffer no irreparable harm and that the grant of stay would be prejudicial as he will not enjoy the fruits of the judgment.
9. He further claim that the applicant has not attached a copy of the logbook of the motor vehicle he proposes to deposit a security thus there is no way to ascertain if the motor vehicle belongs to him hence he has failed to give an acceptable security for due performance of the decree.
10. He prays that the application be dismissed since the appeal would not be rendered nugatory if the judgment sum is paid to him since the money decree is capable of being refunded if the appeal was to succeed.
11. In his submission dated 13th November 2024, the Applicant claims that if the stay is not granted, he will suffer a great injustice because his appeal has triable issues for he is contesting both the awards in quantum and liability.
12. He further claims that the Respondent would be unable refund decretal amount which he terms substantial given his current income and further that the Respondent has not provided any evidence that he would afford to refund him the amount if the appeal is successful.
13. He relied on the case of G. N Muema P/A Mt. view maternity & Nursing home Vs. Miriam Bishar & Another (2018) Eklr.
14. On the issue of security he cited the case of Nicholas Stephen Okaka & another vs. Alfred Waga Wesonga (2022) Eklr and submitted his readiness to comply with any conditions the court may impose.
15. In his submission dated 18th October 2024, the Respondent submitted that the Applicant has not provided sufficient cause to show that he would suffer substantial loss if the application is not allowed. On this ground, he relied on the case of James Wangalwa & another vs. Agnes Naliaka Cheseto (2012) eKLR.
16. He submitted that the decree was a money decree that can easily be restored in case the appeal succeeds and relied on Article 27 of *the constitution* holding that he should not be denied the fruits of his judgment, an act which to him would amount to an act of discrimination.
17. On the issue of security, he submitted that the Applicant has not deposited any copies of the motor vehicle logbook as a security for the due performance of the decree and further, there was no valuation done to prove the value of the motor vehicle.
18. He submitted that the Applicant has not met the threshold required for a stay of execution to be granted.

Analysis and determination

19. The main issue for determination is whether the instant application is merited.
20. The law governing the grant of orders for a stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules, which stipulates as follows: -



1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 the application being made, to consider such application and to make such order thereon as may to it seems just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is referred may apply to the appellate court to have such order set aside.
2. No order for a stay of execution shall be made under sub-rule (1) unless—
3.
 - (a) the court is satisfied that substantial loss may result to the 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.
21. The above provision requires the Applicant seeking orders for a stay of execution to establish that he has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted, and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for a stay of execution pending appeal must be made without unreasonable delay.
22. The three conditions to be fulfilled can therefore be summarized as follows;
 - a. That substantial loss may result to the applicant unless the order is made.
 - b. Application has been made without unreasonable delay.
 - c. Security as the court orders for the due performance.
23. The Court of Appeal in *Butt Vs Rent Restriction Tribunal* [1979] stated what ought to be considered in determining whether to grant or refuse a 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 motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse
24. The first condition that the Applicant should meet is if he will suffer substantial loss if the stay orders are not granted.



25. On what constituted substantial loss, it was explained in the case of James Wangalwa & Another v 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.

26. The Applicant contends that he stands to suffer irreparably if the respondent executes against him since he is employed and depends on his income, which would not be sufficient to pay off the advocate costs as well as the decretal sum if they execute against him before the appeal is heard and determined.

27. On the other hand, the Respondent states that he has the right to enjoy the fruits of the judgment since the case was determined on merit and in his favor.

28. He holds that the Applicant has not demonstrated that he will suffer irreparable harm. The Respondent argues that the Applicant has not demonstrated the substantial loss he stands to suffer, and further that it's a money decree that can be refunded in case the appeal was successful.

29. The Applicant has filed an appeal which is waiting for a determination and has produced a copy of his pay slip as proof of his monthly income which shows he is unable to pay the decretal amount and thus he shall suffer irreparable harm if the execution proceeds against his salary. The Respondent, on the other hand, has not given any material as to his ability to repay the decretal sum in case the appeal succeeds; he has not provided any evidence that he shall suffer substantial loss if the stay is granted. Accordingly, I am persuaded that the aspect of substantial loss has been proved by the Applicant.

30. The second consideration is whether the application was filed without unreasonable delay.

31. The court in Jaber Mohsen Ali & Another vs. Priscillah Boit& Another E&L No. 200 of 2012[2014] eKLR was of the view that unreasonable delay depends on the circumstances of the case. The court stated:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land. I note that the judgment was delivered on 23rd July 2024. The memorandum of appeal was filed on 29th July 2024 which was less than a week after the judgment was entered.

32. The application was filed on 7th October 2024 within 3 months of filling the memorandum of appeal. This court thus finds that the appeal and this application for a stay of execution have been filed without undue delay.



33. The last consideration is on the security. In *Focin Motorcycle Co. Limited vs Ann Wambui Wangui & Another* (2018) eKLR the court stated that:

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground.”

34. Security is discretionary and it is upon the court to determine the same. In this case, the applicant is willing to deposit his log book as security pending the determination of the appeal. The respondent on the other hand, claims that the Applicant has not produced a copy or a valuation report of the log book; hence, the court should not admit the log book of the motor vehicle as security.

35. The issue of a logbook being used as security for a stay of execution of a decretal sum has been widely discussed by courts in other cases.

36. In *Lochab Brothers Ltd vs. Lilian Munabi Nganga & 2 Others* [2007] eKLR, the court dismissed a similar application to substitute security with a logbook, the court expressed the view that –

“There is no guarantee that by the time the appeal will be heard and determined, the vehicle will be worth the same money or it will be there at all. The vehicle is still under the control and use of the applicant. Many things can happen to it before the appeal is heard. It can be wasted and its value diminished or it can even be involved in an accident and be completely damaged. I am not saying that this is going to happen but it can happen. If that happens then there will be no security for the respondent to fall back on if the appeal is not successful. Deposit of motor vehicle log book is therefore not a satisfactory security.”

37. In the case of *Esri Star Ltd & Another vs. Sila Oweshiwani* [2018] eKLR the court held that “a motor vehicle or a trailer, as in this matter, is the worst form of security that an applicant can offer with the aim of obtaining orders for stay of execution in a case involving a money decree.

38. The question for consideration before this court is whether the deposit of the logbook by itself is sufficient security.

39. As it has been discussed in the above case laws, the logbook if deposited with the court, the motor vehicle will be in the control of the applicant who will be using it for the period the appeal is still ongoing. The motor vehicle will continue depreciating in value and in the event the appeal is dismissed, the respondent may not recover the fruits of his judgment hence, leading to other proceedings in court.

40. It would only be fair that the applicant deposit a reasonable amount of the decretal sum instead of, the log book of the motor vehicle as security for the performance of the decree.

41. Considering all relevant factors and in order not to render the intended appeal illusory, and since, based on the grounds of appeal, the same is also against the quantum awarded, I do grant a stay of execution of the decree herein on condition that;

- a. The Appellant/Applicant does deposit a sum of Kenya shillings three hundred thousand (Kshs. 300,000/=), as security for the performance of the decree in a joint interest earning account in the names of the Advocates of the parties.



- b. This condition is to be met within 90 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
- c. The costs of this Application will be in the cause.
- d. Mention on 11.6.2025 for directions on the hearing of the appeal.
- e. It is so ordered.
- f. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF APRIL, 2025

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Albright Sunguti

Ms Andeya holding brief for Mr. Amasakha for the Applicant present online.

Ms Muriithi for the respondent present online.

