



**Bakari & another v Wainaina (Civil Appeal E345 of 2024)
[2025] KEHC 5137 (KLR) (7 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E345 OF 2024**

**G MUTAI, J
APRIL 7, 2025**

BETWEEN

MOHAMED MZEE BAISHE BAKARI 1ST APPELLANT

ALI MAHAMED ALI ISLAM 2ND APPELLANT

AND

JOHN WAINAINA RESPONDENT

RULING

1. Vide a notice of motion dated 9th October 2024, the appellants /applicants seek to stay the execution of the judgment delivered by the Hon Nyariki vide which the respondent was awarded Kes.850,000/-, as general damages, Kes 7,600/- as special damages, together with costs and interest.
2. The appellants/applicants are aggrieved by the decision of the court below on the ground that, as sellers of a motor vehicle, they were not liable for events that happened while the vehicle was under the purchaser's control.
3. In the affidavit in support of the application, the first appellant/applicant stated that they were aggrieved by the decision of the court below and were in the process of lodging an appeal, which he stated has a high chance of success. He was, however, apprehensive that the respondent was in the process of executing the judgment, and thus, they had moved to have the same stayed.
4. The appellants/applicants urged that the respondent had not demonstrated that he had the capacity to repay the money in the event that the appeal was successful. He was apprehensive that the appeal might, therefore, become academic and, as such, they would suffer substantial loss and damage.
5. The appellants/applicants attached to the application the memorandum of appeal in which it was pleaded that the suit motor vehicle had been sold and that, as such, the trial magistrate was wrong to



- find that the appellants/applicants were liable for the accident. Further the said court had granted the respondent remedies that he had not pleaded.
6. The application was opposed. The respondent filed a replying affidavit sworn on 22nd October 2024 in which he deposed that the applicant had not satisfied the test for issuance of a stay pending as he had not shown how he would suffer substantial loss if the application were not allowed. It was further urged that the applicants hadn't provided security for the due performance of any orders that may ultimately be binding upon them.
 7. The respondent deposed that the application lacked merit. He stated that it hadn't been shown that he would be unable to refund the money if the appeal was unsuccessful, nor had the applicant furnished security.
 8. In the alternative he proposed that half the decretal sum be paid to him while the rest could be held in a joint interests earing account in the names of both advocates on record.
 9. On 12th November 2024, the court ordered that the application be canvassed by written submission. On 6th March 2025, this court confirmed that written submissions had been filed by the parties and fixed the matter for ruling on 31st March 2025.
 10. The submissions of the appellant /applicant are dated 13th January 2025. Vide the submissions, it was urged that an applicant seeking a stay pending appeal must show that he would suffer substantial loss unless the orders were issued. The applicant also had to show that the application for stay was filed without undue delay.
 11. Counsel urged that the application was filed without undue delay. He urged that his clients would suffer substantial loss if they were made to pay the decretal sums to the respondent as there was no assurance of recovery.
 12. Regarding the provision of security, counsel urged that whereas the court could impose such a condition, it should not be of such magnitude as to impede access to justice. He relied on the Supreme Court's decision in *Westmont Holdings SDN BHD vs Central Bank of Kenya Ltd & 2 others* [2023]eKLR.
 13. I was therefore urged that this court imposes "a nominal fee as costs for security to enable the appellant to pursue his appeal to conclusion."
 14. He thus prayed that the application be allowed.
 15. The respondent's submissions are dated 3rd February 2025. In his submissions, the respondent prayed that the court dismiss the application dated 9th October 2024 with costs to the respondent.
 16. The respondent identified two issues as coming up for determination to wit:-
 - a. Whether the appellant/ applicant had demonstrated that it would suffer substantial loss if the application were not allowed; and
 - b. Whether the application had given security for the due performance of the decree or order which may be ultimately binding on him
 17. On the first ground, it was urged that it hadn't been shown that the respondent wouldn't be able to pay up and reimburse the applicant should the appeal be successful. Counsel urged that the applicant, as the party asserting inability, had the burden of proving his allegation, something that he failed to do.



18. On the question of security, it was urged that the purpose of security wasn't to punish a party but merely to provide an assurance that the decree would be honoured once the trial process was concluded.
19. Counsel urged that the application be dismissed.
20. I have considered the application and the affidavits and annexures in support as well as the response thereto. I have also taken into account the submissions of the parties.
21. Stay is at the discretion of the court. The court must, however, exercise its discretion judiciously.
22. 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) of the Civil Procedure Rules.

“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 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.”
23. Under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:-
1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. 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.
24. What is substantial loss? This question has been the subject of numerous decisions by the court. Substantial loss is what is sought to be prevented by the issuance of the orders of stay. Kimaru, J (as he then was), while considering an application for stay of execution pending appeal, stated as follows in *Century Oil Trading Company Ltd vs Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007*:-

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case, and since the Code expressly prohibits the stay of execution as an ordinary rule, it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer a substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant, who is seeking to preserve the status quo pending the hearing of the appeal, so that his appeal is not rendered nugatory, and the interest of the respondent, who is seeking to enjoy the fruits of his judgement.”



25. Similarly in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto[2012]eKLR stated that:-

“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. I haven't seen any evidence that the respondent can pay back the decretal sum if the appeal is successful. I agree that the appellants/applicants aren't assured of recovery in the event that the appeal is successful.

27. The application was filed without undue delay. Therefore, the second condition is satisfied.

28. The applicants have stated they are willing to provide nominal security. This court has the discretion to determine what that would amount to.

29. Taking into account all the matters herein, it is my view that it would be best to issue a stay order so that if the appeal is successful, it would not be rendered an academic exercise. In doing so, I must, however, bear in mind that I am denying the successful party fruits of a judgment in his favour. As a balancing act, therefore, I am inclined to order that the entire decretal sum be deposited in a joint interest-earning account in the name of both party's counsels within 30 days of the date hereof.

30. In the event of default by the appellants/applicants, and noting that time is of the essence, the stay herein granted shall lapse automatically, and the respondent shall, therefore, be at liberty to execute.

31. However, the hearing of the appeal shall be fast-tracked. For this reason, the matter shall be mentioned on 10th May 2025 for directions on the hearing of the appeal.

32. The costs of the application shall be costs in the appeal.

33. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 7TH DAY OF APRIL 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

No appearance for the Appellants/Applicants;

Mr Kiragu, for the Respondent; and

Arthur – Court Assistant.

