



Achieng v Oduor (Suing as Widow and Legal Representative. to the Estate of Isaac Osundwa Makau Wamuyoka - Deceased) & another (Civil Appeal E018 of 2023) [2025] KEHC 6348 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E018 OF 2023**

**DK KEMEL, J
MAY 22, 2025**

BETWEEN

RAPHAEL OMONDI ACHIENG APPELLANT

AND

LYDIA ACHIENG ODUOR (SUING AS WIDOW AND LEGAL REPRESENTATIVE. TO THE ESTATE OF ISAAC OSUNDWA MAKAU WAMUYOKA - DECEASED) 1ST RESPONDENT

RANA AUTOSELECTION LIMITED 2ND RESPONDENT

RULING

1. The Appellant herein has approached this court vide a Notice of Motion application dated 28th February 2025, seeking the following orders:
 - i. Spent.
 - ii. That this Honorable Court be pleased to grant an interim order for stay of execution of the judgment and decree of Ksh 1,671, 972/=plus costs and interest in Bondo PMCC No. E051 of 2021 delivered on 29/06/2023 pending the hearing and determination of this application interpartes.
 - iii. That this Honorable Court be pleased to grant an interim order for stay of execution of the judgment and decree of Ksh 1, 671, 972/=plus costs and interest in Bondo PMCC No. E051 of 2021 delivered on 29/06/2023 pending the hearing and determination of this appeal.
 - iv. That the Bank guarantee from Family Bank Limited for Ksh 1,671, 972/= which was the initial security for stay of execution which was initially granted by the court vide a ruling dated



31/08/2023 in PMCC No. E051 of 2021 continue to be held as security pending the hearing and determination of the intended appeal.

- v. Costs of the application be provided for.
2. The said application is supported by an affidavit sworn by Joan Turgutt on even date wherein she averred inter alia; that the judgment in Bondo PMCC No. E051 of 2021 was delivered on 29/06/2023 and that the trial court held the Appellant 100% liable and awarded the 1st Respondent Ksh 1,671, 972/= together with costs and interest plus 30 days stay of execution; that aggrieved with the trial court's decision, the Appellant appealed to the High court on liability; that the judgment on appeal being Siaya HCCA No. E018 of 2023 was delivered on 07/02/2025 where the Honorable Judge agreed with the finding of the trial court thereby dismissing the appeal for lack of merit and awarding costs of the appeal to the 1st Respondent; that the Appellant being aggrieved with the Honorable Judge's decision intends to appeal to the Court of Appeal and has already filed a Notice of Appeal dated 13/02/2025; that the stay orders granted by the trial court have since lapsed and thereby necessitating the instant application; that the intended appeal shall be rendered nugatory if the orders sought herein are not granted; that the Respondent is a person of straw and may not be able to make good any loss/damage suffered if the decree herein is enforced and the appeal ultimately succeeds; that the Bank guarantee from Family Bank Limited for Ksh 1,671, 972/= which was initially security for stay of execution which was initially granted by the court vide a ruling dated 31/08/2023 in PMCC No. E051 of 2021 continue to be held as security pending the hearing and determination of the intended appeal; that the judgment subject matter herein being substantial and should the execution succeed, the Appellant stands to suffer irreparable loss and prejudice as the intended appeal raises triable issues unless orders of stay of execution pending appeal are granted.
3. In response to the Appellant's application for stay of execution, the 1st Respondent has filed a replying affidavit sworn on 12th March 2025 wherein she has averred inter alia; that the deceased Isaac Osundwa was her husband and the father of her children and the sole breadwinner of her family; that she was left with a young family of school going age who solely depend on her and that the pendency of this matter in court is making life difficult for the deceased's family; that since the Appellant intends to go for a second appeal which is his right, he should be ordered to release half the decretal amount that the bank had guaranteed to enable her cater the needs of the deceased's family and that the balance be deposited into a joint interest earning account in the names of the advocates on record; that the Applicant is out to frustrate the deceased's family by delaying justice; that the orders sought are discretionary and prays that the court disallows the same and order the Appellant/applicant to settle the decretal sum; that the law firm that has filed the application is not properly on record and has filed the application without leave of court; that the rules of natural justice demand that litigation must come to an end and that a successful litigant should be allowed to enjoy the fruits of her judgment; that the application should be dismissed with costs.
4. The application was canvassed by way of written submissions. Both parties duly complied. Learned counsels agreed to submit on the key issue of deposit of security pending determination of the intended appeal.
5. In his submissions, the Appellant submitted only on the issue of security, insisting that the bank guarantee that was deposited vide the lower court case is sufficient. He submitted further that releasing the monies to the Respondent would be difficult to recover the same should the appeal succeed.



6. The Respondent on the other hand submitted on all the grounds provided for under Order 42 Rule 6(2) of the Civil Procedure Rules outlining three conditions for granting stay of execution as follows;

“No order for stay of execution shall be made under sub rule (1) unless—

- (a) the court is satisfied that a 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.”

7. The Respondent relied on the case of Antoine Ndiaye vs. African Virtual University (2015) eKLR on the exercise of the courts discretion where it was held:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been often said, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 rule 6 of the Civil Procedure Rules.”

8. I have considered the application dated 28/02/2025 the rival affidavits as well as the submissions filed. It is not in dispute that the Appellant herein has expressed his intention to lodge appeal against the judgement of this court as he has filed a notice of appeal to the Court of Appeal. It is also not in dispute that both learned counsels agreed to canvass the issue of deposit of security pending determination of the intended appeal at the Court of Appeal. I find the issue for determination is whether this application has merit.

9. The issue of security is a prerequisite under Order 42 Rule 6(2) (b) of the Civil Procedure Rules that no order for stay of execution shall be made under sub rule (1) unless 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.

10. The principles for consideration in the exercise of the court’s unfettered discretion to grant an order of stay of execution are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that, unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. (See Stanley Kangethe Kinyanjui vs. Tony Keter & Others [2013] EKLK)

11. In RWW vs. RKK High Court Civil Suit No. 25 of 2012 [2019] eKLR as quoted in the Respondent’s submissions the court stated that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in the dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called



upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs...”

12. It is noted that the Appellant herein had deposited a security in the form of a bank guarantee vide the lower court case Bondo PMCC No. E051 of 2021 for the sum of Kshs 1, 671, 972/ pending determination of this appeal. Indeed, this court has since determined the appeal vide its judgement dated 7/2/2025. The Appellant who wishes to proceed on appeal to the Court of Appeal is entitled to approach this court for an order of stay of execution pending the appeal or approach the Court of Appeal under Rule 5(b) of the Court of Appeal Rules. As the Appellant has approached this court for redress, the application should be considered on its own merits. The 1st Respondent has contended that her family stands to suffer prejudice as the appeal is canvassed and has urged this court to order that half of the decretal sums be paid to her while the balance be deposited in a joint interest earning account. Indeed, the Appellant has been riding on the stay orders under the said bank guarantee up to the time of determination of the appeal herein. Looking at the record of the lower court and this court and without delving into the merits or otherwise of the intended appeal, the Appellant’s contention has been in regard to the issue of liability and that there is no likelihood that at the end of the determination of the intended appeal at the Court of Appeal the 1st Respondent will come out empty handed. That being the case, iam persuaded by the 1st Respondent that she should be paid half the decretal sums while the balance be deposited into a joint interest earning account in names of both Advocates for the parties pending determination of the appeal at the Court of Appeal. It is instructive that the bank guarantee has specific timelines and further does not offer the parties interest on the sums deposited and hence the need to place it in an interest earning account pending determination of the appeal. I find this arrangement to be appropriate and takes care of the interests of the parties in the circumstances.
13. In the result, it is my finding that the Appellant’s application dated 28/2/2025 succeeds to the extent that an order of stay of execution of the decree herein is hereby granted pending determination of the intended appeal at the Court of Appeal upon the Appellant paying half of the decretal sums to the 1st Respondent while the balance is deposited in a joint interest earning account in the names of the advocates on record within thirty (30) days from the date hereof failing to which the stay shall lapse. The costs of this application shall abide in the intended appeal at the Court of Appeal.

Orders accordingly.

DATED AND DELIVERED THIS 22ND DAY OF MAY, 2025.

D. KEMEI

JUDGE

In the presence of :

N/A M/s Turget.....for Appellant

N/A Paul Juma.....for 1st and 2nd Respondent

Okumu.....Court Assistant

