Onsongo & another v Wahome t/a Precious Care Medical Centre (Civil Appeal 4 of 2024) [2025] KEHC 10282 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10282 (KLR)

FORMERLY KIAMBU CIVIL APPEAL NO. E433 OF 2023

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 4 OF 2024

H NAMISI, J

JULY 18, 2025

BETWEEN

WILFRED ONSONGO ..... 1ST APPELLANT

DR BONFACE ONSONGO T/A EQUITY AFIA, KITENGELA .. 2ND APPELLANT

AND

CHRYSOSTOM NGUNYI WAHOME T/A PRECIOUS CARE MEDICAL CENTRE ..... RESPONDENT

(Being an appeal from the judgement of Hon. Christine Asuna Okello, Principal Magistrate delivered and dated at Ruiru on 30 November 2023 in Civil Suit No. E031 of 2022)

RULING

Introduction.

1. The Appellants/Applicants filed a Notice of Motion dated 19 December 2023 seeking the following orders:

    i. (spent)

    ii. That pending the hearing and determination of this Application of the appeal, that this Honourable Court be pleased to stay the judgement of Ruiru Law Courts in civil suit no. E031 of 2022;

    iii. That the Honourable Court be pleased to order that any proceedings and/or directions obtained since the filing of the suit be hereby set aside until the final determination of the appeal;

iv. That this Honourable Court be deemed to grant any further directions that may be necessary for the expeditious determination of this appeal;

v. That the costs of this application be provided for

2. The Notice of Motion is based on the grounds on the face of the Application and supported by the Affidavit of Dr. Bonface Onsongo sworn on 19 December 2023. The Applicants aver that the trial court pronounced an unfair judgement, which they wish to appeal against. Their grounds of appeal include the lack of opportunity to be heard by the trial court and to mount a defence. They contend that their appeal is meritorious and stand a high chance of success.

3. In response thereto, the Respondent filed a Replying Affidavit dated 4 March 2024. The Respondent refutes the claims that the Applicants were not given a chance to be heard by the trial Court. He narrates the history of the matter in the trial court, pointing out the Applicants' absence even when dates had been taken by consent. The Respondent contends that the judgement entered by the trial court was regularly obtained and that the Respondent should be allowed to realise the fruits of judgement, in the sum of Kshs 9,161,920/=.

4. Parties were directed to file written submissions. The Respondent filed submissions dated 29 November 2024. The Applicants did not file any submissions.

Analysis.

5. I have considered the application, the Affidavit in support thereof, the Replying Affidavit as well as the Respondent's written submissions.

6. The principles upon which the court may grant stay of execution pending appeal are well settled. Order 42 rule 6 of the *Civil Procedure Rules* requires that an applicant seeking a stay of execution pending appeal must demonstrate that:

a. Substantial loss may result to the application unless the order is made;

b. The application was made without unreasonable delay; and

c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as given by the applicant

7. In *Antoine Ndiaye v African Virtual University* (2015) eKLR, Gikonyo,J opined thus:

> " ...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. From the foregoing, it is evident that the power to grant stay of execution pending appeal is an exercise of the discretion of the Court on the Applicant meeting the conditions set out therein. It is noteworthy that the three conditions must be met simultaneously as they are conjunctive and not disjunctive.

9. In the time acclaimed case of *Buttv Rent Restriction Tribunal* (1982) KLR, the Court gave guidance on the exercise of discretion in granting of stay of execution pending appeal. It was held that:

> " 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. 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 that appeal court reverse the judge's discretion.

3. 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.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. 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 for costs as ordered will cause the order for stay of execution to lapse."

10. The first consideration is whether the application was filed timeously. Judgement of the lower court was rendered on 30 November 2023. The Application herein was filed on 19 December 2023.The Application was, therefore, filed in good time.

11. The Applicants/Appellants contend that they will suffer substantial loss if the orders sought are not granted. The Respondent, on the other hand, contends that there is no proof of the substantial loss and proof that the appeal will be rendered nugatory if the Application is allowed.

12. It is the duty of the applicant in an application for stay of execution to establish that they will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Company Advocates v East African Standard* [2002] KLR 63, the Court of Appeal, in considering what amounts to substantial loss, held as follows:

> 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."

13. On the third issue of security, the Respondent submitted that the Applicants did not offer security for the due performance of the decree or address the issue of whether or not if the decretal sum is paid, they may not recover it from the Respondent. The Respondent relied on the case of *Hassan Guyo Wakalo v Straman East Africa Ltd* [2013] eKLR, where the Court stated thus:

> " In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other".

14. In the case of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd* [2019] eKLR it was held that:

> "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."

15. The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.

16. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court expressed itself as follows:

> "The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them.
>
> So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer

> to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

17. Whereas the Applicants did not address the issue of security, this Court has the discretion to impose such conditions.

Disposition.

18. The upshot is that the Appellants' Notice of Motion dated 19 December 2023 is allowed. There shall be a stay of execution of the judgement and decree of Hon. Christine Asuna Okello, Principal Magistrate, delivered on 30 November 2023 in Ruiru Civil Case No. E031 of 2022 pending the hearing and determination of the appeal on the following conditions:

    i. The Appellants shall deposit the sum of Kshs 8,500,000/- in Court as security within 30 days of this Ruling;

    ii. In the event of failure to comply with order (i) above, the stay of execution orders shall automatically be vacated and the Respondent shall be at liberty to proceed with execution of the decree;

    iii. The costs of this application are in the cause.

DATED AND DELIVERED AT THIKA THIS 18 DAY OF JULY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Appellants/Applicants: Mr. Oketch

Respondent: Mr. Mugwe

Court Assistant: Libertine Achieng.