



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Njoroge & another v Kilivi (Civil Appeal 174 of 2023)
[2024] KEHC 241 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 174 OF 2023
RN NYAKUNDI, J
JANUARY 24, 2024**

BETWEEN

JASSAN NJOROGE 1ST APPELLANT

KAN TRAVELLERS 2ND APPELLANT

AND

WINFRED NDAMA KILIVI RESPONDENT

RULING

Background

1. Before me is an application for determination dated September 15, 2023 brought under orders 42 rule 6 and order 51 rule 1 of the *Civil Procedure Rules* seeking for orders for stay of execution of the judgment delivered by the Honorable T.W. Mbugua, Adjudicator in Small Claims civil suit No. E115 of 2023 pending the hearing and determination of the application and the appeal.
2. In opposition to the said application, the respondent filed a replying affidavit dated October 13, 2023.
3. The appellants also filed submissions in support of the application, which I have considered.

The Appellants' Case

4. It is the appellants' case that judgement was delivered on August 18, 2023 and the trial court granted thirty (30) days temporary stay of execution which was to lapse on September 18, 2023. Being aggrieved by the decision of the trial court, the appellants' sought to appeal against the whole judgment.
5. The appellants/applicants contend that the appeal raises triable issues and unless stay of execution is granted, the intended appeal will be rendered nugatory and the applicants will suffer irreparable harm as they will have to pay the decretal sum. Furthermore, it is contended that if the decretal sum is paid,



the applicant may not recover the sum from the respondent as the ability of the respondent to repay is unknown.

6. The applicants in their submissions prayed that a Bank Guarantee be issued as the decretal sum as well as half the sum is colossal much as the appeal challenges the award on quantum.

The Respondent's Case

7. It is the respondent's case that the mere filing of an appeal does not entitle the appellants to a grant of an order for stay of execution. It was his case that as a successful litigant, he ought to be allowed to enjoy the fruits of judgment more so being compensation for injuries.
8. The respondent argued that if the court is inclined to grant stay, the appellants ought to pay a substantial part of the judgment sum being two thirds of the award pending appeal and balance be deposited in a joint interest earning account in the names of both advocates on record.

Issues For Determination

9. The only issue I find for determination is whether the applicants have met the prerequisite for grant of stay of execution pending appeal.

Whether The Applicants Have Met The Prerequisite For Grant Of Stay Of Execution Pending Appeal.

10. 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.
11. Therefore, 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 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.



12. These principles were enunciated in *Butt v 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

13. On this limb, an applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd v 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.

14. The applicants state that they stand to suffer substantial loss as the respondent's financial standing is unknown and the judgment being of a substantial amount, the respondent is unlikely to refund the decretal sum if paid to him. The respondent on the other hand never responded to the issue of substantial loss. It is trite law that a mere claim that the respondent cannot refund the decretal sum is not efficient. 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. Though the respondent in the instant case did not provide evidence to show his financial capabilities nor did he swear an affidavit of means. In that regard, I do find that the applicants have demonstrated substantial loss.

The application has been made without unreasonable delay.

15. Judgment herein was delivered on August 18, 2023 and temporary stay for 30 days was granted. The instant application was filed on September 26, 2023 which was within the period of stay given by the trial court. As such, the application has been filed timeously.

Security of costs.

16. The applicants ought to satisfy the condition of security. In the persuasive decision of [*Gianfranco Manenthi & another v 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.”

17. Similarly in [*Arun C. Sharma v 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.”

18. From the above persuasive decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same. Notably, in their application, the applicants stated that they are willing to offer security in the form of a bank guarantee if called upon by this Honourable Court to do so.



The respondent on the other hand prays that if stay is granted, the court should order the applicants to pay a substantial part of the judgment sum being two thirds of the award pending the appeal and the balance be deposited in a joint interest earning account in the names of both advocates on record.

19. It is worth noting 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 v Nasserpuria Memon Jamat* (2013) eKLR where the court upheld the decision of *Portreitz Maternity v 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.”

20. It is my considered view that on a balance of interests, since the applicants are willing to deposit the decretal sum, I am convinced that the fair balance would be for the applicants to provide a bank guarantee.
21. In the upshot, the motion dated 14th September, 2023 is found to be meritorious. It 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.
22. Costs of the motion to abide the outcome of the appeal.
23. It is hereby so ordered.

DATED AND SIGNED DELIVERED VIA EMAIL AT ELDORET THIS 24TH DAY OF JANUARY, 2024

R. NYAKUNDI
JUDGE

