



**Swala v Invesco Assurance Co. Ltd; Songoei (Suing on Behalf of the Estate of Ali Kipkemboi) & 2 others (Interested Parties) (Civil Suit 164 of 2023) [2024] KEHC 277 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 277 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT 164 OF 2023  
RN NYAKUNDI, J  
JANUARY 24, 2024**

**BETWEEN**

**ERICK KURIA SWALA ..... APPLICANT**

**AND**

**INVESCO ASSURANCE CO. LTD ..... RESPONDENT**

**AND**

**JOSPEH T SONGOEI (SUING ON BEHALF OF THE ESTATE OF ALI KIPKEMBOI) ..... INTERESTED PARTY**

**SHADRACK BIWOTT ..... INTERESTED PARTY**

**JOSEPH K RONO (SUING ON BEHALF OF THE ESTATE OF MARK KIPTANUI) ..... INTERESTED PARTY**

**RULING**

1. The applicant approached this court vide a Notice of Motion application dated 9<sup>th</sup> August 2023 seeking the following orders;
  1. Spent
  2. Spent
  3. Spent
  4. That there be stay of execution of the ruling dated 11<sup>th</sup> July 2023 in Civil Case no. E126 of 2023 pending the hearing and determination of the appeal.
  5. That the costs of the application be provided for.



2. The application is premised on the grounds set out therein and the contents of the affidavit in support of the application.
3. The applicant contends that vide a ruling entered on 11<sup>th</sup> July 2023 by the Honourable Magistrates' Court declined to grant an order that the defendant satisfy the judgement made in Eldoret CMCC No. 323,324 and 325 of 2014. Additionally, the trial court struck out the suit against the interested parties. Being aggrieved by the ruling of the trial court, the appellant intends to file an appeal.
4. The application was opposed by a replying affidavit sworn by the 2<sup>nd</sup> interested party. He averred that the application is an abuse of the court process as the applicant should have filed an application for stay under the filed appeal. Counsel urged that in order to grant the orders sought the court must satisfy itself that the requirements of Order 42 rule 6 have been met by the applicant. He stated that the applicant has failed to demonstrate that he will suffer substantial loss if the application is not allowed. Further, that mere apprehension that execution is about to commence does not amount to proof of substantial loss. The applicant has a duty to provide the court with tangible proof of the anticipated loss.
5. The interested party urged that he is a man of means and shall be ready and willing to refund the decretal sum in the event the appellate court finds otherwise. He urged that the applicant has a duty to provide security to the court if the orders are granted and sought that the same be paid into a joint interest earning account in the names of the advocates on record for the parties.
6. The applicant filed a further affidavit in response to the replying affidavit stating that he is yet to obtain a certified copy of the ruling and he is at risk of execution proceedings being commenced against him, evidenced by the notice to show cause dated 14<sup>th</sup> November 2023 that he was served with. He maintained that the interested parties have not shown proof that they will be ready and able to refund the decretal sum in the event that the appeal succeeds.
7. The applicants' case is that there exists an insurance contract between the applicant and the respondent in respect of third-party risks that is supposed to satisfy the judgment. The defendant has acknowledged said contract and offered to settle the claim which offer has been rejected by the interested parties. Further, that the defendant has refused to settle the decretal amount without any lawful excuse. The applicant is entitled to legal protection as he is validly insured by the defendant. Unless restrained by the courts the applicant is at risk of losing his source of income or being committed to civil jail. He urged that the scales of justice tilt in favour of issuing the orders sought.
8. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties filed submissions on 3<sup>rd</sup> November 2023 in opposition to the application. Counsel submitted that the application is not properly before the court. He urged that Order 42 contemplates, in mandatory terms, that if a party is aggrieved by a decree or order issued in court, that party has a right to appeal by lodging an appeal before the appellate court on the manner and style provided under said order. The appellant ought to have filed an appeal pursuant to order 42 or pursued a review under order 45. According to the present application, there is no evidence that an appeal exists and no evidence has been attached. Counsel maintained that an order under order 42 cannot derive on application by way of a miscellaneous proceeding.
9. The provisions of order 42 require the following conditions to be met before the orders sought to be granted;
  1. The court must be satisfied that substantial loss may result to the applicant unless the order is made.
  2. The application is made without undue delay.



3. Applicant to deposit security for due performance of such decree.
10. The applicant has not in any way demonstrated that any loss will result in the event that the orders sought are not granted. Further, no mention of the security that the applicant intends to deposit has been made by the applicant. In the unlikely event that the court grants the orders sought, the interested parties urged the court to direct that the applicant deposit into court half the decretal amount in court and pay the remainder to the respondents. Counsel urged that the application is made in bad faith and meant to delay the course of justice.

### **Analysis and determination**

11. The following issue arises for determination;
  1. Whether the application is properly before this court and if so;
  2. Whether the orders for stay of execution should issue

### **Whether the application is properly before the court**

12. The application is expressed to be brought under Order 51 Rule 1 and Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*. Order 42 Rule 6 provides as follows;
  6. Stay in case of appeal [Order 42, rule 6.]
    - (1) 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 order set aside.
    - (2) 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.
    - (3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
    - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
    - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
    - (6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction



on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

13. This *rue* is clearly intended to be on stay in case of an appeal. A reading of the same indicates that the orders sought are to be issued where there is an appeal pending. The applicant has not annexed any evidence that there is an intended appeal. Further, the applicant has filed this application on its own rather than in the appeal file. There is no evidence that the applicant has filed an appeal or at the least, a memorandum of appeal. The approach taken by the comparative jurisprudence in the cases of *Marie Makhoul and Marguerita Desir v Sabina James Alcide* SLUHC VAP No. 30/2011 is similar in our domestic jurisdiction as reflective of the following principles that;

The general rule is for non stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly, there must be good reason advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favour, particularly after a full trial on the merits.

14. The modern authority on the guiding principles the court employs in exercising its discretion to grant a stay is the case of *Linotype-Hell Finance Ltd Vs Baker* where Staughton L.J opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success. It must be emphasized that it is not enough to merely make a bald assertion to the effect that an applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.
15. The authority of *Hammond Suddard Solicitors v Agrichem International Holdings* is grounded in the same principle through formulated differently. In that case the court pointed out that the evidence in support of a stay needs to be full, frank and clear. They went on to state the principle thus;

“Whether the court should exercise its discretion to grant a stay will depend on all the circumstance of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that he responded will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent.

16. The court jurisdiction to grant a stay is based upon the principle that justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the court is whether there is a risk of injustice to one or both parties if it grants or refused to stay. Further, the evidence in support of the application for stay of execution should be full, frank and clear. The normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting one. The mere existence of arguable grounds of appeal is not by itself a good enough reason.” (see also the principles in *National Bank of Kenya Limited Vs Behan and Okero Advocates*, Nairobi civil application number 178 if 2006, *Umoja Service Station Ltd and others vs Hezy Ltd*, Nairobi civil application number 36 of 2006, *East Africa Safari Limited vs Anthony Ambaka Kegode and another*, civil application number Nairobi 72 of 2006.
17. From the sequence of events leading to this juncture, there is a clear abuse of the court process by the applicant. The application is intended to delay the court process and deny the respondents the fruit of their judgements. The applicant has not laid out a basis as to why he filed this application instead of instituting an appeal. I reiterate that the provisions of order 42 are to be used in case of an appeal and as there is no proof that there is any intended appeal, the cannot be applied herein.



18. In the premises, the application is dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED DELIVERED VIA EMAIL AT ELDORET ON THIS 24<sup>TH</sup> DAY OF JANUARY  
2024**

.....

**R. NYAKUNDI**

**JUDGE**

