



REPUBLIC OF KENYA



**Ruso v Njiriri (Civil Appeal 35 of 2023)
[2024] KEHC 1357 (KLR) (Civ) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CIVIL
CIVIL APPEAL 35 OF 2023
CM KARIUKI, J
FEBRUARY 15, 2024**

BETWEEN

PETER MURERI RUSO APPELLANT

AND

JESSY WENDO NJIRIRI RESPONDENT

*(Appeal from Judgment and Orders dated 11th April 2023 of
Hon. Harrison Barasa Senior Resident Magistrate in Civil Case
No. E006 of 2022 at Engineer Senior Resident Magistrate Court)*

RULING

1. By an application dated 29/7/2023, the Applicants seek a stay of execution of trial court judgment/ Decree pending hearing and determination of appeal.
2. The applicant has also sought to be allowed to deposit bank guarantee as security.
3. The petitioner case in Notice of Motion dated 29/7/2023 is as follows;
 - a. That judgment herein was delivered on 13th April, 2023 and the respondent was awarded liability 100% General damages Kshs. 900,000/= future medical expenses at Ksh. 200,000/= and special damages Kshs. 19,550/= costs and interest.
 - b. That respondent/Applicant being aggrieved and dissatisfied with the said judgment on quantum has preferred a Cross Appeal.
 - c. The lower Court Magistrate did not consider the defendant's evidence on quantum and similar cited authorities with similar injuries.
 - d. The applicant's Cross Appeal has high chances of success.



- e. That the application has been presented without inordinate delay.
 - f. The respondent is a person of unknown means hence respondent/Applicant is apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.
 - g. The applicant has a strong arguable appeal which has high chances of success.
 - h. That the Application is made in good faith and the respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs if this application is allowed.
 - i. Unless a Stay of Execution is granted the Applicant's Application for stay pending hearing and determination of the Appeal and Cross Appeal will be rendered nugatory and the Applicant will suffer irreparable loss and damage.
 - j. That the applicant is ready, willing, and able to furnish such reasonable security in the form of a bank guarantee from the Family Bank for the entire decretal amount pending the hearing and determination of this application and Appeal.
4. The application is supported by an affidavit for Jessy Wendo Njiriri sworn on 29/7/2023 reiterating the content of the grounds above in the Notice of Motion.
5. The respondent opposes the application vide replying affidavit of Peter MureriRuso sworn on 7/7/2023. The respondent case is as follows;
- i. That the said application is intended to deny and or delay him from enjoying the fruits of his lawful judgment of this court and therefore should be dismissed with costs.
 - ii. That the applicant has failed to meet the minimum threshold set under Order 42 Rule 6 of the *Civil Procedure Rules* for the grant to stay of execution pending appeal
 - iii. In the interest of fairness and justice, he proposes that the entire judgment sum be deposited in both counsels' joint interest bank account at Kenya Commercial Bank Nakuru and that will serve the interest of both parties.
 - iv. Respondent still undergoing very expensive treatment at Valley Hospital and others that require cash payment that he is not able to afford.
 - v. It is for the aforesaid reason that he prays that in the alternative to the above half of the judgment sum plus costs be paid to the respondent and the balance to be deposited in both counsel joint interest-earning account. attach copies of the treatment notes.
 - vi. He is opposed to the proposed Bank Guarantee since the facility is in the control only of the applicant and beyond reach by the respondent and as such the same prejudice interests the respondent.
 - vii. That the deposing of a security is a mandatory requirement under the law and best practice before the stay orders can be granted.
 - viii. That applicant will be exposed to irreparable health risk if this honourable court allows the applicant's proposed stay without considering his well-being.



Issues, Analysis and the Determination

6. The court having through the affidavits, application and the record finds the issues are; Whether the principles of grant of stay of execution pending appeal are demonstrated in the instant application and costs.

The Principles

7. The principles for granting a stay of execution are provided for under Order 42 Rule 6 (1) of the Civil Procedure Rules as follows:

“No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.”

8. Order 42, rule 6 (2) states:

“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.”

9. In Pauline Yebei & Another v estate of Kiprotich Letting represented by Andrew Kipkoech Kiprono [2017] eKLR the Court of Appeal affirmed its decision in Ishmael Kagunyi Thande v. Housing Finance Kenya Ltd., Civil Appln No. Nai 157 Of 2006 (Unreported) where the court held as follows on the principles for stay of execution: -

“The jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of that appeal will be rendered nugatory.”

10. In Hamisi Juma Mbaya v Amakecho Mbaya [2018]eKLR it was held:-

“The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and



3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”
11. For money decree stay of execution is only considered in special circumstances
12. In the case of *Ujagar Singh v Runda Coffee Estates Limited* [1966] EA 263 it was held:-

“It is not normal for a court to grant a stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial, and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful.”
13. The Respondent bears the burden to show the capability to refund the amount in the decree if the appeal is successful
14. In *Boniface Kariuki Wabome v Peter Nziki Nyamai & another* [2019] eKLR it was held:-

“In view of the foregoing, the evidential burden resides with the Respondents to prove that he is not a man of straw as alleged. None of the two Respondents in the instant case has made any attempt to discharge this burden. It is expected that a respondent would depone and show the means she has to refund the decretal sum. It is enough for the applicant to depone that they are not able to refund. He cannot be expected to dig deep into the financial standing of the respondents, which is for the respondent to produce and prove.

The law is that as stated by the Court of Appeal in *National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another* (UR) C.A. 238/2005, the evidential burden is on the respondent to prove that he is able to refund. I am of the view that the Respondent has not discharged the burden to prove that she has the resources to pay back the decretal sum. The Respondents merely stated that they are capable of repaying the decretal amount that the Court grants after hearing and determination of the Appeal if it exceeds the sum to be released to the Respondents.”

Conclusion

15. Based on the foregoing an application for stay will be succesiful if:-
 - a) It is brought without unreasonable delay
 - b) Substantial loss will occur if the orders are not given
 - c) The applicant gives security for the performance of the decree sought to be stayed.
16. The court will not order a stay of execution for money decrees unless special circumstances are proved such as: -
 - a) The regularity of the impugned judgment is in issue
 - b) The decretal sum is colossal
 - c) The decree-holder is a man of straw



17. Where it is alleged that the decree-holder is a man of straw the burden is on him to prove that he is capable of repaying the decretal sum if the appeal is successful. In all circumstances, courts strive to do justice by balancing the interests of the applicant and that of the successful litigant who should enjoy the fruits of his judgment.
18. The respondent in rejoinder to the applicant's application is noted to state that
- “in the interest of fairness and justice, I propose that the entire judgment sum be deposited in both counsels' joint interest bank account at Kenya Commercial Bank Nakuru and that will serve the interest of both parties”
19. Essentially the respondent is conceding to a conditional stay of execution with a departure from the applicant's proposed mode of the security to be deposited. I agree with the respondent that the bank guarantee proposed by the applicant will be under the applicant's control thus a joint interest earning account by parties advocates names will be safer for both sides.
20. Thus, the court makes the orders that;
- i. Stay of execution of trial court decree is granted on condition that all the decretal amount is deposited in the interest-earning account to be opened in the names of the parties advocate within thirty (30) days from the dates of this ruling pending hearing and determination of the appeal.
 - ii. In default execution to issue.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 15TH DAY OF FEBRUARY 2024

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C KARIUKI
JUDGE

