



**Trustees of Sisters of Mary Immaculate Kenya ((As the proprietors of Mary Immaculate Primary School)) v Kubai ((As the administrator of the Estate of the Late Duncan Kubai Kithinji)) (Civil Appeal E001 of 2023) [2024] KEHC 726 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 726 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CIVIL APPEAL E001 OF 2023  
AK NDUNG’U, J  
FEBRUARY 2, 2024**

**BETWEEN**

**THE TRUSTEES OF SISTERS OF MARY IMMACULATE KENYA . APPELLANT  
(AS THE PROPRIETORS OF MARY IMMACULATE PRIMARY SCHOOL)**

**AND**

**JANE MUTHONI KUBAI ..... RESPONDENT  
(AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE DUNCAN KUBAI  
KITHINJI)**

**RULING**

1. This ruling concerns the notice of motion dated 23/02/2023. The application seeks stay of execution of the decree arising from Nanyuki CMCC No. E137 of 2022 pending hearing and determination of the appeal. The application is brought under Order 40, Rule 6, Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010, and section 1A, 1B and 3A of the [Civil Procedure Act](#). Interim stay was garneted on 01/03/2023 by this court (Muchemi J).
2. What is sought to be appealed against is the award of damages for loss of dependency of Kshs.1,500,000/- that was awarded by the lower court in the aforementioned case.
3. The application is grounded on the grounds on the face thereof and is supported by an affidavit of Ann Njoki Kinyua, working at the legal department of the Appellant’s insurer. She deponed that the Appellant was dissatisfied with the trial court judgment on liability and quantum hence the appeal. The Appellant was granted 30 days stay of execution by the trial court which has since lapsed and the counsel for the Respondent intimated the intention to commence with execution.
4. That the appeal has high chances of success and shall be rendered nugatory unless an order for stay of execution is granted. The Respondent has no known assets and the amount in question is substantial



- therefore if paid, it will not be recoverable and that the Appellant's insurer is ready and willing to deposit a reasonable insurable bond or bank guarantee as security for due performance of any resultant decree.
5. The Respondent in opposing the appeal filed a replying affidavit dated 14/03/2023 and deponed that the application is devoid of merit and an abuse of the court process in that the Appellant has failed to establish the conditions set under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) and has failed to show that the appeal has high chances of success. Further, the Appellant has failed to show by way of an affidavit that they stand to suffer substantial loss if stay is not granted. That it is the Respondent who stands to suffer harm considering the injuries sustained and is being denied the fruit of her judgment. That if the court is desirous of granting stay, an order be given that half of the decretal sum be paid to the Respondent and the balance be paid in court as security.
  6. This court directed that the application be canvassed by way of written submissions. The Appellant submitted that they have met the set out principles in granting the orders sought in that the Appellant is likely to suffer substantial loss if the orders sought is not granted since the Respondent is a woman of straw and has not given any material as to her ability to repay the decretal sum if the appeal succeeds. Therefore, the Appellant stands to suffer irreparable harm since the Respondent cannot pay back the decretal sum.
  7. Reliance was placed on the case of [Focin Motorcycle Co. Ltd v Ann Wambui & another](#) (2018)eKLR where the court held that substantial loss lies in the inability for the respondent to refund the decretal sum and [National Industrial Credit Bank Limited v Aquinas Francis Wasike & another \(UR\) C.A 238/2005](#) where the court stated that the respondent has the evidential burden to show what resources he has since that is a matter which is peculiarly within his knowledge.
  8. The Appellant further submitted that the appeal raises arguable point of law in that the dependant was the deceased's grandmother who according to the [fatal Accident Act](#) is not considered as a dependant. As to security, the Appellant submitted that it is willing to furnish a security to the court in the sum of Kshs.431,600/-.
  9. On the other hand, the Respondent submitted that the Appellant has failed to demonstrate what substantial loss they would suffer should execution ensue since the Appellant ought to have stated the specific details as to the lose they stand to suffer if stay orders are not granted as was held in [Machira T/A Machira & Co. Advocates vs East African Standard \(No. 2\)](#) (2002)KLR 63 where the court stated that the applicant must prove specific details and particulars of substantial loss and without demonstrable pecuniary or tangible loss to the satisfaction of the court, the court will not grant stay. See also [Michael Ntouthi Mitheu v Abraham Kivondo Musau](#) (2021) eKLR.
  10. Further, the Appellant has based the ground of substantial loss on account that the Respondent will not be able to refund the decretal sum if the appeal succeeds and that the Respondent has no known assets. The Respondent quoted a myriad of cases that held that the Applicant must place real evidence before the court to prove that the Respondent would be unable to refund the decretal sum and that poverty and financial inability of a decree holder is not a ground for allowing stay. As to security, the Respondent submitted that the Appellant should be ordered to pay half of the decretal sum to the Respondent and the balance in court or in a joint earning account in the names of the advocates.
  11. I have read through the application, the replying affidavit and I have considered rival arguments by the parties herein. The application at hand is stated to be brought under Order 40, Rule 6 of the [Civil Procedure Rules](#), 2010 and also under sections 1A, 1B and 3A of the [Civil Procedure Act](#), Cap 21.



12. The first thing to note is that Order 40 Rule 6 of *the Rules* is erroneously cited. This is because Order 40 deals with a totally different matter as to the prayers sought herein. Although the Appellant herein did not cite Order 42 Rule 6(2) of the Rules on its application, its main submissions are made under that rule, which provides for applications for stay of decrees or orders.

13. The principles guiding the grant of a stay of execution pending appeal are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

“No order for stay of execution shall be made under subrule (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.

14. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made; (b) that the application has been made without unreasonable delay; and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

15. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in 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. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

16. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”



17. Musinga J in *Daniel Chebutul Rotich & 2 Others v Emirates Airlines* Civil Case No. 368 of 2001 also stated that;

“It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur. Disruption of business and loss of reputation can only be suffered if stay of execution was refused and the applicant refused to pay or became unable to pay and auctioneers had to move in to carry out execution. “Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum.

18. The Appellants have not sufficiently stated the substantial loss they are likely to suffer if the order of stay is not granted. It is however noted that there has been no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on the 05/12/2022 and the Memorandum of Appeal was filed on 18/01/2023. Further, I have read the memorandum of appeal and it is my view that it raises triable issues that requires to be heard on merit. It is therefore my view that the appeal might be rendered nugatory if the order for stay is not granted.

19. As to security of costs, the Appellant in its application offered to deposit a reasonable insurable bond or a bank guarantee as security. In its submissions it offered to furnish security to the court in a sum of Kshs.431,600/-. The court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice as was held in *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR

20. From the foregoing, am persuaded that the applicant is deserving of the exercise of this courts discretion in their favour. I will grant a stay pending appeal conditional to the depositing of security in court in the sum Kshs 500,000 within 30 days. Costs to abide the outcome of the appeal.

**DATED SIGNED AND DELIVERED AT NANYUKI THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**A.K. NDUNG’U**

**JUDGE**

