



REPUBLIC OF KENYA



KENYA LAW
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**Watuku v AWM (A Minor Suing Through His Grandmother and Next Friend BNW)
(Civil Appeal 270 of 2023) [2024] KEHC 950 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 270 OF 2023**

FR OLEL, J

FEBRUARY 7, 2024

BETWEEN

GEORGE KAHURA WATUKU APPELLANT

AND

**AWM (A MINOR SUING THROUGH HIS GRANDMOTHER AND NEXT
FRIEND BNW) RESPONDENT**

RULING

1. The application before this court is the Notice of Motion application dated 21st October 2023 brought pursuant to provisions of Section 3A, 79G and 95 of the *Civil Procedure Act*, Order 22 rule 22, Order 42 Rule 6 and 7, and Order 50 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is prayer 3 & 4 that there be a stay of execution of the judgment/decree of Honourable Ole Keiwua Chief Magistrate delivered on 28th September 2023 in Kangundo Cmcc No 205 OF 2019 and he be allowed to furnish court with a bank guarantee from a reputable bank as security pending the hearing and determination of the appeal filed.
2. The application is supported by a supporting affidavit of the appellant George Kahura Watukudated 21st October 2023. He depones that judgement was entered as against him for Kshs.100,000/=, plus special damages of Kshs.4,500/= on 28th September 2023. Being dissatisfied by the said judgement, he had preferred this appeal, which had overwhelming chances of success, especially on the issue of liability. His insurer was swilling to provide a bank guarantee for the decretal sum pending hearing and determination of the appeal and prayed that his application be allowed.
3. This application is opposed by the Respondent Belita Ndave Wambuawho filed Replying Affidavit's dated 7th November 2023. She maintained that the said application was misconceived and the applicant had not met the conditions for granting stay under Order 42 Rule 6(2)(b) of the *Civil Procedure Rules*, 2010 and thus the said application should be dismissed. In the alternative if the court was inclined



to allow the said application, the respondent urged court to order the applicant to pay them half the decretal sum and the other half be deposited in a joint interest earning account.

Analysis & Determination

4. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issue which arise for determination is whether this court should grant stay of execution of the Judgment/Decree dated 28th September 2023 issued in Kangundo Cmcc No 205 of 2019.
5. Stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security for the due performance of any decree or order as may ultimately be binding on the Applicant. (see *Butt v Rent Restriction Tribunal* [1982] KLR 417 and *James Wangalwa & Another v Agnes Nalika Chereto* [2012] eKLR)
6. The judgment appealed against was delivered on 28th September 2023. The Appeal herein was filed on 17th October, 2023 and this application was also filed on 24th October 2023. Thus, it can be said that this appeal and application for stay of execution have been file timeously.
7. On the likelihood of suffering substantial loss, it was sufficient if an applicant seeking a stay of execution demonstrated that he/she would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful. See *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another* [2010] eKLR, *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (2006) eKLR .
8. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person of means, I find that the Appellant has satisfied this court that he would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
9. On the security, the Appellants have indicated that they are ready and willing to abide by this courts orders as to security for due performance of the decree. In particular they have offered to provide court with a bank guarantee to cover for the said decretal amount. The respondent has averred that they should be paid half the decretal sum and the other half be deposited in a joint interest earning account.
10. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another (Supreme)*; *Mukuma vs Abuoga* [1988] KLR 645.

Disposition

11. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;



- a. The Appellant/Applicant do deposit the entire decretal sum in court within the next thirty (30) days, from the date of this ruling
 - b. In default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
12. The costs of this Application will be in the cause.
 13. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 7TH DAY OF FEBRUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 7TH DAY OF FEBRUARY, 2024

