



**Chambuni v Geminia Insurance Company Limited (Civil Appeal
E018 of 2021) [2024] KEHC 2190 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E018 OF 2021
PJO OTIENO, J
MARCH 1, 2024**

BETWEEN

SILAS CHAMBUNI APPELLANT

AND

GEMINIA INSURANCE COMPANY LIMITED RESPONDENT

RULING

1. Before the Court is the Respondent's Notice of Motion application dated 31st August, 2023 brought pursuant to sections 3,3A and 63 of the *Civil Procedure Act*, Order 42 Rules 6(1), (2), (4) & 6 and Order 51 of the Civil Procedure Rules and Article 15 of *the Constitution* of Kenya seeking, in the main orders that the Court be pleased to grant a stay of execution herein pending hearing and determination of the intended appeal at the Court of Appeal.
2. The application is supported by the grounds on the face of the application and the Supporting Affidavit of George Rayori, a Manager of the Respondent Company, Kisumu Branch sworn on 31/8/2019. The grounds in support of the application are that the Respondent has filed a Notice of Appeal against the Judgment of the Court delivered on 1/8/2023 in Kakamega HCCA No. E018 of 2021, in favour of the Appellant.
3. It is contended that the Appellant is likely to proceed and execute if no stay is in force thereby rendering the Applicant substantial loss by having to buy a new car for a party whose damaged vehicle is sitting in a garage thereby suffering double jeopardy. It is further averred that the Appellant is not in any gainful employment, going by his evidence in court, and would unlikely be able to refund any amount paid by the Applicant should the appeal succeed thereby causing them substantial loss. They further claim that they are ready and willing to provide reasonable security of not more than a sum of Kshs. 500,000/- within 30 days of the order.



4. The Appellant appears not to have filed a response to the application dated 31/8/2023, but both parties have tendered their Submissions on the application which are as below;
5. It is the Submission by the Applicant that though the Appellant asserts that he is capable of reimbursing the decretal sum should the appeal succeed; the Appellant has failed to demonstrate that capability since the evidentiary burden falls on him as he understands his financial means. For that proposition the Applicant cites the case of National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (2006) eKLR. They argue that there is a necessity to balance the interests of both parties and that Applicant's right of appeal must be safeguarded so that if the appeal is successful it's not rendered nugatory.
6. On whether the application was filed without undue delay, they argue that the Judgment of the High Court was delivered on 1/8/2023 whereas the Notice of Appeal was filed on 11/8/2023 and that the subject application was brought 36 days later on 7/9/2023 which they submit is timely filing considering that the Applicant had to first seek leave to be heard during the High Court Vacation.
7. They contend that the decree is not a money decree since there is nothing to guide the Court on the value to attach to the decree as the Judgment is not clear for which reason they propose to deposit a bank guarantee of not more that Kshs. 500,000/- as security and argue that granting an order for stay of execution will not prejudice the Appellant in any way.
8. For the Appellant/Respondent, it is submitted that this Court has the discretion to stay the execution of its judgment provided the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules are met that is; substantial loss, security and unreasonable delay.
9. On the first element of substantial loss, he defines substantial loss to mean creating a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal in which regard he cites the case of James Wangalwa & another v Agnes Naliaka Chesetowhere [2012] eKLR for the proposition that the legal process of execution is not demonstration of substantial loss. The position is taken that it is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence. In support of such contention the case of Suleiman v Amboseli Resort Limited [2001] 2 KLR 959 is cited.
10. It is further argued, without evidence by an Affidavit, that the Applicant has not demonstrated that the Appellant is a person of straw and that he may not repay the sum in the event the appeal succeeds because the fact that the Appellant is not employed does not render him a man of straw as employment is not the only source of income.
11. On the second element of security, he argues that contrary to the Applicant's assertions, the suit is a money decree and that the value of the vehicle at the time of insuring on 1/7/2017 was Kshs. 890,000 plus Kshs. 30,000/- being the value of the entertainment equipment totaling to Kshs. 920,000/- as captured in paragraph 71 of the record of appeal. He therefore proposes that a sum of Ksh. 920,000/- be deposited with the Appellant as security and he cites the case of Mohamed Ali Osman t/a Hanan Petroleum v Juanco Group Limited [2021] eKLR for that proposition. In the alternative, it is proposed that the Applicant pays the Appellant a sum of Kshs. 460,000 and the other half be deposited in a joint interest earning account of the Advocates. For that proposal, the decision in Anwarali Limited v Joseph Wambua Kanini (suing as the administrator of the estate of Kioko Kanini Mulugye [2018] eKLR is cited.
12. On the last element of unreasonable delay, he contends that the Judgment was rendered on 1/8/2023 in the presence of both parties with the Court granting the Applicant an informal stay of execution for 30 days and that instead of the Applicant filing for a formal application for stay they waited until the



expiry of the informal stay and made an application on 7/9/2023 which was 36 days after the Judgment without explaining the reasons for the delay.

Issue, Analysis and Determination

13. This Court has considered the application and the submissions by the parties and identifies the issue for determination to be whether the Applicant has met the thresholds for an application for stay of execution pending appeal.
14. The conditions for grant of stay of execution pending appeal, pursuant to Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 is that the Applicant must satisfy the Court that substantial loss may result to him unless the order is made; that the application has been made without unreasonable delay; and finally that 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.
15. On timeliness, the Court notes that the Judgment was delivered on 1/8/2023 and the subject application was filed on 7/9/2023, just 36 days later. That delay was attributed to the need for leave since the High Court was on vacation. Indeed, the High Court was on vacation during this time and for that reason I find that the application was made within reasonable time and without undue delay.
16. On substantial loss, the cornerstone of stay pending appeal, it is the contention of the Applicant that the Appellant is likely to proceed and execute if no stay is granted thereby rendering the Applicant substantial loss by having to buy a new car for a party whose damaged vehicle is sitting in a garage thereby suffering double jeopardy. The Applicant further argues that the Appellant testified that he is not employed and he would therefore be unable to refund the decretal sum thus occasioning the Applicant substantial loss in the event the appeal is successful. The Appellant on the other hand argues that he has other means of income.
17. What amounts to substantial loss must be more than the mere fact that the fact that the process of execution has been put in motion, or is likely to be put in motion.
18. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the Court in addressing the point in light of execution process said: -

“No doubt, in law, 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.”
19. Once an Applicant alleges inability of the decree-holder to effect a refund in the event of success of the appeal, the evidentiary burden then shifts to the Respondent to demonstrate ability to effect the refund. Here, the Appellant has not given any material to demonstrate his ability to repay the decretal sum in case the appeal succeeds and for that reason I am of the view that substantial loss will be occasioned on the Applicant if the application is denied.
20. On the element of security of costs, the Applicant has offered to deposit an amount not exceeding KShs. 500,000/- as security reason being that the decree issued on 19th December, 2023 by Musyoka J. was not clear on the decretal sum.



21. The Court has perused the Judgment and picks it to read that: -

“The Defendant be and is hereby ordered to pay full monetary compensation of motor vehicle registration number KBP 961J as per the valuation report of the said motor vehicle in force as at the time of insuring on 1st January, 2017 and/or based at the subsisting valuation of such a model and the year of manufacture, duly assessed by licensed valuer.”

22. It is the view of the Court from the reading of the above excerpt that the Applicant may have arguable reasons for the need for the same to be interpreted in order to establish the decretal sum. However, the law mandates it to provide security as may ultimately bind on it. In deed should the interpretation of the Judgment yield a lower sum, the money would not have been paid to the decree-holder but held in escrow. The order that commands itself to the Court is that the decree be secured fully by deposit of the sum assured as disclosed at page 71 of the record of appeal.

23. While the Appellant has offered to deposit a sum not exceeding Kshs. 500,000/- as security, it is for the Court to order what amount of security suffices. In coming to that determination, the Court endeavours to achieve the purpose of a stay of execution. In *RWW v EKW* [2019] eKLR the Court observed as follows;

“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.”

24. For this Court to preserve the substratum of the appeal not to be rendered nugatory and taking all the above factors into account, it is inclined to allow the application for stay for execution and impose the condition that the full decretal sum be deposited into an escrow account in the joint names of the Advocates for the parties with 30 days from today.

25. It is noted that the parties have argued the questions of costs of the appeal and await a determination by the Deputy Registrar. On that basis the costs of the application are ordered to be in the appeal to the Court of Appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF MARCH, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Asuna for the Applicant/Respondent

Mr. Bulowa for the Appellant

Court Assistant: Polycap Mukabwa

