



**Eliud & another v Njubi (Civil Appeal 232 of 2023)
[2024] KEHC 3060 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 232 OF 2023
FN MUCHEMI, J
MARCH 7, 2024**

BETWEEN

WANG ELIUD & JACKLINE NJAMBI NDUTI APPELLANT

AND

JEFFREY NJUBI RESPONDENT

RULING

Brief facts

1. The application dated 29th May 2023 seeks for orders for stay of execution of the judgment delivered on 4th May 2023 in Ruiru SPMCC No. E512 of 2022 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 13th June 2023.

Applicants' Case

3. The applicants state that judgment in Ruiru SPMCC No. E512 of 2022 was delivered on 4th May 2023 whereby the court found them 100% liable. The respondent was awarded Kshs. 300,000/- as general damages and Kshs. 4,050/- as special damages plus costs and interest. Being aggrieved by the decision, the appellants lodged the instant appeal (formerly Kiambu HCCA No. E142 of 2023).
4. The applicants aver that their appeal is arguable and meritorious therefore it has overwhelming chances of success. The applicants contend that they are ready and willing to offer security for the due performance of the decree in form of a bank guarantee from a reputable bank in the country. The applicants are apprehensive that if stay of execution of the ex parte judgment is not granted, they stand to suffer great injustice and prejudice of being unable to defend the suit against them contrary to Article 50 of the Constitution of Kenya.



The Respondent's Case

5. The respondent opposes the application and urges the court to order the applicants to deposit the decretal sum of Kshs. 405,350/- in court or alternatively in a joint interest earning account. The respondent further states that in the event the court is inclined to grant the prayers sought, the applicants be directed to pay the balance of the decretal sum together with costs to the respondent's bank account.
6. The respondent contends that the letter of establishment of bank guarantee from Family Bank subject to be reviewed after 12 months from the date thereof, is not proof of the decretal sum as per the court order and the same should not be treated as proof of any security of decretal sum subject to the suit.
7. The respondent elected not to put in written submissions. However the applicants failed to put in written submissions despite being given a chance to do so.

The Law.

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

8. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-
 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 orders 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 1st 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. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.



10. Substantial loss was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR:-

“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.

11. The applicants state that they stand to suffer irreparable loss and damage if stay is not granted. The applicants have not demonstrated how they stand to suffer substantial loss. It is only merely stated in their affidavit that the applicants shall suffer irreparable loss and damage without stating what loss and how it would occur. Thus, it is my considered view that the applicants have not demonstrated substantial loss which is the cornerstone condition in granting stay of execution.

Has the application has been made without unreasonable delay.

12. Judgment was delivered on 4th May 2023 and the applicants filed the instant application on 29th May 2023. As such, it is evident that this application was filed timeously.

Security of costs.

13. The purpose of security was explained in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

14. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicants have stated that their insurer Directline Assurance Company Limited is ready and willing to furnish the court with a bank guarantee from a reputable and well known bank in the country. I have perused the bank guarantee as annexed by the applicants and noted that the bank guarantee is dated 18th February 2022 and is for a period of one year, which has since lapsed and therefore it is not viable. Furthermore, the bank guarantee is between Family Bank and the insurer, nowhere does it mention the applicants. Moreover, the same is not fully executed. I am further persuaded by the respondent’s contentions that a bank guarantee is not equivalent to deposit of the decretal sum.



15. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

16. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent his right of enjoying his judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise any arguable points of law.
17. It is my considered view that the applicants have not met the threshold of granting stay of execution pending appeal as set out in Order 42 Rule 6. Accordingly, the application dated 29th May 2023 lacks merit and is hereby dismissed with costs to abide in the appeal.
18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 7TH DAY OF MARCH 2024.

F. MUCHEMI

JUDGE

