



REPUBLIC OF KENYA



KENYA LAW
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**Gikonyo v Mwaniki (Civil Appeal E007 of 2024)
[2024] KEHC 2730 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2730 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E007 OF 2024**

**FR OLEL, J
MARCH 13, 2024**

BETWEEN

FRANCIS MAINA GIKONYO APPELLANT

AND

DAVID MAKALI MWANIKI RESPONDENT

RULING

A. Introduction

1. The Application before this court for determination is the notice of motion application dated 15.01.2024 brought pursuant to the provisions of section 3A of the *Civil Procedure Act* and Order 42 rule (6) of the *Civil Procedure Rules* and all other enabling provisions of law. Prayers (1) and (2) of the said application are spent and the main prayer sought is prayer (3), for an order of stay of execution of ruling/order delivered by Honourable M. Thibaru dated 21st December 2023, in Machakos SCCC No E084 of 2023, be issued pending the hearing and determination of this Appeal and costs of the application be provided for.
2. The Application is supported by a supporting affidavit of one Victor Colins Kiminja, the Assistant legal Manager at First Assurance company limited dated 15th January 2024 and is opposed by the Respondent, through the replying affidavit sworn by his advocate Peter Wanjue dated 05.02.2024.
3. The applicant averred that vide a ruling dated 21st December 2023, the trial court dismissed their application seeking to be granted leave to set aside the ex parte – interlocutory default judgement in the primary suit. In the said Judgement, the Appellant had been held 100% liable for special damages arising from a road traffic accident, yet it was not revealed to court that the parties were already negotiating and had agreed to settle the matter at a lower quantum amount. The appeal as filed was arguable as it raised strong grounds of appeal in support thereof and the respondent if paid would not



be in position of refund the sums paid out, should the Appeal succeed. The Applicant also deposed that they were ready and willing to deposit security as maybe directed by court.

4. This application was opposed by the respondent, through his advocate, who deposed that this application was filed in bad faith and was calculated to defeat justice/ delay the expeditious conclusion of this matter for the reason that the Appellant was properly served with summons and the pleading's through his phone number 0721XXXX, and the court upon being satisfied that proper service had been effected proceeded to enter interlocutory Judgment, which the applicant was trying to set aside.
5. The applicant was guilty of laches and not deserving of the discretionary orders as sought as they had not meet the threshold required to setting aside of *ex parte* Judgment. The respondent would be greatly prejudiced should the orders sought be granted and he therefore prayed that this application be dismissed with costs.

B. Analysis & Determination

6. I have carefully considered this Application, as well as the corresponding affidavits filed. 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 as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant.(see [Butt Vs Rent Restriction Tribunal](#) (1982) KLR 417 and [James Wangalwa & Another Vs Agnes Nalika Chereto](#) (2012) eKLR)
7. The judgment appealed against was delivered on 21st December 2023. The Appeal herein and this application were simultaneously filed on 15th January 2024. Thus, it can be said that this appeal and application for stay of execution have been filed timeously.
8. On the likelihood of suffering substantial loss, it is sufficient if an applicant seeking for an order of stay of execution can demonstrate 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 Vs Miriam Maalim Bisbar & Another](#) (2010) eKLR, [National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another](#) (2006) eKLR.
9. Guided by the above authorities and in the absence of the requisite proof from the Respondents that he is a person of means, it would be safe to hold that the appellant would suffer substantial loss and this appeal would be rendered academic in nature if the decretal sum is paid out to the Respondent. The Appellant has therefore fulfilled this condition.
10. On the security, the Appellant has indicated that his is willing and ready to abide by this court's order as to security. The Respondent on the other hand opposes the same. In determining what appropriate security should be offered, 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 her 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 her judgment. See [Attorney General Vs Halal Meat Produces Limited](#) Civil Application No. Nairobi 270 of 2008; [Kenya Shell Ltd Vs Kibiru & another](#) (Supreme); [Mukuma vs Abuoga](#) (1988) KLR 645.



11. The law is that where the Applicant succeeds, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. See Court of Appeal in *Ndubiu Gitabi Vs Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100.

Disposition

12. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff, I grant an order of a stay of execution of the decree herein on condition that;
- (a) The Appellant/Applicant will deposit the entire decretal sum in court within the next 45 days from the date of this ruling and in default this application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.
- (c) The costs of this application shall be in the cause
13. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 13TH DAY OF MARCH, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 13th day of March, 2024.

In the presence of;

Ms Oloo for Appellant

Mr. Nganga for Respondent

Sam Court Assistant

