



REPUBLIC OF KENYA



KENYA LAW
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Guardian Coach v Mutai (Suing as the Legal Representatives of the Estate of Nickson Kiprotich Mutai) (Civil Appeal E057 of 2023) [2024] KEHC 2779 (KLR) (12 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E057 OF 2023
RL KORIR, J
MARCH 12, 2024**

BETWEEN

THE GUARDIAN COACH APPLICANT

AND

**MERCY CHELAGAT MUTAI (SUING AS THE LEGAL REPRESENTATIVES OF
THE ESTATE OF NICKSON KIPROTICH MUTAI) RESPONDENT**

RULING

1. The Applicant filed a Notice of Motion Application dated 18th October 2023 which sought the following Orders:-
 - I. Spent.
 - II. Spent.
 - III. That pending the hearing and determination of the Applicant's Appeal, to wit, Bomet High Court Civil Appeal No. E057 Of 2023, this Honourable Court be pleased to issue a stay of execution of the Judgment and Decree issued in Sotik PMCC NO. 65 OF 2022 on 19/09/2023
 - IV. That costs of this application be provided for.
2. The Application was brought under Order 42 Rule 6, Order 51 Rule 1, Order 22 Rule 22 of the *Civil Procedure Rules* and sections 1A, 1B, 3A of the *Civil Procedure Act* and Articles 50 and 159 of the *Constitution* of Kenya. It was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Erik Oira.



The Applicant's Case.

3. The Applicant stated that the trial court awarded the Respondent a sum of Kshs 1,546,607.04/=. That they were aggrieved by the said Judgment and had filed an Appeal against the trial court Judgment in this court.
4. It was the Applicant's case that the decretal sum was substantial and if they paid the amount and their Appeal was successful, they won't be able to recover the same from the Respondent thereby rendering the Appeal nugatory. That the Respondent was a person of straw who would not be able to refund the decretal sum.
5. The Applicant stated that he would suffer substantial loss if the orders sought were not granted. The Applicant further stated that they had brought the Application timeously.
6. It was the Applicant's case that the Respondent would not be prejudiced as its insurer, Directline Assurance Limited was ready and willing to furnish security by providing a Bank Guarantee.

The Response

7. Through her Replying Affidavit dated 30th October 2023, the Respondent stated that the Applicant had not demonstrated her alleged inability to repay the decretal sum should the Appeal succeed.
8. It was the Respondent's case that she would be greatly prejudiced if the Applicant failed to deposit the entire decretal sum of Kshs 1,707,278/= in court or in a joint interest earning account. That the court's discretion in awarding stay of execution should be exercised in a manner that no party would be worse off by virtue of a court order. It was her further case that the court should consider that both parties have rights and ought to balance between the two.
9. The Respondent stated that the Applicant had not demonstrated any willingness or readiness to furnish any security. That the attachment in their Application was not a Bank Guarantee but an application for renewal of a banking facility.
10. The parties made oral submissions in court. Mr. Ndolo on behalf of the Applicant submitted that the Applicant would provide security for the performance of the Decree by way of a Bank Guarantee. Mr. Tombe on behalf of the Respondent submitted that the entire decretal sum be deposited in court.
11. I have read through and carefully considered the Notice of Motion Application dated 18th October 2023, the Replying Affidavit dated 30th October 2023 and the parties' oral submissions in court. The only issue for my determination was whether the Applicant had satisfied the requirements for the grant of the Order of Stay of Execution.
12. The principles that relate to Stay of Execution Orders are well settled. 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 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”.
13. Thus under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), the Applicant should satisfy the court that:-
 - i. Substantial loss may result to him unless the order of stay is granted.
 - ii. That the Application has been made without unreasonable delay.
 - iii. The Applicant gives such security as the court orders for the due performance of such Decree or order as may ultimately be binding to them.
14. Regarding the issue of substantial loss, the Court of Appeal in the case of [Kenya Shell Limited v Benjamin Karuga Kibiru & another](#) (1986) eKLR, held that:-

“Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”
15. Similarly in [James Wangalwa & Another v Agnes Naliaka Cheseto](#) (2012) eKLR, Gikonyo J. held 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.”
16. The Applicant stated that they would suffer substantial loss unless the execution was stayed. That the decretal amount was substantial and the Respondent would be unable to refund them the decretal sum in the event that their Appeal succeeded.
17. In my view, the burden is on the Applicant to prove that the Respondent would not be able to refund the decretal sum. Shifting that burden to the Respondent who is the Judgment holder is unjust. I agree with Odunga J. (as he then was) in [Michael Ntouthi Mitheu v Abraham Kivondo Musau](#) (2021) eKLR where he held:-

“Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree.”



18. Similarly, the Court of Appeal in *Caneland Ltd Malkit Singhpandhal & another v Delphis Bank Ltd* (2000) eKLR held:-

“We now turn to apply these principles to the facts of the present case. Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits or otherwise that the respondent will be unable to refund to the defendants any sums of money paid in satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue.....”

19. The Applicant stated that the Respondent was a person of straw and would not be able to refund them the decretal sum in the event of a successful Appeal. The Applicant did not adduce any evidence or set out factual circumstances to demonstrate that it would suffer substantial loss if the execution was not stayed.
20. Based on the evidence before me, it is my finding that the Applicant has not proved the substantial loss that it would suffer. Therefore, he failed to prove the first condition for the grant of stay of execution.
21. On the issue of unreasonable delay, the Applicant stated that the trial court delivered its Judgment on 19th September 2023 and that they brought the present Application within reasonable time. That they temporary stay of execution that had been granted by the trial court was set to lapse on 18th October 2023.
22. I have gone through the Applicant’s pleadings and I have noted that the Applicant filed their Appeal and current Application on 17th October 2023. It is my finding that there was no delay in filing the present Application as the Applicant filed the current Application a day before the lapse of the temporary stay of execution granted by the trial court.
23. Regarding security for the performance of the Decree, Gikonyo J in the persuasive case of *Arun C Sharma v. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* (2014) eKLR held that: -

“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 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.”

24. Similarly in *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* (2019) eKLR Nyakundi J. observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.



Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.....”

25. The Applicant submitted that he was willing to provide security by way of a Bank Guarantee. On the other hand, the Respondent was insistent on having the entire decretal sum deposited in court or in a joint interest earning account.

26. It is salient to note that the power of the court in deciding whether or not to grant a stay of execution is discretionary. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal held that

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

27. I have noted that the Applicant’s main reason for the prayer of stay of execution is that it was apprehensive that the Respondent would be unable to refund him the decretal sum if the Appeal succeeded. I have also noted that the Respondent was the decree holder who should be enjoying the fruits of the Judgment. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice.



28. This principle was enunciated in the decision of Gikonyo J. in *Absalom Dova v. Tarbo Transporters* (2013) eKLR, where he stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

29. I have gone through the attached document marked as EO.2 and dated 6th July 2023 The document is referenced as an Application for renewal of Banking Facilities made by the Applicant’s Insurers to Family Bank. The document shows that Family Bank had agreed to renew its Bank Guarantee to Directline Insurance to the tune of Kshs 200,000,000/= and it stated that it would be used for providing security for awards an or costs awarded in various court cases/claims pending before court.

30. Though the said Bank Guarantee was not specific to Sotik PMCC No. 65 of 2022, I have noted the Applicant’s willingness through their Application and submissions of its intent to deposit security for the performance of the Decree and I am satisfied that the Applicant is willing to deposit security.

31. In the final analysis, even though the Applicant has failed to satisfy the first two conditions for the grant of stay of execution, it is my finding that the Applicant does not deserve to be driven away from the seat of justice as his right of appeal is enshrined in the *Constitution* of Kenya 2010.

32. In the end, I grant stay of execution of the Judgment in Sotik PMCC Number 65 of 2022 on the following conditions:-

- i. The Applicant shall issue a Bank Guarantee specific to this suit for the total decretal sum within 14 days.
- ii. The Applicant shall file the Record of Appeal within 30 days.
- iii. The trial file is returned to the lower court and it is to be brought back to this court upon the lapse of 21 days.
- iv. Though successful, the Applicant is denied costs for the reason that the stay order was for their sole benefit.

33. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 12TH DAY OF MARCH, 2024.

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Ms. Kemunto for the Applicant, Mr. Tombe for the Respondent and Siele(Court Assistant).

