



**Kungu v Kaarumbi (Civil Appeal 335 of 2023)
[2024] KEHC 3062 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 335 OF 2023
FN MUCHEMI, J
MARCH 7, 2024**

BETWEEN

JAMES KINYANJUI KUNGU APPELLANT

AND

LUKAS CURINGI KAARUMBI RESPONDENT

RULING

Brief facts

1. The application dated 4th October 2023 seeks for orders of stay of execution in respect of the judgment delivered on 31st August 2023 in Thika Small Claims Court Case No.E339 of 2023 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 17th October 2023.

Applicant's Case

3. The applicant states that judgment in Thika Small Claims Court Case No. E339 of 2023 was delivered on 31st August 2023 in favour of the respondent. Being aggrieved by the decision, the appellant lodged this appeal (formerly Kiambu HCCA No. E375 of 2023) and filed his memorandum of appeal on 29th September 2023. He has also sought to be provided with copies of the typed proceedings in the trial court.
4. The applicant contends that the appeal raises pertinent points of law as it seeks for orders of setting aside judgment of the trial court, and in the alternative for a reassessment of damages.
5. The applicant further states that unless the application is allowed, he stands to suffer substantial loss as the respondent will execute the judgment and decree in the trial court thereby rendering the appeal



nugatory. Further, the applicant states that he is ready and willing to deposit one third of the decretal sum in court as a condition for the grant of the orders for stay of execution pending appeal.

6. The applicant states that the instant application has been made without inordinate delay. No prejudice shall be suffered by the respondent.

The Respondent's Case

7. The respondent opposes the application on the premise that it is frivolous, vexatious, a total abuse of the court process and is meant to deny him the opportunity to enjoy the fruits of his judgment.
8. The respondent states that the appeal does not raise any serious issues for consideration by the court since the judgment on record was well reasoned and arrived after a critical analysis and determination of the facts and evidence on record.
9. The respondent further states that the applicant has not met the legal threshold for grant of stay of execution pending appeal as no substantial loss has been demonstrated. The applicant has merely stated that if stay is not granted, he will suffer substantial loss without substantiating the loss. Moreover, the fact that the process of execution has been put in motion, by itself does not amount to substantial loss as execution is a lawful process. In any event, the respondent avers that execution in the instant case has not commenced and therefore the orders sought are unwarranted.
10. The respondent contends that the applicant has not demonstrated his ability to deposit any amount as security for costs. The applicant has merely stated his readiness and willingness to deposit security without giving details of such security.
11. The respondent avers that he is bound to suffer further prejudice and loss since the accident occurred on 7th August 2021 and occasioned him serious bodily injuries. The respondent further avers that he has not been able to carry out any normal duties as a driver after losing all his right toes yet the applicant is frustrating all the efforts for him to be compensated.
12. In the event the court allows the application, the respondent urges the court to direct that the applicant pay him half the decretal sum for his sustenance pending the outcome of the appeal.

The Applicant's Submissions

13. The applicant reiterates the contents of his affidavit in his submissions. He further adds that he has an arguable appeal premised on law and fact whereby the applicant argues that the trial magistrate failed to appreciate that the jurisdiction of the trial court had ceased by effluxion of time. Furthermore, the trial court erred by awarding future medical expenses where the threshold of proof had not been attained and admitting and considering substantive evidence that violated the provisions of Section 35 and 48-54 of the *Evidence Act* as well as Sections 24 and 12(c) & (d) of the VAT Act as read with Regulation 4(1) of the said statute.
14. The applicant relies on Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules and the cases of Charles Mwangi Gitundu v Charles Wanjohi Wathuku [2021] eKLR and Absalom Dova vs Tarbo Transporters [2013] eKLR and submits that he has met the threshold of granting of stay of execution orders.
15. On the issue of substantial loss, the applicant contends that he stands to suffer substantial loss of over Kshs. 561,550/- as well as costs and interest if stay of execution is not granted. To support his argument, the applicant relies on the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR and submits that he has demonstrated that he stands to suffer irreparable and substantial



loss. Conversely, the applicant argues that the respondent has not demonstrated that they will suffer substantial loss should the application be allowed as prayed.

16. The applicant further argues that he has demonstrated his intention to prosecute his appeal by annexing the memorandum of appeal as well as payment request for copies of proceedings.
17. Relying on Section 79G of the *Civil Procedure Act* and the case of Erick Oting'u Murilla v Joseph Muthee Ngure Macharia [2015] eKLR the applicant submits that the instant application has been made without unreasonable delay as it was filed less than 30 days after judgment was delivered by the trial court on 31st August 2023.
18. The applicant has proposed to provide security by depositing a portion of the decretal sum in court or a joint interest earning account as a condition for the grant of the orders. To support his contentions, the applicant relies on the cases of Arun Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR and Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another [2018] eKLR and urges the court to exercise its discretion and direct both parties to deposit half the judgment sum in court or in a joint interest account within 60 days.
19. The applicant relies on the case of Stanley Karanja Wainaina & Another vs Ridon Anyangu Mutubwa [2016] eKLR and contends that it does not lie with him to demonstrate the respondent's inability to compensate the applicant. The respondent ought to demonstrate the same which the applicant argues he has failed 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.

20. 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.
21. 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.
22. 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.
23. The applicant in his affidavit, deposes that he stands to suffer irreparably as the respondent will levy execution against him and thereby render the appeal nugatory. The respondent argues that the applicant has not demonstrated that he will suffer substantial loss.
24. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. It is therefore my considered view that the applicant has not demonstrated substantial loss he stands to suffer.

Has the application has been made without unreasonable delay.

25. Judgment was delivered on 31st August 2023 and the applicant filed this application on 4th October 2023. It has taken the applicant one month and three days between the date of judgment delivered in the trial court and the time when he filed the instant application. It is therefore my considered view that a delay of one month and three days is not inordinate. As such, the application was filed timeously.

Security of costs.

26. 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.”
27. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has offered to provide security by depositing one third of the decretal sum in court as a condition for the grant of orders for stay of execution.



28. 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.”

29. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue is 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 no arguable points of law have been raised.

30. It is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal. Accordingly, the application dated 4th October 2023 lacks merit and is hereby dismissed.

31. Costs to abide in the appeal.

32. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

