



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kenduiywo v Nyigei (Civil Appeal E004 of 2023)
[2024] KEHC 2263 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E004 OF 2023**

JK SERGON, J

MARCH 6, 2024

BETWEEN

NANCY VALERIE KENDUIYWO APPELLANT

AND

MAUREEN NYIGEI RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 12th April, 2023 seeking the following orders;
 - (i) Spent
 - (ii) That this Honourable Court be pleased to grant stay of execution of the judgment and decree of the subordinate court in Kericho CMCC No. 89 of 2016 Maureen Nyigei v Nancy Valerie Kenduiywa dated 16th November, 2022 pending hearing and determination of this application inter partes.
 - (iii) That this Honourable Court be pleased to grant stay of execution of the judgment and decree of the subordinate court in Kericho CMCC No. 89 of 2016 Maureen Nyigei v Nancy Valerie Kenduiywa dated 16th November, 2022 pending hearing and determination of the appeal herein.
 - (iv) That costs of this application be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit of Nancy Valerie Kenduiywo the applicant herein.
3. The applicant deponed that the respondent instituted a suit against her vide Kericho CMCC No. 89 of 2016 Maureen Nyigei v Nancy Valerie Kenduiywa, and further that on 10th August, 2022 a day



- after the general elections the respondent's case proceeded in the absence of the applicant who could not access court premises due to the tension arising from the election mood in the country.
4. The applicant deponed that judgment was delivered without any notice being served upon her, after delivery of the judgment she was served with a notice of entry of judgment and she swiftly sought to set aside the judgment through an application dated 18th November, 2022 but the same was dismissed pursuant to a ruling delivered on 11th January, 2023. The applicant further deponed that she has since appealed to this court seeking to set aside the orders of the subordinate court and annexed a copy of the memorandum of appeal.
 5. The applicant deponed that the respondent had applied for execution of the decree and the applicant was served with a proclamation notice dated 5th April, 2023 which was set to lapse and the applicant was apprehensive that the auctioneers would attach and auction her property.
 6. The applicant deponed that the execution of the ex-parte judgment and decree would be tantamount to a violation of the applicant's right to a fair hearing.
 7. The applicant deponed that the respondent is a person of straw and should the decretal amount be paid to her, she shall not be in a position to refund in the event the appeal is successful. The applicant deponed that the appeal has high chances of success and that she was ready and willing to abide by the conditions of this court for stay pending appeal.
 8. The respondent filed a replying affidavit in response to the application which was sworn by Maureen Nyigei the respondent herein.
 9. The respondent deponed that she filed Kericho CMCC No. 89 of 2012, the matter was heard and determined in the absence of the appellant on a date which was taken by consent when the appellant failed to attend court and a regular judgment delivered.
 10. The respondent deponed that the instant application is therefore misconceived, mischievous, frivolous, vexatious and lacking in merit since it is the applicant who chose not to attend court for reasons that are imagined and untenable as following the general elections normal operations resumed the next day since Kenyans had voted peacefully.
 11. The respondent deponed that the application was intended to frustrate and further delay the just conclusion and finalization of this suit, an abuse of the court process and should be dismissed with costs.
 12. The respondent deponed that she would suffer prejudice and loss were the application to be allowed in stark contrast to the applicant. The respondent therefore invited this court to consider the fact that the right of appeal must be balanced against an equally weighty rigid right of the respondent to enjoy the fruits of the judgment delivered in her favour and that there must be a just cause for depriving the respondent of that right which cause has not been demonstrated herein.
 13. The respondent conceded that the granting the orders sought is conditional and discretionary, she therefore reiterated that should this court decide to exercise its discretion in favour of the applicant, the same should be made on the condition that the applicant deposits the entire decretal amount in court or in an interest earning account in the joint names of the respondents and applicants advocates within a stipulated time period.
 14. I have considered the notice of motion and replying affidavit by the respective parties and I find that the sole issue for this court determination is whether the Court should issue orders for stay of execution pending appeal. The power to grant orders for stay of execution pending appeal is discretionary. This discretion must be exercised judiciously.



15. Order 42 Rule 6 (2) of the *Civil Procedure Rules*, 2010 sets out the conditions necessary for the grant of an order for stay of execution in the following terms:
 - (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."
16. I find that the applicant has met the conditions for stay pending appeal as set out in the foregoing section. The applicant filed the instant application timeously and has demonstrated substantial loss if the order is denied. On the question of the security for due performance of the decree, in the present case, the applicant has offered to provide security on any terms that this court may set and has therefore satisfied this ground for stay.
17. However, the determination of what amounts to a suitable security is a matter of the court's discretion too. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, the court stated that: "Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security ..."
18. Consequently the notice of motion dated 12th April, 2023 is allowed giving rise to issuance of the following orders;
 - (i) An order for stay of execution of the judgment and decree of the subordinate court in Kericho CMCC No. 89 of 2016 *Maureen Nyigei v Nancy Valerie Kenduiywa* dated 16th November, 2022 pending hearing and determination of the appeal is granted on condition that the applicant deposits the entire decretal amount in an interest earning account in the joint names of the Advocate appearing in this matter within forty five (45) days of this ruling. In default, the order shall automatically lapse.
 - (ii) Costs of this application shall abide in the outcome of the appeal.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 6TH DAY OF MARCH, 2024

.....

J.K. SERGON

JUDGE

