



**Njagi v Kithua & another (Suing as legal representatives of the Estate of Doreen Kinya Ithinyai-Deceased) (Civil Appeal E062 of 2023) [2024] KEHC 2745 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2745 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E062 OF 2023  
LM NJUGUNA, J  
MARCH 13, 2024**

**BETWEEN**

**ROBERT KARIUKI NJAGI ..... APPELLANT**

**AND**

**GENESIO NTHIGA KITHUA & GEOFFREY MUGWIKI (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF DOREEN KINYA ITHINYAI-DECEASED) ..... RESPONDENT**

**RULING**

1. Vide a notice of motion dated 24<sup>th</sup> November 2023, the appellant/applicant seeks the following orders:
  - a. Spent;
  - b. That pending hearing and determination of this application, the Honourable Court be pleased to issue an interim order of stay of execution of the judgment and decree arising from Siakago Civil Case No. E054 of 2021;
  - c. That this honourable court be pleased to stay execution of the judgment and decree in Siakago Civil Case No. E054 of 2021 pending hearing and determination of the appeal herein;
  - d. That this honourable court allow the appellant/applicant to furnish the court with reasonable security in the form of a bank guarantee;
  - e. That the costs of this application abide the outcome of the appeal.

The application is supported by the grounds on its face and facts deposed in the supporting affidavit thereof.

2. It is the applicant's case that his insurer is willing to give security for the decretal sum in the form of a bank guarantee. That if the orders sought are not granted, the respondents may move to execute for



the decretal amount, thereby causing the applicant irreparable loss and rendering the appeal nugatory. That the appeal raises an arguable case and has high chances of success. That any payments made to the respondent as a condition for stay of execution may not be recovered if the appeal succeeds. That the application has been brought without delay.

3. The respondents filed a replying affidavit sworn on 18<sup>th</sup> December 2023, opposing the application. In it, they deposed that the applicant's constitutional right of appeal should not supersede their rights to enjoy the fruits of their judgment. That should the court grant stay of execution, the applicant should deposit a substantial amount of the decretal sum into a joint interest earning account and then the balance can be secured by a bank guarantee.
4. The court directed that the application be disposed of by way of written submissions but only the applicant complied.
5. The applicant submitted that according to Order 42 Rule 6 of the *Civil Procedure Rules*, for the court to grant stay orders, it must be satisfied that substantial loss may result if the orders are not granted and that security for performance of the decree must be provided. That the applicant is ready to comply with both requirements to satisfy the court that the decretal amount of Kshs. 3,770,000/= will be secured through a bank guarantee by his insurer. He argued that the appeal is arguable and it has high chances of success. Reliance was placed on the case of *Kenya Revenue Authority v. Sidney Keitany Changole & 3 Others* (2015) eKLR.
6. Further reliance was placed on the case of *Edward Kamau & Another v. Hannah Mukui Gichuki & Another* (2015) eKLR in support of his argument that he is likely to suffer irreparable loss if the orders are not granted. That the respondents have not demonstrated their financial capabilities to refund any amounts paid to them to satisfy the decretal sum, should the appeal succeed. That the application was filed on 07<sup>th</sup> November 2023 without delay since the impugned judgment was delivered on 19<sup>th</sup> October 2023. It was his submission that his insurer's bank guarantee is sufficient security for performance of the decree and he relied on the case of *Gianfranco Manentbi & Another v. Africa Merchant Assurance Company Ltd* (2019) eKLR.
7. The issue for determination is whether the application meets the threshold for issuance of orders for stay of execution.
8. In considering whether or not to grant stay of execution, the court is expected to look at the circumstances of the case and test them against the provisions of the law before applying its discretion on the matter. I am guided by Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides:
  - (2) No order for stay of execution shall be made under subrule (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.
9. First, the applicant argued that he will suffer substantial loss if the orders are not granted. However, he does not demonstrate what loss he is bound to suffer and how the same will render the appeal nugatory. If the applicant's apprehension is that the respondents will move to execute, this not sufficient cause because execution is a legal process. In the case of *James Wangalwa & Another vs. Agnes Naliaka*



Cheseto [2012] eKLR, the court was of the view that substantial loss is indeed dependent on whether alteration of status quo will substantially affect the case. It was 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.”

10. It is the applicant’s argument that if the decretal sum is paid to the respondent, the same may not be recovered if the appeal succeeds as they have not demonstrated their financial ability. It is my view that this apprehension can be cushioned where the decretal amount is held by court or in a joint interest-earning account as stated by the respondents.
11. As to whether the application was brought timeously, the applicant filed the application within 2 weeks of the impugned judgment. In my view, there is no delay that needs to be explained as the application was filed promptly since the impugned judgment was delivered on 19<sup>th</sup> October 2023 and the application was filed on 07<sup>th</sup> November 2023. On the third aspect of security for performance of the decree, Order 42 Rule 6(2)(b) of the Civil Procedure Rules provides that the intended security must be ultimately binding to the applicant. He urged the court to allow him to provide security in the form of a bank guarantee from his insurer.
12. A bank guarantee is indeed a form of security as has been held previously in precedence. However, the bank guarantee, when intended for use as security under Order 42 of the Civil Procedure Rules, must be so specific to the decretal sum and other incidentals. The applicant knows exactly how much the decretal amount is and the same must reflect specifically on a bank guarantee while also expressly stating the case number and parties. This enhances the chances of recovery of the amount if and when the need arises in the specified judgments. In the case of Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others (2015) eKLR, it was held that:

“..... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words 'ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”
13. If the applicant is to provide a “blanket” bank guarantee for many unspecified cases, the question may arise as to how the security will be realized, potentially opening up the parties to further litigation and denying the respondents the fruits of their judgment. In the case of Nzyuko v Matbeka (Civil Appeal E061 of 2023) [2023] KEHC 23844 (KLR) (12 October 2023) the court held thus:

“This Court notes that there is an agreement exhibited between Family Bank and the directors of Direct Line Assurance Company Limited who is the insurer of the Applicant.



The same is for a sum of Kshs 50,000,000 million. It is for a period of 12 months with an option to renew the guarantee was received by the said bank on 23<sup>rd</sup> February, 2022 which as the time of this ruling had not been renewed. This Court further takes note of the fact that Applicant is not a party to the said agreement as the said agreement is between the Applicant’s insurer and Family Bank. There is no evidence that the bank guarantee herein is for the intent and purpose of this matter. This Court finds and agrees with the Counsel for the Respondent that the said bank guarantee is not suitable in this present case. It is in a nutshell general bank guarantee it has not stated how each party will benefit from it hence it will pose hindrance at the time of enforcement.”

14. Article 48 of the *Constitution of Kenya* 2010 guarantees every person the right of access to justice. Further, Article 50(1) of the *Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. More importantly, Article 159(2) of the *Constitution* guides me in application of discretion in order to serve justice to all parties in this matter. I am therefore inclined to grant the orders only on the strength of the *Constitution* which is the supreme law of the land.

15. Further, justice is meant to serve both the applicant and the respondents herein. While the applicant has a right to appeal, the respondents have a right to be compensated for the death of their kin. At the same time, I am reminded of the role of the court in administration of justice as stated in the case of *Kamuti v Kariuki* (Miscellaneous Civil Cause E001 of 2023) (2023) observed that:

“The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out unless for a good reason.”

16. In the end, I find that it is in the interest of justice that the following orders do issue:

- a. Pending hearing and determination of the appeal, stay of execution of the judgment in Siakago Civil Case No. E054 of 2021 is hereby issued on condition that the applicant deposits half of the decretal sum into a joint interest-earning account in the names of both the advocates for the applicant and the respondents within 30 days of this ruling, failing which the respondents may proceed to execute; and
- b. Costs of this application shall abide the outcome of the appeal.

17. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 13<sup>TH</sup> DAY OF MARCH, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the Appellant/Applicant

..... for the Respondent

