



REPUBLIC OF KENYA



KENYA LAW

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**Directline Assurance Company Limited & another v Obed (Civil Appeal
E019 of 2023) [2024] KEHC 17116 (KLR) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 17116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E019 OF 2023**

TM MATHEKA, J

APRIL 15, 2024

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED 1ST APPLICANT

JULIAH NJERI KINUTHIA 2ND APPLICANT

AND

PRUDENCE WANJIRU OBED RESPONDENT

RULING

1. The application before me is dated 13/04/2023 and was brought under certificate of urgency under Sections 3A, 79G and 95 of the *Civil Procedure Act* (CPA) Cap 21 Laws of Kenya, Order 42 Rule 4,6 & 7, Order 50 Rule 6, Order 51 Rules 1&3 of the Civil Procedure Rules 2010. It seeks the following orders;
 1. Spent.
 2. That this honorable court be pleased to order a stay of execution of the judgment in Makindu Civil Suit No. 111 of 2020 delivered by Hon A.N Ndung'u Senior Resident Magistrate on 23rd February 2023 pending the hearing and determination of this application.
 3. That this honorable court be pleased to order a stay of execution of the judgment in Makindu Civil Suit No. 111 of 2020 delivered by A.N Ndung'u Senior Resident Magistrate on 23rd February 2023 pending the hearing and determination of this appeal.
 4. That as a condition for stay of execution pending the hearing and determination of this appeal, the applicants/appellants be ordered to provide/issue security for the entire decretal sum/ amount in the form of a bank guarantee to be issued by Family Bank Ltd.
 5. That the costs of this application abide the outcome of the appeal.



2. The application is supported by the grounds on its face which include; that the appeal has high chances of success, that the application has been presented without inordinate delay, that the respondent is a person of unknown means, that it is in the interests of justice that the entire decretal sum be secured through a bank guarantee as the appeal is primarily on the trial court's determination on the issue of liability and quantum. That if part payment is made, recovery of the same will be arduous in the event that the appeal on liability succeeds.
3. The application is supported by the Affidavit of Juliah Njeri Kinuthia sworn on the same day. She depones that she is the registered owner of motor vehicle KBM 165B that is alleged to have been involved in an accident on 25/10/2019 along Mombasa road. That according to information from her advocates which she verily believes to be true, the respondents are in the process of extracting a decree hence execution is imminent. A copy of the judgment is exhibited as JK1 and a letter requesting for payment & threatening execution is exhibited as JK2. She depones that if execution is levied, the appeal will be rendered nugatory and will cause irreparable loss and damage to them.
4. She depones that according to information from her advocates which she verily believes to be true, the lower court magistrate did not consider the defendant's evidence on liability and the submissions on quantum. She has also deposed that they are ready and willing to furnish the court with bank guarantee as security, pending the hearing and determination of the appeal. The bank guarantee is exhibited as JK3.
5. The application is opposed through the respondent's replying affidavit sworn on 20/04/2023. It is deponed that the defendants did not call any witness in the trial court and the judgment is good unless upset on appeal. That the form of security being offered is not capable of securing her interest. That if the court holds the view that stay should be granted; half of the decretal sum should be released to her and the other half be deposited in an interest earning account in the names of the advocates on record. That the appellants be directed to file the record of appeal within a specified period and thirdly, that there be a default clause against non-compliance with the conditions set.
6. The application was canvassed through written submissions.
7. The applicants submit that the appeal is mainly on quantum as the award is excessive and not proportionate to the loss and damage suffered. That they only need to show that the appeal is arguable and have relied on Kenya Revenue Authority v Sidney Keitany Changole & 3 Others [2015] eKLR where the Court of Appeal stated;

“This Court has further held that the applicant need only prove or establish one arguable point noting that an arguable appeal is not necessarily one that will succeed but one that is not frivolous.”

8. As to whether substantial loss will occur, they submit that the respondent's means are unknown and will be incapable of refunding the decretal amount if the appeal succeeds. That the respondent has not furnished the court with any documentary evidence to prove her financial standing. They rely on Edward Kamau & Anor v Hannah Mukui Gichuki & Anor [2015] eKLR where the court stated;

“This court appreciates that the applicants being a party seeking favorable exercise of the court's discretion is under a legal duty to place some material before the court upon which such discretion should be exercised. In other words they should prove that the respondent is impecunious that if the decretal sum is paid then they will not recoup should the appeal succeed, thereby rendering it nugatory. They have also argued that although the respondent is offering a bank guarantee, that is not deposed on her affidavit of means. I am in agreement



with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed.”

9. They submit that the appeal was filed soon after delivery of the judgment thus signaling their interest in pursuing the appeal. That there is no inordinate delay on their part.
10. With regard to security, they submit that they are ready and willing to provide a bank guarantee which is an acceptable form of furnishing security. They rely on the case of Gianfranco Manenthi & another v Africa merchant Assurance Co Ltd [2019] eKLR the court observed: -

“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 favor. 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. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

11. They submit that they have satisfied all the conditions set out in Order 42 Rule 6 of the CPR.
12. For the respondent it is submitted that the mere fact that her economic means are unknown to the applicants is not ipso facto proof of substantial loss. That a discharge of any financial obligation occasioned by a lawful judgment does not amount to substantial loss reliance is placed on Samwel Kimutai Korir (Suing as personal and Legal Representative of Estate of Chelangat Selivia (Deceased) v Nyanchwa Adventist Secondary School & Anor [2017] eKLR where the court held that;

“..I find that poverty per se cannot be a basis for keeping a party away from enjoying the fruits of his decree as the court needs to look at all the aspects of the case and balance the interests of the respondent vis a vis the applicant who under article 48 of *the Constitution* is guaranteed right to access to justice and right to fair hearing under article 50(1) of *the Constitution* which latter right cannot be limited under article 25 of *the Constitution*”

13. It is submitted that according to the Memorandum of Appeal, the appeal is only on quantum and as such, the respondent cannot go home empty handed. That even as the appellants are heard, she should be allowed to access part of her lawful judgment and relies on Tabro Transporters Ltd v Absalom Dova Lumbasi (2012) eKLR where the court stated;

“(65) I observe that liability was agreed by consent of the parties. The only aspect of the case that is in dispute is the quantum of damages. Both parties' rights must be safeguarded. Avert; substantial loss from befalling the Applicant; and a total trodden over the Respondent's prima facie right to the fruits of his judgment. In the circumstances, I order that half of the decretal sum to be paid to the Respondent, and the other half to be deposited in a joint account in the names of the advocates within 30 days from the date of this ruling. This is sufficient



security for the performance of the decree herein in accordance with Order 42 Rule 6 of the CPR.”

14. It is also submitted that the respondent is not a party to the purported bank guarantee and as such, it is not appropriate security in this case. It is contended that the applicants should provide security which would be easily access upon the conclusion of the appeal and relies on Gianfranco Manenthi (supra) where the court stated;

“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.

Analysis and Determination

15. According to Order 42 Rule 6 of the Civil Procedure Rules, the conditions which should guide the Court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.
16. Judgment in the case appealed from was delivered on 23/02/2023 and this application was filed on 12/04/2023. The memorandum of appeal was filed on 15/03/2023. The appeal was filed within time and the application was filed shortly after the period prescribed for appeal. Evidently, the application was filed without unreasonable delay.
17. As for substantial loss, the applicants are apprehensive that if the decretal amount is released to the respondent, they will be unable to recover the same if the appeal succeeds. From the judgment, the applicants are 100% liable and the total decretal award is kshs 1,017,750/= . From the authorities cited above it is not sufficient to merely express the fear. There ought to be demonstration that substantial loss will occur.
18. As for security, the applicants offered a Bank Guarantee from Family Bank and its purpose is indicated as “...for providing security for awards and or costs awarded in various Court cases/claims pending before Court”. The guarantee is dated 18/02/2022 and its duration is indicated to be “12 months with an option to renew”. Evidently, the guaranteed has lapsed and the Court was not informed as to whether renewal was done. In my view, the Bank Guarantee is not appropriate.
19. The Court has a duty to balance the competing interests of the parties; the appellants’ right to pursue an appeal, the respondent’s to enjoy the fruits of her judgment.
20. From the lower court judgment the defendant/appellant submitted for an award of Ksh 500,000 , while the plaintiff /respondent submitted for Ksh 950,000. Half the award is about Ksh 500,000.
21. In the circumstances I find it fair and just to make the following order:
22. The application for stay of execution is allowed on condition that the sum of Ksh 500,000 be released to the respondent and the balance be deposited in a joint interest earning account in the names of both Advocates on record within 30 days hereof. In default the stay will lapse and the application will stand dismissed with costs to the respondent.



23. The Record of appeal be filed and served within 30 days hereof.
24. Mention before the Deputy Registrar within 30 days hereof for compliance on the filing and service of the Record of Appeal and a date for directions on the appeal before me.

DATED, AND SIGNED 12TH APRIL 2024

DELIVERED ON 15TH APRIL 2024 DUE TO SYSTEM DOWNTIME ON 12/4/2024

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

DATE: 2024-04-15 21:12:57

