



REPUBLIC OF KENYA



KENYA LAW
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**Kang'ethe v Muoki (Civil Appeal E030 of 2023)
[2024] KEHC 5458 (KLR) (10 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E030 OF 2023
SN MUTUKU, J
APRIL 10, 2024**

BETWEEN

DAVID KIARIE KANG'ETHE APPELLANT

AND

AGNES MALI MUOKI RESPONDENT

RULING

1. By a Notice of Motion dated 26th June 2023 brought under various provisions of the law as shown on the face of the application, the Appellant has approached this court seeking the following orders:
 - i. Spent
 - ii. Spent
 - iii. That this Honourable Court be pleased to grant a stay of execution of the Judgment issued by Honourable E. Kagoni on 25th May 2023 pending the full hearing and determination of this Appeal in Kajiado HCCA No. E030 of 2023.
 - iv. That this Honourable Court be pleased to order stay of proceedings in Kajiado CMCC No. 130 of 2020, 129 of 2020, E20 of 2021, E302 of 2021 and E153 of 2021 pending the hearing and determination of this Application.
 - v. That this Honourable Court be pleased to order stay of proceedings in Kajiado CMCC No. 130 of 2020, 129 of 2020, E20 of 2021, E302 of 2021 and E153 of 2021 pending the hearing and determination of this Appeal.
 - vi. That as a condition of stay of execution pending the hearing and determination of the Appeal, the Appellant be hereby ordered to provide/issue security for the entire decretal sum in the form of a Bank Guarantee to be issued by Family Bank Limited.



- vii. That the Application be heard inter partes on such date and time as this Honourable Court may direct.
 - viii. That costs of this Application abide the outcome of the Appeal.
2. The Appellant has backed the Notice of Motion by grounds found on the face of the application and in the Supporting Affidavit sworn by Kelvin Ngure who has described himself as the Deputy Claims Manager at Directline Assurance Company Limited (the Company). In summary form, the grounds in support of the application are that the trial court, in its judgment delivered on 25th May 2023 in CMCC No. 83 of 2020, found the Appellant to be 100% liable for the accident that occurred on 2nd September 2019 and awarded the Respondent Kshs 250,000 for general damages and Kshs 3,550 for special damages. The Appellant was aggrieved by the said judgment and has preferred an appeal in HCCA No. E030 of 2023 on liability and quantum.
 3. Mr. Kelvin Ngure avers in his supporting affidavit that Directline Assurance Company Limited were the insurers of the Motor Vehicle No. KBA 530H; that the Company instructed M/s Kimondo Gachoka & Company Advocates to defend the suit; that the appeal has high chances of success; that the Respondent may execute the said judgment which will render the appeal nugatory and that the Company is willing and able to furnish the court with a Bank Guarantee from Family Bank Limited as security.
 4. The deponent further avers that the Respondent may not be able to repay the decretal sum should the appeal succeed as she has not disclosed or furnished the court with any documentary evidence to prove her financial standing.
 5. By a Replying Affidavit sworn by Mr. Musili Mbiti, learned counsel for the Respondent, the Respondent is not opposed to the Application but asks the court to order the Appellant to pay half of the decretal sum being Kshs 192,164 to the Respondent and deposit the other half in a joint interest earning account in both names of the advocates for the parties.

Submissions

6. Parties were directed to files submissions. The Appellant's submissions are dated 8th December 2023 and the Respondent's submissions are dated 3rd October, 2023.
7. The Appellant has submitted that he stands to suffer substantial loss of over Kshs 253,550 as well as costs of the suit and interest if stay of execution is not granted because the Respondent has not demonstrated that she is able to refund the sum if the appeal succeeds. The Appellant has relied on [*RWW v EKW* \[2019\] eKLR](#) to stress the point that the purpose of granting stay of execution pending an appeal is to preserve the subject matter is dispute so that the rights of the appellant who is exercising the right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory.
8. The Appellant has submitted that the Application was filed without unreasonable delay and that they are willing and ready to provide security of costs and therefore, the Appellant has satisfied the conditions for stay provided under order 42 rule 6(2) of the *Civil Procedure Rules*.
9. The Respondent has submitted that she is not opposed to the Appellant's application on condition that half of the decretal sum be paid to her, and the other half be deposited in an interest earning account in both names of the counsel representing the parties. The Respondent urged this court to be persuaded by the reasoning of the court in [*Edward Kamau & Another v Hannah Mukui Gichuki*](#) in Misc. Application No. 78 of 2015 on the issue of balancing the rights of the appellant to appeal and



those of the respondent to enjoy the fruits of a lawful judgment. The Respondent urged this court to balance the rights of the Applicant and the Respondent and make orders that protect both.

Analysis and Determination

10. I have considered the application and the grounds supporting it as well as submissions of the parties and the authorities cited. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides for the conditions to be met before a court can grant stay of execution as follows:
 - (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.
11. The Appellant has stated that substantial loss may result if the orders sought are not granted because the Respondent may not be able to refund the decretal sum should the appeal succeed. I have noted that the Respondent has not addressed this issue. The Appellant stated, further, that the application was made without unreasonable delay and that they are willing and ready to provide security for costs.
12. The application is not opposed. The only condition the Respondent has placed on the granting of the orders sought is that half of the decretal sum be paid to her and the other half be deposited in an interest earning account in both names of counsel for the parties.
13. This court must balance the rights of both parties, it is my considered view that the Appellant has met the threshold in seeking stay of execution pending the appeal. However, I need to point out that the Appellant has not demonstrated why this court should grant stay of proceedings in CMCC No. 130 of 2020, 129 of 2020, E20 of 2021, E302 of 2021 and E153 of 2021 pending the hearing and determination of this Appeal. There is no evidence supporting prayers 4 and 5 of the Notice of Motion. The only mention of these cases is in the submissions of the Appellant on page 2. Submissions serve the purpose of persuading the court to rule in favour of the party. They are not evidence.
14. For the above reasons, it is my finding, and I so hold, that the Appellant has not satisfied this court why prayers 4 and 5 of his application should be granted. I will, and do hereby, allow the Notice of Motion dated 26th June 2023 in the following terms:
 - i. That stay of execution of the Judgment issued by Honourable E. Kagoni on 25th May 2023 is hereby granted pending the hearing and determination of this Appeal in Kajiado HCCA No. E030 of 2023.
 - ii. The Appellant shall provide security by depositing the entire decretal sum in a joint interest earning account in both names of counsel currently on record for both parties within 45 days from the date of this Ruling.
 - iii. That failure to comply with the above order will automatically lead to lapse of the order for stay.
 - iv. That costs of this application shall abide by the outcome of the appeal.
 - v. The Appellant shall, within 60 days, file and serve the Record of Appeal.
15. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 10TH APRIL 2024.



S. N. MUTUKU

JUDGE

