



Nzau & another v Hassan & another (Suing as the legal representatives of the Estate of Ali Hassan Boru - Deceased) (Civil Appeal E204 of 2023) [2024] KEHC 4893 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4893 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E204 OF 2023
EM MURIITHI, J
APRIL 18, 2024**

BETWEEN

PATRICK MUSYOKI NZAU 1ST APPELLANT

PASHA ENTERPRISES LIMITED 2ND APPELLANT

AND

**BISHARO ALI HASSAN & RUKIA ABDULAHI (SUING AS THE
LEGAL REPRESENTATIVES OF THE ESTATE OF ALI HASSAN BORU-
DECEASED RESPONDENT**

RULING

1. By a certificate of urgency dated 7/12/2023 pursuant to Order 42 Rule 6 of the [Civil Procedure Rules](#), Sections 1A, 2A & 3A of the [Civil Procedure Act](#) and [the Constitution](#), the Appellants seek:
 1. Spent
 2. Spent
 3. That there be stay of execution of the decree in C.M.C.C. No. 49 of 2015 Isiolo pending the hearing and determination of this appeal against the judgment and order of the Honorable Magistrate.
 4. That cost of this application be provided for.
2. The application is premised on the grounds on the face of it and supporting affidavit of Shadrack Ruto, the legal officer of the Appellants' insurer sworn on even date. On 15/7/2015, the company instructed Wangari Muchemi & Company Advocates to handle the lower court suit on behalf of the Appellants. Aggrieved by the judgment of the court, she instructed their advocates on record to appeal against it. She is advised by her advocates that the appeal raises arguable issues with high chances of success, and the same will be rendered nugatory if the decree is executed. The decretal sum of Ksh. 10,660,000 is



quite substantial and the Respondents are unlikely to refund it if the appeal succeeds. The Appellants stand to suffer substantial loss, as their goods are likely to be attached and sold by public auction unless stay is granted. The Insurance Company is not only ready to offer security for costs but also pay up to the insurance policy statutory limit after the appeal is heard and determined. The Respondents will not be prejudiced as they will have security of the decretal sum in case the appeal is unsuccessful and they will enjoy the fruits of their judgment as the money will accrue interest.

3. The Respondents have opposed the application vide a replying affidavit sworn on 27/12/2023, by Mugambi Nyaga, their advocate. He accuses the Appellants of inordinate and unexplained delay by filing this application 2 months after the impugned judgment was delivered on 24/10/2023. The deceased, who was the only bread winner, sustained fatal injuries as a result of the accident, and the Respondents have really struggled to bring up his 3 children. The Appellants cannot be taken seriously since the application has been filed by the legal officer of their insurer who is not a party to the suit. He avers that the Appellants have not demonstrated what substantial loss they will suffer if execution proceeds as the appeal does not raise any triable issues at all. He believes that the Appellants' motive is to delay the execution process and deny them the fruits of the judgment, and urges the court to dismiss the application with costs. The Respondents are not impecunious as the Appellants arrogantly refer to them, and he is amenable to payment of Ksh.3,000,000 to the Respondents to enable them cater for school and other related expenses of the deceased children and the balance to be deposited in an interest earning account in joint names of the advocates.
4. Bisharo Ali Hassan, the 1st Respondent swore a further replying affidavit on 29/12/2023 in opposition to the application.

Submissions

5. The Appellants urge that substantial loss shall be occasioned to them and the appeal will be rendered nugatory if execution proceeds. They urge that the decretal sum is colossal and the Respondents' means of refunding it are unverifiable and the Respondents can still access the fruits of their judgment if the appeal is dismissed. They urge that if there is any prejudice that the Respondents will suffer if stay is granted, the same can be compensated by an award of costs, and cite *Nicholas Okaka & Anor v Alfred Waga Wesonga* [2022] eKLR, *Gyka Fuel Mart Ltd v Bwana Msbiri Sungura* [2013] eKLR, *Mohammed Abbas M. Somji v James Japheth Otieno* [2009] eKLR and *Devki Steel Mills v Robert Aputo Amariati* [2014] eKLR. They urge that the application was filed timeously and if there was any delay, the same is excusable and has been plausibly explained.
6. The Respondents did not file any submissions.

Analysis and Determination

7. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, as follows: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order set aside.



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 Applicant unless the order is made and that the application has been made without unreasonable delay.
- 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.”

Substantial loss

8. The cornerstone consideration for granting stay is substantial loss, which has been espoused by the Court of Appeal (Platt, AG JA) in *Kenya Shell Limited v Kibiru Another* [1986] eKLR as follows:

“.....If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

9. The Appellants are apprehensive that if the decretal sum is paid to the Respondents, whose financial ability is unverifiable, the same will be lost, and the appeal will be rendered nugatory. The Respondents have merely denied that they are impecunious people without rebutting the Appellants’ legitimate fears of their inability to refund the decretal sum if the appeal eventually succeeds.
10. The court notes from the grounds of appeal as raised in the Appellants’ memorandum of appeal, questioning inter alia the quantum of damages awarded and the apportionment of liability, that the appeal is indeed arguable, which is not one which must necessarily succeed and neither is it for the court to go into the merits of the intended appeal.
11. The court accepts that the decretal sum in issue of Ksh. 10,660,000 is quite substantial and the Appellants’ apprehension that the same may not be refunded, in the event the appeal succeeds, is substantial loss.

Delay

12. The court finds that the application herein was filed without unreasonable delay on 19/12/2023 as the judgment sought to be appealed against was delivered on 24/10/2023.

Security for Costs

13. The court appreciates the Appellants’ willingness to offer security for the due performance of the decree, and the Respondents’ inclination to accept payment as security, of Ksh.3,000,000 and the deposit of the balance in an interest earning account in the names of the advocates.
14. In granting stay, this court strives to strike a delicate balance between the Respondents’ right to enjoy the fruits of their judgment and the Appellants’ undoubted right to appeal against the trial court’s decision.
15. The court notes that the Record of Appeal filed on 13/3/2024 is incomplete.



Orders

16. Accordingly, for the reasons set out above, the court allows the Appellants' application dated 7/12/2023 in the following terms:

1. An order for stay of execution of the Judgment and Decree in Isiolo CMCC No. 49 of 2015 pending the hearing and determination of this appeal is hereby issued.
2. The Record of Appeal to be filed within 60 days from the date hereof.
3. The Appellants shall within 30 days from the date hereof pay to the Respondents the sum of Ksh.2,000,000/= and deposit a Bankers Guarantee for balance of the decretal sum of Ksh.8,660,000.
4. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
5. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF APRIL, 2024.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Ms. Wangari Muchemi for the Applicants

Mr. Kiautha Arithi for the Respondent

