



Take U Adventure Safaris & another v Rikoyian (Civil Case E050 of 2023) [2024] KEHC 4621 (KLR) (10 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE E050 OF 2023
SN MUTUKU, J
APRIL 10, 2024**

BETWEEN

TAKE U ADVENTURE SAFARIS 1ST APPELLANT

STEPHEN NJOROGE GATONGA 2ND APPELLANT

AND

PETER NG'ESHIAN RIKOYIAN RESPONDENT

RULING

Notice Of Motion

1. The Applicants have brought this Notice of Motion (the Application) dated 31st August 2023, based under various provisions of the [Civil Procedure Rules](#) as specifically stated on the face of the Application, seeking the following reliefs:
 - a. Spent.
 - b. Spent.
 - c. This Honourable Court be pleased to grant stay of execution of the decree in Kajiado CMCC E0207 of 2022 pending the hearing and determination of this appeal.
 - d. That costs of this application be provided for.
2. The grounds in support of the application are found on the face of it and in the supporting affidavit sworn by Murithi Mwititi, the Claims Legal Associate at Britam General Insurance Company (Kenya) Limited, the insurer of the Applicant on 31st August 2023. It is deposed that in line with the provisions of the [Insurance \(Motor Vehicles Third Party Risks\) Act](#) Cap. 405 Laws of Kenya, the insurer is authorized and obligated to handle proceedings instituted against the insured, the Appellants; that the insurer instructed a firm of advocates to defend the insured in Kajiado CMCC E207 of 2022 and



that after the determination of that case, judgment was delivered on 31st July 2023 in favour of the Respondent and against the Appellants.

3. The Applicant is dissatisfied with the said judgment and prefers to appeal against it and has filed a memorandum of appeal on 30th August 2023 challenging the failure by the trial court in apportioning liability.
4. It is deposed that unless stay of execution is granted, the Applicants stand to suffer substantial loss and the appeal will be rendered nugatory; that the application has been made without inordinate delay and the Applicants are willing to provide security by depositing a third of the decretal sum in court as a condition for the grant of the orders sought.

Replying Affidavit

5. The application is opposed by the Respondent through a Replying Affidavit sworn by Antony Mungai Njogu, a partner in Njogu Mungai & Co. Advocates, the firm on record for the Respondent.
6. The deponent has stated that the Applicants are using this application to delay satisfying the judgment and deny the Respondent the enjoyment of the fruits of the judgment; that the Applicants have not satisfied the decree and have instead moved this court to contest the judgment of the trial court even though the Applicants did not call witnesses to tender evidence in support of their case. It is stated that the Applicants have failed to deposit security towards the realization of the general damages and special damages awarded.
7. The Respondent asked this court to dismiss the application with costs to the Respondent.

Submissions

8. The Application has been canvassed by way of written submissions as directed by this court on 16th November 2023. The Applicants filed submissions dated 29th November 2023. They have raised one issue for determination: whether the Applicants have met the threshold for grant of stay of execution.
9. The Applicants have cited Order 42 Rule 6 (1) and (2) which provides that:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.
 - (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.
10. They have relied on [New Nairobi United Services Ltd & another v. Simon Mburu Kiiru](#) [2021] eKLR where the court reiterated the conditions for grant of stay and stated that the power to grant stay of execution pending the appeal is an exercise in discretion of the court. They submitted that the



- Applicants will suffer substantial loss because the decretal sum is substantial and that the appeal is likely to be rendered nugatory if stay is not granted. They relied on *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR among other authorities on the issue of substantial loss.
11. They submitted that the application was filed without unreasonable delay because the judgment was delivered on 31st July 2023 and the application was filed on 30th August 2023. They relied on *Jaber Mohsen Ali & another v Priscillah Boit & Another* [2014] eKLR where the court stated that unreasonable delay depends on the surrounding circumstances of each case.
 12. They submitted that they have undertaken to provide security of costs and that they are fully aware of the legal purpose of furnishing the security (see *Arun C. Sharma v. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR).
 13. They submitted that they have an arguable appeal which may be rendered nugatory if the orders sought are not granted and relied on *Nyaboke v. NCBA Bank Kenya PLC & Another* (Civil Application E0308 of 2021 [2021] KECA 323 KLR).
 14. The Respondent, through submissions dated 14th December 2023, raised two issues for determination:
 - a. Whether the Applicants should be granted stay of execution of the decree in Kajiado CMCC E207 of 2022 pending the hearing and determination of the Appeal.
 - b. Whether the Applicants should deposit security towards the realization of the decretal sum.
 15. On the first issue it was submitted that the application is a delaying tactic and that it should not be allowed; that the Applicants were granted 45 days stay of execution after judgment was delivered but they did not deposit security towards the realization of the damages awarded to the Respondent and have now turned to the court to seek refuge and that the Applicants have not demonstrated that they stand to suffer substantial loss if stay is not granted; that the application has been filed without unreasonable delay; that they are willing to furnish security for the due performance of the decree and that the applicant has an arguable appeal.
 16. On the second issue, it was submitted that the Applicants should furnish security by depositing the entire decretal sum as security. The Respondent asked this court to dismiss the application with costs.

Analysis and Determination

17. I have considered the application and the grounds in support. I have considered the submissions of the parties. The conditions to be met by an applicant seeking orders for stay of execution pending an appeal are well settled. Order 42 Rule 6 (2) of the *Civil Procedure Rules* is clear that “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.”
18. The Applicants have stated that they have met the threshold for grant of stay by demonstrating that they stand to suffer substantial loss and that the appeal will be rendered nugatory if stay of execution is not granted. They have stated that they filed the application without unreasonable delay and that they are willing to provide security for costs, although they are proposing a third of the decretal amount.
19. On the other hand, the Respondent has stated that the Applicants have not satisfied the grounds for grant of stay because they have not demonstrated that they stand to suffer substantial loss, that they had been granted 45 days stay during which period they did not provide security.



20. The purpose of providing security under Order 42 is to guarantee the due performance of the decree or order. It is not meant to punish the Judgment debtor (see *Arun C. Sharma* case cited above). My view on this application is that the Applicant filed the application without unreasonable delay and are willing to provide security. They also claim to have an arguable appeal.
21. To grant or decline granting stay is discretionary. I have considered the arguments of both parties, and it is my considered view that the Applicants be allowed the opportunity to ventilate their appeal. I will and do hereby allow the on the following conditions:
- a. That stay of execution of the judgment in Kajiado CMCC E207 of 2022 is hereby granted pending the hearing and determination of the appeal.
 - b. That the Applicants shall furnish security by depositing the decretal sum in a joint interest earning account in both names of the advocates currently on record for the respective parties within 30 days from today's date failing which the order for stay of execution will lapse.
 - c. The Applicants shall file and serve the Record of Appeal within 60 days from the date of this ruling.
22. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 10TH APRIL 2024.

S. N. MUTUKU

JUDGE

