



**Arigisi v Ooko & another (Suing as Administrators and the Legal Representatives
of the Estate of the Late Veronica Achieng Ahawo - Deceased) (Civil
Appeal 40 of 2023) [2024] KEHC 5823 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5823 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL 40 OF 2023
JK SERGON, J
MAY 23, 2024**

BETWEEN

CHARLES OGOTI ARIGISI APPELLANT

AND

JOSEPH OOKO 1ST RESPONDENT

PAUL OOKO 2ND RESPONDENT

**SUING AS ADMINISTRATORS AND THE LEGAL REPRESENTATIVES OF
THE ESTATE OF THE LATE VERONICA ACHIENG AHAWO - DECEASED**

RULING

1. The application coming up for determination is a notice of motion dated 27th October, 2023 seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That this Honourable Court be pleased to order a stay of execution of the judgement/decree dated 3.10.2023 vide Kericho CMCC Number E143 of 2020 Joseph Ooko & Paul Ooko suing as administrators and legal representatives of the estate of Veronica Achieng' Ahawo v Charles Ogoti Arigisi pending hearing and determination of Kericho HCCA No. 40 of 2023.
 - (iii) That this Honourable Court be pleased to order that the appellant furnishes security in the form of a bank guarantee for the sum of Kshs. 3,000,000/= pending hearing and determination of this Appeal.
 - (iv) That costs of this application be provided for.



2. The application is supported by grounds on the face of it and the supporting affidavit of Charles Ogoti Arigisi the appellant herein.
3. The appellant avers that he is the insured driver of motor vehicle registration no. KCG 052W which forms the subject of this case.
4. The appellant avers that he was aware that the firm of M/s Kimondo Gachoka & Company Advocates was instructed by Directline Assurance Co. Ltd to act for and on his behalf in this matter.
5. The appellant avers that he was informed by the advocates on record that judgement was delivered on 3rd October, 2023 vide Kericho CMCC Number E143 of 2020 Joseph Ooko & Paul Ooko suing as administrators and legal representatives of the estate of Veronica Achieng' Ahawo v Charles Ogoti Arigisi by the Hon. C Obulutsa (the Learned Chief Magistrate) whereby the plaintiff was awarded to Kshs. 6, 459, 695/= plus costs and interest at court rates.
6. The appellant avers that he was informed by the advocates on record that the stay period granted is set to lapse thus exposing him to an imminent risk of execution proceedings.
7. The appellant avers that upon perusal of the file and analysis of the judgement, he was aggrieved by the said judgement and instructed his advocates on record to lodge an appeal.
8. The appellant avers that an appeal was lodged vide Kericho HCCA No 40 of 2023 and attached a copy of the filed memorandum of appeal.
9. The appellant avers that he was advised by his advocates, that it is trite law that an appeal does not operate as a stay of execution and therefore his properties were exposed to execution proceedings by way of proclamation and attachment.
10. The appellant avers that once the period of stay of execution in force lapses, he is apprehensive that the respondent will proceed to proclaim and attach his goods thereby rendering the appeal nugatory. The appellant was therefore adamant that he would suffer irreparable loss and damages if the orders sought in the instant application are not granted.
11. The appellant avers that his insurer M/s Directline Assurance Co.Ltd is ready and willing to offer security in the form of a bank guarantee for the full decretal amount of Kshs. 3,000,000/= (being its limit) pending hearing and determination of the appeal.
12. The appellant avers that the respondent is a man of straw and will not be able to refund the decretal sum should he execute and thereafter the appeal succeeds as his financial capabilities are unknown.
13. The appellant avers that he has come to court within a reasonable period of time and without undue delay. The appellant further avers that the instant application will not occasion any prejudice to the Respondent as the same can be compensated by an award of costs.
14. Finally, the appellant implores this Court to adhere to the rules of natural justice, doctrines of equity and *the constitution* in this matter as the applicant will be condemned unheard if the applicant is not granted an opportunity to defend the suit.
15. The respondents filed a replying affidavit in response to the appellants application for stay pending appeal dated 27th October, 2023 which was sworn by Dr. Joseph Ooko Nyangaga the 1st Respondent on behalf of the 2nd Respondent.
16. The 1st Respondent avers that he holds a doctorate in law and is currently working for IOM UN Migration as the Head of Wau, Sub Office, South Sudan.



17. The 1st Respondent avers that the appellant has not appealed against the judgement on special damages amounting to Kshs 3, 677,685/= and should therefore pay up this amount before the instant application can be heard or determined.
18. The 1st Respondent contends that the appellant was insured for third party risks by Directline Assurance Co. Ltd and it is the insurance company that would pay out the claim. The appellant has not therefore demonstrated how he would suffer loss if a stay of execution pending appeal is not granted and that the said insurance company has not repudiated the claim to make the applicant settle the claim personally.
19. The 1st Respondent contests the security proposed by the appellant by way of a bank guarantee for Kshs. 3,000,000/= as it does not secure the entire decretal amount of Kshs. 6,459,685/= and the said security is not specific to this matter.
20. The 1st Respondent contends that the applicant has not established that he is a person of straw who cannot refund the decretal amount is successful.
21. The 1st Respondent avers that apart from being employed by an international organisation, he owns several parcels of land and annexed copies of the title deeds to the said parcels of land. The 1st Respondent maintained that he is a person of means and can therefore refund the decretal amount in the unlikely event that the appeal is successful.
22. Finally, the 1st Respondent reiterated that he is entitled to the fruits of his judgement.
23. The matter came up for inter partes hearing on 7th May, 2024 and the counsel representing the parties made oral submissions which this court has considered.
24. Mr. Nyambane Learned Counsel for the Appellant reiterated that they are seeking for the orders sought in the application for stay dated 27th October, 2023. Mr. Nyambane reiterated that they had offered a bank guarantee for Kshs. 3,000,000/= million as security.
25. Mr. Ogutu the Learned Counsel representing the respondents submitted that they opposed the application and would be relying on the averments in their replying affidavit. The Learned Counsel contended that the applicant was undeserving of an order for stay of execution as he had not demonstrated substantial loss. The Learned Counsel submitted that the respondent is a person of means. The Learned Counsel contended that the bank guarantee was not specific to this matter and further that the purported bank guarantee was only for 3,000,000/= million whereas the judgement sum is above Kshs. 6,459,934/=.
26. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the replying affidavit and submissions by both counsel for their respective clients. The main issue for determination is whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited.
27. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides: “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.



28. In the instant case, the appellants aver that they stand to suffer substantial loss of over Kshs. 6, 459,934/= as well as costs and interest if stay of execution is not granted and that the respondent is man of straw and would therefore be unable to refund the decretal sum in the event the appeal succeeds. The respondent on his part was adamant that the appellants had not demonstrated substantial loss, he was a man of means employed by an international organisation and had a vast portfolio of real estate properties and therefore able to refund the decretal sum in the unlikely event the appeal succeeds.
29. The appellants have also pleaded that they are able to comply with any order as to security of costs as they have secured a bank guarantee from Family Bank. The respondent contended that the purported bank guarantee was not specific to this matter and further that the purported bank guarantee was only for 3,000,000/= million whereas the judgement sum is above Kshs. 6,459,934/=.
30. In matters for stay of execution pending appeal, the courts are duty bound to balance the interests of the appellant and those of the respondent. In *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words: “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court, when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”
31. As regards to the conditions for stay pending appeal set out in order 42 rule 6 (2) of the Civil Procedure Rules whereas the appellants contend that they will suffer substantial loss, the respondents have furnished this Court with sufficient material as to their ability to repay the decretal sum in case the appeal succeeds. Hence if the instant application for stay pending appeal is solely pegged on proof of substantial loss then it fails, however, I have to consider the other conditions for stay pending appeal in this matter.
32. I am satisfied that there has been no inordinate delay in bringing the instant appeal as the judgement and decree being appealed against was delivered on the 3rd October, 2023 and the memorandum of appeal filed on the 23rd October, 2023.
33. As to security of costs, the appellants’ have made provision for a bank guarantee meaning, they are able and willing to comply with that condition on security for the due performance of the decree appealed from. However, this court is not bound by the type of security offered by an applicant. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR the court observed as follows; “Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgement. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.” Therefore this court can therefore make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
34. This Court takes cognisance of the fact that the instant appeal arises from the judgement of the trial court in Kericho CMCC Number E143 of 2020 Joseph Ooko & Paul Ooko suing as administrators and legal representatives of the estate of Veronica Achieng’ Ahawo v Charles Ogoti Arigisi where the respondents sued the appellant for a road accident and the trial court awarded the respondents a decretal sum of Kshs. 6, 459, 695/= plus costs and interest at court rates. It is not contested that the



appellant was insured for third party risks by Directline Assurance Co. Limited, at the time of the accident. However, there is a statutory limit of Kshs. 3,000,000/= imposed by section 5 (b) and section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, CAP 405 which set a cap on claims that can be paid out by insurer to the insured.

35. In light of the foregoing, the notice of motion dated 27th October, 2023 is hereby allowed giving rise to the following orders;

(i) An order for stay of execution of the judgement/decreed dated 3.10.2023 vide Kericho CMCC Number E143 of 2020 Joseph Ooko & Paul Ooko suing as administrators and legal representatives of the estate of Veronica Achieng' Ahawo v Charles Ogoti Arigisi is issued pending the hearing and determination of Kericho HCCA No. 40 of 2023 on condition that the Appellant deposits the sum of Kshs. 3,000,000/= in an interest earning account in the joint names of the Advocates or firms of advocates appearing in this Appeal within 45 days from the date of this ruling.

(iii) That costs of this application shall abide in the outcome of the appeal.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 23RD DAY MAY, 2024.

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J.K. SERGON

JUDGE

In the presence of:-

C/Assistant – Rutoh

Ogutu for the Respondent

Miss Ogato holding brief for Nyambane for Applicant

