



REPUBLIC OF KENYA



KENYA LAW
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Ayan Automobile Ltd & another v Chebet & Chepkemoi (Suing as Administrators and the Legal Representatives of the Estate of the Late of David Kipkorir Mutai) (Civil Appeal E007 of 2023) [2024] KEHC 5814 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E007 OF 2023**

JK SERGON, J

MAY 23, 2024

BETWEEN

AYAN AUTOMOBILE LTD 1ST APPELLANT

DOUGLAS MAISO MIKAE 2ND APPELLANT

AND

MERCY CHEBET & HILLARY CHEPKEMOI (SUING AS ADMINISTRATORS AND THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE OF DAVID KIPKORIR MUTAI) RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 18th March, 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 27.2.2023 vide Kericho CMCC Number E65 of 2023 *Mercy Chebet & Hillary Chepkemoi suing as administrators and legal representatives of the estate of David Kipkorir Mutai v Douglas Maiso Mikae* pending hearing and determination of Kericho HCCA No. 7 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. 2,739,438/= 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 Douglas Maiso Mikae the 2nd appellant herein.
3. The 2nd appellant avers that he is the insured driver of motor vehicle registration no. KCT 728G which forms the subject of this case.
4. The 2nd 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 2nd appellant avers that he was informed by the advocates on record that judgement was delivered on 27th February, 2023 vide Kericho CMCC Number E65 of 2023 *Mercy Chebet & Hillary Chepkemotui suing as administrators and legal representatives of the estate of David Kipkorir Mutai v Douglas Maiso Mikae* by the Hon. C Obulutsa the Learned Chief Magistrate, whereby the plaintiff was awarded to Kshs. 2,739,438/= plus costs and interest at court rates.
6. The 2nd appellant avers that he was informed by the advocates on record that the stay period granted had lapsed thus exposing him to an imminent risk of execution proceedings.
7. The 2nd 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. The 2nd appellant avers that the appeal was lodged vide Kericho HCCA No.7 of 2023 and attached a copy of the filed memorandum of appeal.
8. The 2nd 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.
9. The 2nd appellant avers that the period of stay of execution has since lapsed and he is apprehensive that the respondent will proceed to proclaim and attach his goods thereby rendering the appeal nugatory. The 2nd appellant was adamant that he would suffer irreparable loss and damages if the orders sought in the instant application are not granted.
10. The 2nd appellant avers that his insurer M/s Directline Assurance Co.Ltd was ready and willing to offer security in the form of a bank guarantee for the full decretal amount of Kshs. 2,739,438/= pending hearing and determination of appeal.
11. The 2nd 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.
12. The 2nd appellant avers that he has come to court within a reasonable period of time and without undue delay. The 2nd 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.
13. Finally, the 2nd 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 appellant is not granted an opportunity to defend the suit.
14. The respondents filed a replying affidavit in response to the applicant's application dated 18th March, 2023. The respondents contended that the application is misconceived, incompetent, lacks merit and ought to be dismissed with costs. The respondents contended that the application ought to have been filed first in the trial court as provided for in order 22 rule 22 of the [Civil Procedure Rules](#).
15. The respondents were adamant that the application was solely meant to deny them the opportunity to enjoy the fruits of judgement entered on 27th February, 2023 and was therefore made in bad faith.



16. The respondents contended that the applicant failed to meet the threshold set out under order 42 rule 6 of the *Civil Procedure Rules* for grant of stay of execution pending appeal.
17. The respondents contended that the trial court had considered all the evidence on record before rightfully finding the applicant fully liable for the cause of the accident herein and that the amount awarded as damages was fair and reasonable as it was based on precedent. The respondents therefore maintained that the appeal did not have overwhelming chances of success.
18. The respondents were opposed to the provision of a bank guarantee of the entire decretal sum awarded by the trial court as security.
19. The respondent was adamant that if this Court is inclined to allow the application for stay, the applicant should pay half the decretal amount to the respondent and the other half of the decretal amount be deposited in a fixed joint interest earning account held in the joint names of both advocates.
20. The matter came up for inter parties hearing on 18th March, 2024 and the counsel representing the parties made oral submissions which this court has considered.
21. Mr. Nyambane Learned Counsel for the Appellants submitted that their application for stay is dated 18th March, 2023 and that he would be relying on the grounds set out on the face of the application and the facts deponed in the supporting affidavit. Mr. Nyambane submitted that they were willing to deposit the entire decretal sum in court.
22. Miss Chelangat 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 maintained that the appeal does not have chances of success and therefore in the event that the instant application succeeds, sought to have half of the decretal sum paid to the respondents and the other half of the decretal sum deposited in court.
23. 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 appellants have demonstrated that the orders of stay of execution pending appeal are merited.
24. 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.”
25. In the instant case, the appellants aver that they stand to suffer substantial loss of over Kshs. 2,739,438/ = as well as costs and interest if stay of execution is not granted. They further aver that the respondents have not demonstrated that they are able to refund the sum if the appeal succeeds.
26. 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.



27. On their part, the respondents have not addressed the issue of stay of execution but instead delved into the merits of the appeal.

28. The court 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.”

29. In this case, the respondents have not furnished this Court with any material as to their ability to repay the decretal sum in case the appeal succeeds and in light of the depositions by the appellants’ counsel that they shall suffer substantial loss if stay is not granted. Accordingly, I am persuaded that substantial loss has been proved.

30. I am also 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 27th February, 2023 and the memorandum of appeal filed on the 7th March, 2023.

31. 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 appellant. It can 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.

32. Consequently, the notice of motion dated 18th March, 2023 is hereby allowed giving rise to issuance of the following orders;

(i) An order for stay of execution of the judgement/decreed dated 27.2.2023 vide Kericho CMCC Number E65 of 2023 *Mercy Chebet & Hillary Chepkemoi suing as administrators and legal representatives of the estate of David Kipkorir Mutai v Douglas Maiso Mikae* is issued pending hearing and determination of Kericho HCCA No. 7 of 2023 on condition that the appellant deposits the entire decretal sum of Kshs. 2,739,438/= in an interest earning account in the joint names of the Advocates or firms of Advocates appearing in this Appeal within 45 days 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

Chelang'at for the Respondent

Ogato holding brief for Nyambane for appellant

