



REPUBLIC OF KENYA



**Adage & another v Wanyama (Civil Appeal E054 of 2024)
[2024] KEHC 4549 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E054 OF 2024**

REA OUGO, J

MAY 2, 2024

BETWEEN

ALLAN ADAGE 1ST APPELLANT

ZOOLIE DESIGNS STUDIO 2ND APPELLANT

AND

JACOB WANGILA WANYAMA RESPONDENT

(Being an appeal from the Ruling and Order delivered on 21st day of March 2024 by Honourable Tom Mark Olando (PM) in Bungoma Magistrate Court Commercial Suit E007 of 2023)

RULING

1. The appellant in the notice of motion dated 16/4/2024 brought under Article 159 of the Constitution, section 3A of the Civil Procedure Act, Order 42 Rule 6 (1) and 8, Order 50 Rules 6 and Order 51 Rule 1 of the Civil Procedure Rules, seeks the following reliefs:
 1. Spent
 2. Spent
 3. That pending hearing and determination of the applicant's appeal, the Honourable Court be pleased to order the stay of execution of the Ruling of Honourable Tom Mark Orlando Principal Magistrate in Bungoma Magistrate Court Commercial Suit No E007 of 2023 dated and delivered on the 21st day of March 2024 and all the consequential orders including the warrants of arrests ordered by the Honourable Court on the 21st February 2024.
2. The grounds on the face of the application are that the respondent obtained an interlocutory judgment and sought to execute it through arrest and committal to civil jail. Upon learning of the same, the applicant instructed his advocates to apply to set aside the interlocutory judgment, set aside the



warrants of arrest, and allow the applicant to defend the claim. On 21st March 2024, the Honourable Court delivered a ruling dismissing the application to set aside an interlocutory judgment. The applicant promptly requested to be supplied with typed copies of the proceeding and a certified copy of the ruling.

3. The applicant is dissatisfied with the entire ruling and has in exercise of its right of appeal, filed a memorandum of appeal dated 10th April 2024. It was averred that the appeal raises substantial and weighty issues of the law with a high probability of success. The respondent has commenced execution to enforce the judgment and its consequential orders and the appellant is on the verge of losing his liberty on the execution of the said warrants of arrest. The applicant is willing to furnish security to the court for the performance of the judgment should the appeal fail. The application is further premised on the affidavit sworn by Allan Adage.
4. The respondent who filed his replying affidavit dated 21/4/2024 opposed the application. He avers that the pleadings and summons to enter appearance were served upon the appellants both physically and through their WhatsApp numbers on 30/10/2023 and an affidavit of service was filed to that effect. The appellant failed to enter appearance and or file their defence within the legally stipulated timelines prompting the filing of the request for judgment in December 2023. The trial court, satisfied with the contents of the affidavit of service, entered judgment against the appellants as prayed in the plaint.
5. The respondent deposed that the 1st appellant was further served with a Notice to Show Cause on 16/2/2024 scheduled for hearing on 21/2/2024 through Whatsapp, however, he failed to appear in court in person but instead, his advocate sent a clerk with scanty and unclear instructions regarding the Notice to Show Cause. Warrants of arrest were issued against the 1st applicant on 21/2/2024 with his knowledge as he had an advocate holding his brief. The 1st applicant did nothing to arrest the execution of the warrants but instead chose to pursue an application to set aside the ex parte judgment. The warrants of arrest were executed on 18/4/2024 and the 1st appellant committed to civil jail. It is clear that the appellant is grossly indolent and is in the habit of sleeping on his rights, only to move the court in haste once decisions have been made. The appellants chose to ignore the service of summons and elected not to participate in the case. The appellants have not disputed the ownership of the Whatsapp number. The appeal filed challenges the discretion of the court and the appellants have not demonstrated on the face of the application that the discretion was not exercised judiciously by the trial court to warrant interference. The orders sought by the appellants are equitable orders and the appellants have not approached the court with clean hands. The application before the court is aimed at delaying the determination of the matter and denying the respondent's enjoyment of the fruits of his judgment.

Submissions

6. Counsel for the applicant, Mr. Osongo submitted that they seek prayer 2 of the application and rely on the supporting affidavit by the applicant. The application is from a Ruling of the trial court delivered on 21/3/2024 in CMCC No. E07/2023. The Ruling was in regard to their application in which they sought to set aside the ex parte judgment, the warrant of arrest, and execution. The Applicant has since been arrested and committed to civil jail. Following the ruling by the subordinate court, the applicant filed a memorandum of appeal dated 10.4.2024. They seek a stay of execution as the appeal raises triable issues with a high probability of success. They submit that the appellant will suffer substantial loss if he remains in custody. The application has been brought without unreasonable delay. The issues raised in the replying affidavit are issues that should be canvassed at the hearing of the appeal.
7. Miss Wakoli for the respondent submitted that they rely on the affidavit dated 21/4/2024 sworn by the Respondent Jacob Wangila Ali. They submit that the warrants of arrest were issued on 21.2.2024



in the presence of a representative of counsel for the applicant. The applicant knew their client could be arrested and committed to civil jail but did not seek to stay the warrants. They now seek to stay an executed warrant. The Ruling being appealed against is from a discretionary decision and they haven't stated the discretion wasn't judicially exercised to state that the appeal has high chances of success. The applicant states that he is ready to deposit something but has failed to demonstrate their ability to meet whatever security the court will require. The application is an abuse of the court process and an afterthought and should be dismissed.

8. In a rejoinder, Mr. Osongo submitted that they seek a stay on the ex parte judgment and the warrants of arrest plus all the consequential orders which include the warrant of arrest and the subsequent orders that led to this arrest and committal to civil jail. On security, the court is to determine the security of costs that will be deposited

Analysis And Determination

9. I have considered the pleadings and the submissions by the parties and the only issue before the court touches on the grant of stay of execution. I will consider the orders being sought in the application in totality as no prejudice will be cause to the respondent. The law governing the granting of orders for a stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the [Civil Procedure Rules](#) which stipulates as follows: -

- (1) 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 referred 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. The purpose for granting an order of stay was enumerated by the court in [RWW vs. EKW](#) (2019) eKLR where the court stated:

“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 judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.⁹ 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.”



11. In this case, the applicant has demonstrated that he stands to suffer a substantial loss, being the continued loss of his liberty. He filed his application without unreasonable delay and has an arguable appeal. The applicant is willing to furnish security to the court for the performance of the judgment should the appeal fail.
12. Consequently, I make the following orders:
 1. A stay of execution of the decree in Bungoma Magistrate Court Commercial Suit No E007 of 2023 on condition that the applicant deposits half the decretal sum with the advocate of the respondent and the balance in court within 45 days from the date of this ruling. In default of compliance, the respondent will be at liberty to execute.
 2. The applicant shall only be released from civil jail once he complies with the conditions of stay of execution.
 3. Costs shall abide by the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 2ND DAY OF MAY 2024.

R.E. OUGO

JUDGE

In the presence of:

Mr. Osongo -For the Applicant

Miss Wakoli -For the Respondent

Wilkister - C/A

