



**Chepkorir & another (Suing as the Legal Representatives of the Estate of the Late Edwin Kipng'eno Chepkwony) v Autospares (Civil Suit E004 of 2021) [2024] KEHC 7193 (KLR) (19 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7193 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E004 OF 2021  
RN NYAKUNDI, J  
JUNE 19, 2024**

**BETWEEN**

**ZEDDY CHEPKORIR ..... 1<sup>ST</sup> PLAINTIFF**

**KIRUI WILSON KIPYEGO ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE  
EDWIN KIPNG'ENO CHEPKWONY**

**AND**

**HARI OUM AUTOSPARES ..... RESPONDENT**

**RULING**

1. This ruling determines the applicants' notice of motion application dated 15<sup>th</sup> May, 2024 expressed to be brought under the provisions of Article 47,48,50 and 159 of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Order 42 Rule 6 and 51 of the Civil Procedure Rules. The applicant seeks reliefs as follows:
  - a. Spent.
  - b. That there be temporary orders of stay of execution and/or further execution of the decree herein pending the hearing and determination of this application inter parties.
  - c. That there be stay of execution and/or further execution of the decree herein pending the hearing and determination of the Appeal to the Court of Appeal vide Notice of Appeal filed on 15<sup>th</sup> April, 2024 against the judgment and/or decree delivered on 5<sup>th</sup> April, 2024.
  - d. That costs of this application be provided for.



2. The application is supported by an affidavit sworn by Khimji Vekaria and anchored on 14 substantive grounds enumerated as follows:

That judgment was delivered on 14<sup>th</sup> December, 2023 and reviewed on 11<sup>th</sup> April, 2024 in favor of the Plaintiffs/Respondents as against the Defendant/Applicant ad follows:

Liability – 100% in favor of the Plaintiffs as against the defendant

Pain and suffering Kshs. 50,000/=

Loss of expectation of life Kshs. 100,000/=

Loss of dependency (165,684/= x 12 x 27 x 2/3) Kshs. 35,355,927

Special damages Kshs. 24,550/=

Funeral Expenses Kshs. 100,000/=

Total Kshs. 35,630,477/=

That the court ordered 30 days stay of execution at the time of delivery of the judgment has since lapsed.

That the defendant/applicant being aggrieved by the judgment of this court has preferred an appeal to the Court of Appeal and wishes to be heard on the appeal before any monies are released and/or paid to the Plaintiffs/Respondents hence the instant application.

That the orders of stay of execution of the court's decree granted at the time of delivery of judgment have since lapsed and the Plaintiffs/Respondents are likely to proceed with execution unless by an order of this court.

That the instant application for stay of execution pending appeal is to preserve the subject matter.

That should the Plaintiffs proceed with execution of the decree herein, the Defendant/Applicant stands to suffer substantial loss that cannot be monetarily compensated in the likely event the appeal succeeds as the Plaintiffs/Respondents have no known means and/or assets sufficient to enable them refund the monies which they might have received under the decree of this court hence the need to grant stay of execution pending appeal.

That the appeal lodged in the Court of Appeal has merit, it is proper and risks being rendered nugatory should execution proceed hence the need to grant stay of execution pending the hearing and determination of this application and thereafter pending appeal.

That the Appeal raises very serious and weighty legal issues for determination by the Court of Appeal hence the instant application ought to be allowed to give the defendant/applicant an opportunity to be heard on appeal.

That the amounts in issue are colossal and unless the orders sought do issue the Defendant/Applicant risks suffering a heavy loss and damage that cannot be monetarily compensated.

That the Claim by the Plaintiffs/Respondents was denied from the word go hence the need for a second opinion on the matter before any monies are paid/released under the decree of this court.

That it is only fair and just that this application be allowed in order to prevent the ends of justice from being defeated.



That the defendant/applicant has a right to be heard on appeal and such right ought to be exercised freely hence the need to grant the orders sought to allow the Defendant/Applicant time/room to be heard on its appeal.

That the defendant/applicant is ready and willing to comply with the provisions of order 42 rule 6 of the Civil Procedure Rules for grant of stay of execution pending appeal.

That the application has been brought timeously and in good faith.

3. In response, the Respondent vehemently protested the application and averred that the same is unmerited.

### **Analysis and determination**

4. I have read through the application, the affidavit in support, the parties' submissions and the response thereto. The only issue I find for determination is whether the applicant has met the conditions necessary to grant stay pending appeal.

5. Order 42 Rule 6 of the [Civil Procedure Rules](#) outlines the principles that this Court ought to consider in granting stay of execution orders pending appeal. The provision stipulates as follows: -

“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 orders 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 1<sup>st</sup> 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.
6. Therefore, under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an Applicant should satisfy the court that:
    - a. Substantial loss may result to him unless the order is made;
    - b. That the application has been made without unreasonable delay; and
    - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
  7. On the limb of substantial loss, it is expected of the applicant to clearly state the loss to be occasioned in the event stay orders are not granted.
  8. Substantial loss brings about actual economic loss. The court has taken note of the colossal amount involved in the instant matter being Kshs. 35,630,477/=. The Applicant has expressed concern of the prejudice they will suffer in the event the Respondent proceeds to execute and the appeal turns our



successful. That the orders ought to be granted to preserve the subject matter. It is the Applicant's position that if stay is not granted, the appeal will be rendered nugatory.

9. The applicant states that they stand to suffer substantial loss as the respondents have no known means and/or assets sufficient to enable them refund the monies which they might have received under the decree of this court hence the need to grant stay of execution pending appeal.
10. It is trite law that a mere claim that the respondent cannot refund the decretal sum is not efficient. There must be reasonable grounds provided by the applicant to show that the respondent cannot make refund of the decretal sum after which the respondent will be called upon to discharge its evidential burden. It is however unreasonable to expect the Applicant to know every resource of asset owned by the Respondent. The Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Anor.* (2006) eKLR stated as follows:

“This court has said before and it would bear repeating that while the legal duty is on an Applicants to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicants to know in detail the resources owned by a respondent or the lack of them. Once an Applicants expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

11. In the present case, the Respondents have not showcased any evidence as to their financial abilities. It is for that reason I find that the applicant has demonstrated substantial loss.
12. It is equally important to note that the right of appeal must be balanced against an equally weighty rigid right of the plaintiffs to enjoy the fruits of the judgment delivered in their favour. In the case of *Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR where the court upheld the decision of *Portreitz Maternity vs James Karanga Kabia* Civil Appeal No. 63 of 1991 and stated that: -

“That right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

13. A stay of execution is like a pause button sought by the applicant to restrain the execution of the decree by the decree holder from being carried out by the Respondent/Defendant to the civil proceedings. Fundamentally so, the applicant besides the elements well stated in Order 42 Rule 6(1) of the *Civil Procedure Rules* must also demonstrate that if execution is allowed to commence and concluded, the intended appeal will be rendered nugatory and if it is a money decree, the amount paid out before the appeal is heard and determined, and at the end of it all his/her appeal succeeds he/she may suffer irremediable substantial loss. Given the specifics of each particular case, stay of execution of a decree in favor of a winning party may be granted if the applicant satisfies the criterion that there are special circumstances sufficient to serve the interest of justice for the court to exercise discretion to grant stay. In a nutshell also, stay of execution of a decree of the court would be granted if the applicant demonstrates that if the order so sought is not granted the subject matter of the appeal will be destroyed or the means to prosecute the appeal will be lost. It should also be noted however, that the court should tinker with the condition precedent of the applicant giving such a security for the due performance of such a decree for grant of stay of execution. Why do I say so? No applicant or intended appellant



should be deprived of his right to appeal due to poverty or financial inability to raise the security in the form of monetary quantum pending the hearing and determination of an appeal.

14. The courts in Kenya have absolute and unrestricted discretion in granting or refusing a stay of execution as well as deciding the terms on which it will be granted for or against the applicant.
15. From the foregoing analysis, I take the position that on a balance of interests, the fair balance would be for the applicants to provide a bank guarantee from a reputable bank.
16. The upshot of it is that the application dated 15th May, 2024 is merited. Consequently, an order for stay of execution pending appeal is granted on condition that the applicant provides a bank guarantee from a reputable bank within 45 days from the date of this ruling as security for the decretal sum pending the hearing and determination of the Appeal. In default the stay order shall automatically lapse.
17. Costs of the motion to abide by the outcome of the appeal.
18. It is hereby so ordered.

**DATED SIGNED AND DELIVERED VIA E-MAIL AT ELDORET THIS 19<sup>TH</sup> DAY OF JUNE, 2024.**

.....

**R. NYAKUNDI**

**\*JUDGE**

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