



Kanyi v Mungathia (Civil Appeal 36 of 2023) [2024] KEHC 7091 (KLR) (14 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7091 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 36 OF 2023
FN MUCHEMI, J
JUNE 14, 2024**

BETWEEN

DOMINIC KANYI APPELLANT

AND

LINAX MUTWIRI MUNGATHIA RESPONDENT

RULING

1. The application dated 5th June 2023 seeks for orders of stay of execution of the judgment in Thika Small Claims Court Civil Case No. E513 of 2022 delivered on 11th May 2023 pending the hearing and determination of the appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 14th November 2023.

Applicant's Case

3. The applicant states that the Thika Small Claims Court in Civil Case No. E513 of 2022 delivered its judgment on 11th May 2023 and awarded to the respondent general damages for pain suffering and loss of amenities at Kshs. 606,815/- together with costs and interest. Being dissatisfied with the judgment, the applicant lodged his appeal in Kiambu HCCA No. E175 of 2023 on 5th June 2023 which file was later transferred to this court after the High Court was gazetted.
4. The applicant avers that the appeal is arguable and meritorious therefore it has overwhelming chances of success as the respondent did not prove. The applicant is apprehensive that if the respondent proceeds to execute against the said judgment and the appeal is successful, he might not be able to recover the decretal amount from the respondent. The applicant is further apprehensive that if stay of execution is not granted, the appeal will be rendered nugatory and he will suffer irreparable loss and damage. The applicant avers that the respondent will not be prejudiced in any way if the application is allowed.
5. The applicant states that the application has been brought promptly and without unreasonable delay. The applicant further states that his insurance company, Directline Assurance Limited is willing and



able to furnish the court with a bank guarantee from Diamond Trust Bank Limited as security for performance of the decree.

The Respondent's Case

6. The respondent opposes the application on the premise that it is an afterthought, frivolous, vexatious and a total abuse of the court process. The respondent states that the appeal is a mere tactic devised to delay his enjoyment of the fruits of his judgment as it does not have any merit.
7. The respondent avers that it is his right as a litigant to enjoy the benefits of the judgment and it is not in any interest to put him to task of demonstrating his financial ability to refund the awarded decretal sum.
8. In the event the court allows the application for stay, the respondent urges the court to order the applicant to deposit half the decretal sum in court and the other half to be paid to his advocates on record.
9. Directions were issued that the application be canvassed by way of written submissions and the record shows that only the respondent complied by filing submissions on 2nd May 2024. The applicant on the other hand had not filed his submissions by the time of writing this ruling.

The Respondent's Submissions

10. The respondent relies on Order 42 Rule 6 of the *Civil Procedure Rules* and the cases of [James Wangalwa & Another vs Agnes Naliaka Cheseto](#) [2012] eKLR and [RWW vs EKW](#) [2019] eKLR and submit that the applicant has not met the conditions for grant of stay of execution and thus the application ought to be dismissed. The respondent further submits that the applicant has failed to demonstrate that he shall suffer substantial loss in the event the orders are denied.
11. Relying on the decisions in [Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others](#) [2014] eKLR and [Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd](#) [2009] eKLR and [Nicholas Stephen Okaka & Another vs Alfred Waga Wesonga](#) [2022] eKLR, the respondent appeals to the court to order the applicant to deposit half the decretal sum in court and pay his advocates the other half.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the [Civil Procedure Rules](#) for stay of execution pending appeal.

12. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) [Civil Procedure Rules](#). Order 42 Rule 6 of the [Civil Procedure Rules](#) stipulates:-
 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 orders set aside.
 2. 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 1st 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.
13. Thus under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. 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.
14. Substantial loss was clearly explained in the case of [James Wangalwa & Another vs Agnes Naliaka Cheseto](#) [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#). This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
15. The applicant in his affidavit contends that should the respondent proceed with execution and the appeal is successful, he may not recover the same from the respondent.
16. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to demonstrate how execution shall irreparably affect him or will alter the status quo to its detriment, thereby rendering the appeal nugatory. In the instant case, the applicant has shown that he does not know the respondent’s financial capabilities and that he may not recover the said amount from the respondent in the event the appeal succeeds. Although the respondent did not file an affidavit of means, I am of the view that substantial loss has not been proved.

Has the application has been made without unreasonable delay.

17. Judgment was delivered on 11th May 2023 and the applicant filed the instant application on 8th June 2023. As such, the application was filed timeously.

Security of costs.

18. The purpose of security was explained in the case of [Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others](#) [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the [Civil Procedure](#)



Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

19. Evidently, the issue of security is discretionary and it is upon the court to determine the issue. The applicant has stated that its insurer Directline Assurance Company Limited is ready and willing to furnish the court with a bank guarantee from DTB Bank as security. I have perused the bank guarantee annexed to the application and noted that the guarantee is dated 18th February 2022 and is valid for a period of 12 months. This application was filed on 11th May 2023. This was three months after the expiry of the bank guarantee. It is borders to contempt of court for the applicant to attach an expired document to their application. It is also a demonstration of an applicant who is buying time to delay the settlement of the decretal amount.
20. The bank guarantee is between the insurer Direct line Assurance Company Limited. The parties are stranger to this application. It is the applicant who bears legal responsibility to settle the decretal amount. The said guarantee is not fully executed. This leads me to the conclusion that the appellants has failed to provide any security for the due performance of the decree.
21. The court must balance the right of appeal as against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-

The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

22. I have looked at the grounds of appeal and note that they do not raise any arguable points of law or fact.
23. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent his right of enjoying his judgment. Judgment was delivered on 5th June 2023 which is about one year ago. This application was filed on 8th June 2023. Judgment in this case was delivered on 11th May 2023 and this application filed on 8th June 2023. The record shows there was delay in service on the respondents and in prosecution of this application. The Kiambu judge directed that service be effected several times. This file was transferred to this court on 29/08/2023 and service on the respondent was ordered again by this court. It was on 7th May 2024 that the counsel for the respondent attended court. The applicant failed to file any submissions, an indication of lack of seriousness in prosecution this application. This indolence on part of the applicant has delayed the hearing of the appeal. It is noted that the record of appeal has not been filed over one year down the line.
24. Having considered all the foregoing, I am of the considered view that the applicant has failed to meet the threshold of granting stay pending appeal and therefore, this application must fail.
25. I find no merit in this application and dismiss it with costs.
26. It is hereby so ordered.

RULING DELIVERED, SIGNED AND DATED AT THIKA THIS 14TH DAY OF JUNE 2024.



F. MUCHEMI
JUDGE

