



SSA v IMA (Family Appeal E027 of 2024) [2024] KEHC 8034 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E027 OF 2024**

**G MUTAI, J
JUNE 21, 2024**

BETWEEN

SSA APPLICANT

AND

IMA RESPONDENT

RULING

1. Before this court is a Notice of Motion application dated 2nd May 2024 vide which the Appellant/Applicant seeks the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That this honourable court be pleased to issue orders suspending and/or lifting the warrant of arrest issued on 30th April 2024 against the Applicant herein and executed on the same day and the Applicant be released from civil jail forthwith pending the hearing and determination of the intended appeal herein;
 - d. Spent;
 - e. That this honourable court be pleased to issue orders of stay of execution of the orders issued on 30th April 2024 and the irregular default judgement entered and delivered on the 8th day February 2024 pending the hearing and determination of the intended appeal herein;
 - f. That this honourable court be pleased to make such orders or further orders as are just and proportionate in the circumstances pending the determination of this matter and issuance of final orders; and
 - g. That the costs of this application be provided for.



2. The application is premised on the grounds stated in the said Motion and the depositions made in the Supporting Affidavit of the Appellant/Applicant.
3. The Appellant/Applicant stated that the Respondent obtained an irregular default judgment against him on 8th February 2024. Upon becoming aware of the said judgment, he moved the court through a Notice of Motion application dated 26th March 2024, seeking to have the same set aside and to be allowed to defend the suit. On 30th April 2024, when the matter came up for interpartes hearing, the Honourable Kadhi committed him to six months in civil jail without determining the application on merit and or, according to him, a fair hearing. He urged that unless the said warrants of arrest are lifted, he will continue to suffer illegal and unlawful detention and that he stands to suffer irreparable loss if the execution of the default judgment proceeds.
4. He further urged that he has preferred an appeal against the subject judgment and orders of 30th April 2024. The Appellant/Applicant stated that the appeal raises serious legal issues and has a high chance of success. He also stated that the application was filed without inordinate delay and that the Respondent would suffer no prejudice if the orders sought were granted. He urged the court to allow the application.
5. In response, the Respondent filed a replying affidavit sworn on 30th May 2024.
6. She stated that the application is vexatious and frivolous and, therefore, should be dismissed as the Honourable Kadhi examined the proof of service of the pleadings filed before him and only proceeded with the matter upon being satisfied with the same and thus the subject judgment was regular. Despite service, the Appellant/Applicant did not enter appearance and or defend the said suit. The said failure was taken into consideration in the said judgement. Further, the Appellant/Applicant was also served with the Kadhi's Court orders, which were duly endorsed with a notice of penal consequences.
7. She further stated that warrants of arrest were issued as a result of the Appellant/Applicant's failure to comply with court orders and to attend court to attend court to show cause why execution should not be issued against him. She averred that the Appellant/Applicant filed an application dated 26th May 2024, seeking a stay of execution and leave to file his defence out of time, which was dismissed by the court. She urged the court to dismiss the application herein.
8. The application was canvassed through written submissions. The written submissions of the Appellant/Applicant are dated 30th May 2024.
9. Counsel relied on Order 42 Rule 6(2) of the [Civil Procedure Rules](#) for the guiding principles governing the issuance of orders of stay of execution orders. He submitted that the instant application was filed without undue delay.
10. On whether the Appellant/Applicant would suffer a substantial loss, counsel relied on the case of [James Wangalwa & Another v Agnes Naliaka Chesoto](#) [2012] eKLR and submitted that if the orders sought are not granted, the applicant will suffer a substantial loss he will be deprived of his personal liberty. It was further submitted that the Appellant/Applicant's appeal would be rendered nugatory and a mere academic exercise if the orders sought were not issued.
11. Regarding security for costs, counsel submitted that being a matrimonial or family matter, the same is not necessary. Counsel urged the court to allow the application as prayed.
12. The Respondent did not file written submissions
13. I have considered the application therein, the response and submissions by Appellant/Applicant's counsel. The issues that arise for determination are whether the warrants of arrest issued on 30th April



2024 against the Appellant/Applicant should be suspended and or lifted and whether the execution of the orders issued on 30th April 2024 and the judgement delivered on 8th February 2024 should be stayed.

14. Stay of execution is provided for under Order 42 Rule 6 of the [Civil Procedure Rules 2010](#), which provides that:-
- a. 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 order set aside.
 - b. 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 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.”
15. The bases upon which courts grant stay of execution pending appeal have been extensively discussed by the superior courts. In the case of [HGE v SM](#) [2020] eKLR it was stated that :-

“The court, in [RWW v. EKW](#) [2019] eKLR, addressed its mind to 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 judgment. 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.”

16. The first condition to be satisfied in an application for stay is whether substantial loss would result if stay is not granted. The court in the case of [James Wangalwa & Another v Agnes Naliaka Chesoto](#) [2012] eKLR (*supra*) discussed substantial loss and stated:-

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein v. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma v Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution under Order 42 of the CPR and Rule 5(2) (b) of the *Court of Appeal Rules*, respectively, emphasised the centrality of substantial loss thus:

“...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.”

17. In this case, the Appellant/Applicant has argued that if the orders sought are not granted, he will suffer a substantial loss as the execution of the subject orders will result in his arrest, depriving him of his personal liberty. From the pleadings, it is evident that the warrant issued with respect to the subject orders was executed on the same day. However, they were lifted vide orders of this court given on 7th May 2024. The orders that resulted in the issuance of the warrants of arrest are the subject of the appeal. That being the case, it is my view that if I do not issue the orders sought, the Appellant/Applicant will suffer substantial loss as he will be deprived of his liberty.
18. On whether the application was filed without undue delay, the court in the case of *Jaber Mohsen Ali & another v Priscilla Boit & another* [2014] eKLR stated that:-

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter.”
19. The fact that the application was filed two days after the issuance of the orders of 30th April 2024 is not in dispute. Filing the application two days after the delivery of the impugned decision would appear to me to reflect diligence on the part of the Appellant/Applicant. It is, therefore, my view that the Appellant/Applicant has met the said requirement.
20. On the issue of security for the due performance of such decree or order as may be ultimately binding on the Appellant/Applicant, it is my view that the subject matter, being a matrimonial dispute, security is neither necessary nor appropriate.
21. The upshot of the foregoing is that, in my view, the instant application has merit. The same is thus allowed. I therefore issue orders staying execution of the decision of the trial court made on 8th February 2024 and 30th April 2024 pending the hearing and determination of the appeal. Warrants of arrest issued against the Appellant/Applicant are hereby lifted.
22. This being a family matter, each party will bear his/her own costs.
23. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF JUNE 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI
JUDGE



In the presence of:-

No appearance for the Appellant/Applicant;

No appearance for the Respondent; and

Arthur – Court Assistant.

