



**Halable & 2 others v Mohamed & another (Civil Appeal  
E048 of 2023) [2024] KEHC 7889 (KLR) (2 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 7889 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CIVIL APPEAL E048 OF 2023**

**SM GITHINJI, J**

**JULY 2, 2024**

**BETWEEN**

**ADEN YUSUF HALABLE ..... 1<sup>ST</sup> APPELLANT**

**SALAD OSMAN ABDILLE ..... 2<sup>ND</sup> APPELLANT**

**MOHAMED MAHAMUD DAGAL ..... 3<sup>RD</sup> APPELLANT**

**AND**

**MOHAMED ABDI MOHAMED ..... 1<sup>ST</sup> RESPONDENT**

**ABDI GUYO BORU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Application for Stay of Execution Pending the determination of the Appeal herein from the Judgment and Decree of the Senior Resident Magistrate, P.E. Nabwana issued on 2nd August, 2023 in Civil Case MCCC No. E017 of 22021 at Mpeketoni)*

**RULING**

1. For determination is the application dated April 8, 2024 by the Appellants/ Applicants brought under Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act as well as Article 159 of the Constitution seeking the following orders;
  1. Spent.
  2. Spent.
  3. That this Honourable Court be pleased to issue an order staying the execution of the Judgment delivered on August 2, 2023 the resulting decree, and all other proceedings emanating therefrom and/or any other consequential orders arising from these proceedings thereto against the Applicants/ Appellant, pending the hearing and determination of this Application.



4. That the Honourable court be pleased to issue an order staying the execution of the judgment delivered on August 2, 2023 the resulting decree, and all other proceedings emanating there from and/or any other consequential orders arising from these proceedings thereto against the Applicants/ Defendants, pending the hearing and determination of the Appeal.
5. That costs of this application be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit sworn by Aden Yusuf Halable on the same day. He deposed that there was Judgment against the Appellants delivered on the 2<sup>nd</sup> day of August, 2023 for an award of Kshs. 3, 048, 515/-. That they have since been served with the Notice to Show Cause for purposes of execution of the said judgment and decree. The said Notice to Show Cause came up for hearing on May 16, 2024.
3. He asserted that they are dissatisfied with the said judgment and that they have filed a Memorandum of Appeal dated August 28, 2023. They have also stated that they intend to deposit a sum of Kshs. 100,000/- to satisfy the condition for granting stay of execution since the Appellants are elderly, low-income earners and sickly. He further deposed that they are apprehensive that the Respondents will execute the judgment and decree rendering this application and the appeal nugatory.
4. In response, the Respondents filed a Replying Affidavit sworn by Mohamed Abdi Mohamed on the 26<sup>th</sup> day of April, 2024. He stated that the Applicants have failed to disclose that vide a Ruling delivered on January 24, 2024, the lower court granted the Applicants stay of execution orders on condition that they deposit in court the entire decretal sum within 30 days. That the Applicants continued to enjoy stay of execution orders up and until February 24, 2024 following which the stay of execution orders by the lower court were discharged by virtue of non-compliance. According to him, the application is made in bad faith and is an abuse of the court process in a calculated ploy to deny the Respondents from enjoying the fruits of the judgment. Further, that they have not demonstrated to this court any loss that they would suffer in the event their appeal succeeded without issuance of stay of execution orders during the pendency of the appeal proceedings herein.
5. The application was canvassed by way of written submissions; the Applicants did not file submissions and the Respondents filed their submissions on the 30<sup>th</sup> day of May, 2024. This court has duly considered those submissions.

### **Analysis and Determination**

6. I have considered the grounds in support of the application dated April 8, 2024, the grounds in opposition thereto and the submissions by the advocate for the Respondents. In my view, the issue for determination is whether this court ought to grant stay of execution pending appeal.

The principles upon which the court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the *Civil Procedure Rules* which requires an applicant seeking a stay of execution pending appeal to demonstrate that -

- a. Substantial loss may result to the applicant unless the order are made;
- b. The application was made without unreasonable delay; and
- c. 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.



A stay of execution should only be granted where sufficient cause is shown. In *Antoine Ndiaye v African Virtual University* [2015] eKLR Gikonyo J opined that -

“...stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the *Civil Procedure Rules*...”

7. It has to be noted that the purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In *RWW v EKW* [2019] eKLR, it was observed that:

“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.”

8. The first consideration is whether the application was filed timeously. The judgment of the trial Court in this matter was delivered on the 2<sup>nd</sup> day of August, 2023. The memorandum of appeal was filed in this court on the 31<sup>st</sup> day of August, 2023. I note that there was no delay in filing the appeal as it was filed within 30 days. Notice to show cause sought to be set aside was issued on September 19, 2023. The application herein is dated March 22, 2024, it was not filed in good time and the delay is not sufficiently explained.

9. On whether the applicant will suffer substantial loss, the applicants have only stated that unless stay of execution is granted, they are likely to suffer injustice and irreparable loss which they have not explained. In my view, the applicant is apprehensive since they have stated in their application that the respondents are in the process of execution. I wish to point out that this is a money decree for a specific amount that has been determined by a court of law. It is also my view that the applicants have failed to demonstrate that they stand to suffer prejudice if the stay orders are not granted but since the appeal is on quantum, the respondents will suffer prejudice if no security is deposited in the meantime. I am persuaded that stay ought to be granted but the decretal sum be deposited as security for the due performance of the decree.

10. In the case of *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* [2014] eKLR the court held that:

“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 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.”

11. In the end, this Court has taken into account the competing interests of the Applicants as against that of the Respondents as well as the principles set out in the *Butt Case*. In the circumstances and in exercise of this court’s discretion, I do order that a stay of execution be and is hereby granted on condition that



the Appellants deposit in court the entire decretal sum within 30 days from the date hereof, failure to which the respondents be at liberty to execute.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 2<sup>ND</sup> DAY OF JULY, 2024.**

.....

**S.M. GITHINJI**

**JUDGE**

In the presence of; -

1. Mr Oduor for the Respondent – present
2. Mr Abdullahi for the Applicant – present

Court; - Mention on July 30, 2024.

