



Ondieki v Rutto (Suing as the legal representative of the Estate of David Kipkemoi Arap Rutto - Deceased) (Civil Appeal 266 of 2023) [2024] KEHC 9815 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9815 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 266 OF 2023
PN GICHOHI, J
JULY 24, 2024**

BETWEEN

GEORGE OGAKA ONDIEKI APPELLANT

AND

ALICE CHEROTICH RUTTO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID KIPKEMOI ARAP RUTTO - DECEASED) RESPONDENT

RULING

1. By a Notice of Motion dated 28/02/2024 and filed through the firm Kimondo Gachoka & Co. Advocates under Section 1, 1A and 3A of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rule 4, 6 and 7, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the [Civil Procedure Rules](#) 2010, the Applicant seeks orders that:
 1. Spent.
 2. Spent.
 3. This Court be pleased to grant an order of stay of execution of the judgment on 28/08/2023 and all consequential orders arising therefrom pending the hearing and determination of the appeal
 4. This Court be pleased to issue an Order for provision of a Bank Guarantee of the entire decretal sum awarded by the trial court of Kshs.1,117, 550 only as security pending hearing and determination of HCCA E266 of 2023.
 5. This Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice.
 6. Costs of this application be provided for.



2. The main grounds on the face of the application and emphasised in the Supporting Affidavit sworn by George Ogaka Ondieki on 25/09/2023 are that judgment in Molo CMCC No. 61 OF 2021 was delivered on 28/08/2023 in the following terms: Liability 100% against the Applicant. Pain & suffering- Kshs. 70,000/- Loss of expectation of life- Kshs. 150,000/- Loss of Dependency- Kshs. 740,000/- Special damages- Kshs. 95,550/- Funeral expenses- Kshs. 62,000/- Costs of the suit and interest thereon awarded to the Respondent herein.
3. Dissatisfied with the judgment, the Applicant filed on 28/09/2023 the appeal dated 25/09/2023. He is now apprehensive that he may never recover the judgment in the event the amount is paid to the Respondent but the judgment be overturned on appeal. The Appellant is also apprehensive that the Respondent will commence execution and this being a substantial amount, the Applicant stands to suffer irreparable loss and prejudice as the ability of the Respondent herein to refund the decretal amount is unknown.
4. Despite being served, the Respondent neither filed any response nor attended Court. The Applicant proceeded to file submissions as a way of disposal of the instant application.

Applicant's Submissions

5. In their Submissions dated 14/06/2024 the Applicant submits he has already filed the Memorandum of Appeal and has made considerable efforts to have the appeal prosecuted in that he is following up on typing of proceedings so as to complete his record of appeal.
6. While highlighting the conditions of granting stay as set by Order 42 Rule 6 (2) of the Civil Procedure Rules and submits that he is in full compliance. He submits that he has offered security. On issue of substantial loss, he cites High Court decision in Nicholas Stephen Okaka & another v Alfred Waga Wesonga [2022] eKLR where the Court was persuaded that substantial loss has been proved as the Respondent had not given any material as to his ability to repay the decretal sum in case the appeal succeeded in light of the of the Applicants' disposition that they would suffer substantial loss if say was not granted.
7. The Applicant further submits that the application herein was brought within the allowed statutory period for lodging an appeal and hence without unreasonable delay. He urges the Court to preserve the subject matter in this case while putting in consideration the rights of the Applicant to appeal.

Determination

8. This Court has considered the application herein, the Affidavit in Support and the submissions by the Applicant. The Court has also noted the Memorandum of Appeal which is on both liability and quantum.
9. The Applicant herein has aptly captured the three conditions that must be met in an application for stay of execution pending appeal as provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules, that is:-
 1. The application must be brought without unreasonable delay.
 2. The applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
 3. The applicant must furnish 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. Having satisfied the conditions of stay and there being no response by Respondent then his rights and those of the Applicant have to be balanced but, in the circumstances herein, it is in the interest of justice that this Court grants a stay of execution of the judgment/decreed in Molo CMCC No. E61 of 2021 pending the hearing and determination of the Applicant's Appeal on condition that:-
1. The Applicant deposits in Court the entire decretal sum within thirty (30) days from the date of this ruling.
 2. The costs of this application to abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH JULY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Cheptai for Ms King'ori for Applicant

N/A for Respondent

Ruto - Court Assistant

