



**Ojwang v Kahiu & 2 others (Civil Appeal E1396 of 2019)
[2024] KEHC 8761 (KLR) (Civ) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8761 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1396 OF 2019

JN NJAGI, J

JULY 12, 2024

BETWEEN

JAMES SIKU OJWANG APPLICANT

AND

NICHOLAS GAKONDI KAHIU 1ST RESPONDENT

KENNETH MUTENO 2ND RESPONDENT

CHAGEMA JOHN KADERA 3RD RESPONDENT

*(Being an appeal from the ruling and orders of Hon. Rawlings Liluma, SRM, in
Milimani Commercial Courts CMCC No.7749 of 2017 delivered on 17/11/2023)*

JUDGMENT

1. The appellant/Applicant has filed a Notice of Motion dated 14th December 2023 seeking for conservatory orders for stay of execution pending the hearing and determination of the appeal filed herein.
2. The application is based on the grounds that the lower court dismissed the Appellant's application wherein he was seeking an order that the honourable court sets aside the ex parte judgment entered against him on the 10th July 2023. That the respondents have threatened to execute the ex parte judgment in which case the respondent will suffer irreparable loss of Ksh. 1,364,427.59 if execution was allowed to proceed. The appellant contended that he has an arguable appeal with good prospects of success. He offered to deposit his log book as security in due performance of the decree.
3. The application was opposed by the 1st respondent vide his replying affidavit dated 12th January 2024 wherein he states that the application is unwarranted.



4. The application was canvassed by way of written submissions.
5. The applicant submitted that the only issue for determination is whether he should be allowed to deposit alternative security for costs being motor vehicle log book in place of the decretal sum of Ksh. 1,364,427.59. He cited the case of Eagle Group International Limited & 2 others v Hamisi (Civil Appeal E723 of 2021 [2023] KEHC 20081 KCLR) where the court allowed the applicant to deposit land title deed as security. The applicant further submitted that the respondents cannot suffer prejudice which cannot be compensated by an award of damages.
6. The respondents on the other hand submitted that the application has not satisfied the conditions for grant of stay of execution as provided under Order 42 Rule 6 of the Civil Procedure Rules, 2010. It was submitted that though the application was filed without unreasonable delay, the applicant has not demonstrated how he stands to suffer substantial loss if the prayers sought are not granted. Reliance was made in the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another [1996] e(KLR) where it was stated that it is substantial loss that has to be prevented in granting an application for stay of execution pending appeal.
7. The respondent submitted that the applicant's offer on security is insufficient as the 1st respondent is incapable of executing against the log book offered and the applicant has failed to provide a valuation report for the purported motor vehicle.
8. The respondent submitted that the court in such an application ought to balance the interests of both parties. That the interests of the respondent in this case outweigh those of the applicant. Additionally, that the applicant has not demonstrated that the respondent does not have the means to refund any amount paid out should the appeal succeed. The case of Patrick Mutua & another v Mutua Nyamai [2018] eKLR was relied on in that respect where the court cited the case of Stephen Wanjohi v Central Glass Industries Ltd, Nrb High Court Civil Case NO. 6726/91 where it was stated that:

Financial ability of a decree holder is not a reason for allowing a stay. It is enough that the decree holder is not a dishonourable miscreant without any form of income.
9. The respondent urged the court to dismiss the application.

Analysis and Determination

10. The applicant is seeking for stay of execution pending appeal. The main issue for determination is whether the application has merit and whether it should be allowed.
11. An Applicant for stay of execution pending appeal is required to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. These are that:
 1. The application was brought without unreasonable delay.
 2. The Applicant will suffer substantial loss unless the orders sought are granted.
 3. The Applicant has given security for due performance of the decree as may be binding on him.
12. On the first condition, the appeal was filed within the time required by the law. The appeal was thus filed without delay.



13. The second condition for grant of stay of execution is that an applicant is required to demonstrate that he/she will suffer substantial loss if the orders sought are not granted. In *Kenya Shell Limited v Kibiru & another* [1986] KLR 410, Platt Ag. JA (as he then was) expressed himself as follows on this subject:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

14. In the case of *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997*, Warsame J. (as he then was) held as follows on the question of substantial loss:

For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...

15. The applicant says that he will suffer substantial loss if execution is allowed to proceed. In the case of *James Wangalwa & Another v Agnes Naliaka Chesetoit* [2012] eKLR it was held that execution is a lawful process and cannot amount to a substantial loss. It was held in that case that what is needed is for the applicant to 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 appellant in his supporting did not allege that the respondent will be unable to refund the decretal sum in the event that his appeal is successful. The applicant has not demonstrated how he will suffer substantial loss if stay is not granted.

16. The third condition for grant of stay of execution pending an appeal is that the applicant has to offer security for due performance of the decree. This is meant to give the Respondent something to fall back to in the event that the appeal is not successful. In *Arun C. Sharm v Ashana Raikundalia T/A/ Rairundalia & 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...”

17. It is the discretion of the court determine what kind of security an applicant should deposit in court. The applicant herein has offered to deposit the log book of his motor vehicle registration No. KWB 868 Mercedes Benz as security. The 1st respondent has opposed the same on the ground that the applicant has not provided a valuation report for the vehicle. I however do not think that the offer should be denied on that basis since the court can make an order for the applicant to provide valuation report of the vehicle.

18. From the foregoing, it is clear that the applicant has not established the conditions of substantial loss. However, I do not think that the application should be denied on that ground. The court in such kind of application is required to balance the competing interests of the two parties, where one party is exercising its undeniable right of appeal and the other which has a judgment in its favour and who



should not be deprived the fruits of the judgment without just cause. In the case of Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 Others [2012] eKLR it was held that:

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.”

19. Additionally, the court has a duty do substantial justice to the parties rather than denying a party its right to appeal. In John Mundia v Francis Muriira Alias Francis Muthika & Another [2016] eKLR the court considered the issue of substantial loss and stated that:

“There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

20. The applicant in his appeal contends that he was not served with summons to enter appearance. I am of the view that I should allow the application so as to give a chance to the applicant to have his day in court. The respondent will not suffer any prejudice if there is adequate security in due performance of the decree. I will therefore grant the application on the following conditions:

- (1) That the applicant deposits with this court the log book of motor vehicle registration No. KWB 868 Mercedes Benz so long as he will file with the court a valuation report from a reputable valuation firm and the value of the motor vehicle is found to be higher that the decretal sum being claimed in this matter.
- (2) The applicant to comply with the above condition within 31 days from the date herein failing which the orders granted will stand vacated.

21. Orders accordingly. The costs of the application to abide by the outcome of the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH JULY 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Awuonda for Appellant/Applicant

Mr. Mr. Wanyama for Respondents

Court Assistant – Mokeira

30 days R/A.

