



REPUBLIC OF KENYA



SK v GNK (Civil Appeal 63 of 2023) [2024] KEHC 9462 (KLR) (5 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET**

CIVIL APPEAL 63 OF 2023

RL KORIR, J

JULY 5, 2024

BETWEEN

SK APPLICANT

AND

GNK RESPONDENT

RULING

1. The Applicant filed his Notice of Motion Application dated 11th December 2023 which sought the following Orders:
 - i. Spent.
 - ii. That this Honourable Court stays the execution of the Ruling dated 21st November 2023 and Warrants of Attachment dated 22nd November 2023 pending the hearing and determination of the Appeal dated 6th December 2023.
 - iii. Spent.
 - iv. That the costs of this Application be provided for.
2. The Application was brought under Articles 27, 40, 41, 47, 50, 159 of the *Constitution* of Kenya, section 17, 19(3) of the *Employment and Labour Relations Act*, 2007, section 114(2) of the *Children's Act* and the *Civil Procedure Rules*, 2010. The Application was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Simion Kirui on 11th December 2023.

The Applicant's Case.

3. The Applicant stated that he married the Respondent and were blessed with two issues, A.C and J.K.K. That the aforementioned two issues were now aged above 18 years old and were no longer governed by the Children's Act.



4. It was the Applicant's case that the Respondent had served the Human Resource Manager in [Particulars Withheld] where he was an employee with Warrants of Attachment for the recovery of Kshs 2,907,920.50/= through attaching a 1/3 of his salary. That the Warrants of Attachment were defective as the execution period for the Ruling dated 21st November 2023 expired once his children attained the age of maturity. It was his case that he had appealed the impugned Ruling dated 21st November 2023.
5. The Applicant stated that if the order of stay of execution of the Ruling dated 21st November 2023 and the Warrants of Attachment issued on 22nd November 2023 was not granted, he would incur substantial loss through the loss of his salary and reputation.
6. It was the Applicant's case that despite his children attaining the age of maturity, he undertakes to pay maintenance fee of Kshs 5,000/= per child, provide comprehensive medical cover for his children and pay any school fees that will arise in the cause of proceedings. It was his further case that he would be willing to provide any security or bond as the court may order.
7. The Applicant stated that his Appeal dated 6th December 2023 had a good chance of succeeding and if the stay order was not granted, then his Appeal would be rendered nugatory.

The Response

8. The Respondent through her Replying Affidavit dated 4th March 2024 stated that even though their children had attained the age of 18 years, they were still students and were still governed by the *Children's Act*. She stated that she served the Warrants of Attachment upon the Applicant's employer because he had neglected his parental responsibilities and was in breach of the court's Ruling.
9. It was the Respondent's case that the Applicant had no right to interfere with the education of their children. It was her further case that the Application had been filed in bad faith and was intended to delay execution of the trial court's Ruling. That an Appeal could not stop any court order.
10. The Respondent stated that the Applicant had not approached this court with clean hands as the Application was meant to deny her the fruits of the impugned Ruling and that the same should be dismissed with costs.

The Applicant's Supplementary Affidavit.

11. Through his Supplementary Affidavit dated 18th June 2024, the Applicant stated that the Respondent's source of income was unknown and it could not be guaranteed that she would refund the Kshs 2,907,920.50/= if the Appeal succeeded.
12. It was the Applicant's case that the Respondent had not shown what loss their two children would suffer if the stay order was granted. That he, on the other hand, had undertaken to provide any security or bond that the court would order.
13. The Applicant stated that he made his Application in good faith and was meant to prevent the misuse of their children for financial exploitation.
14. I have gone through and considered the Notice of Motion dated 11th December 2023, the Replying Affidavit dated 4th March 2024, the Supplementary Affidavit dated 18th June 2024 and the sole issue for determination was whether this court should issue stay of execution for the impugned Ruling dated 21st November 2023 and the Warrants of Attachment issued on 22nd November 2023.



15. The principles that relate to Stay of Execution Orders are well settled. 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 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.
16. Thus under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), the Applicant should satisfy the court that:-
- i. Substantial loss may result to him unless the order of stay is granted.
 - ii. That the Application has been made without unreasonable delay.
 - iii. The Applicant gives such security as the court orders for the due performance of such Decree or order as may ultimately be binding to them.
17. I have carefully gone through the present Application and I have noted that the Applicant's main contention was that the amount that the Respondent wanted to be paid for the maintenance of their children was inordinately high and unsubstantiated. I have also noted that both parties incorrectly submitted on the disputed decretal amounts. In my view, this was premature as the same would be conclusively dealt with at the Appeal stage. At this stage, this court is concerned whether or not the Applicant has satisfied the conditions precedent to granting a stay order as envisioned under Order 42 Rule 6 of the [Civil Procedure Rules](#).

Analysis

18. Regarding the issue of substantial loss, the court in [Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited](#) (2014) eKLR held that:-

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether



by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

19. Similarly in *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* (2004) 2 EA 331, the court stated that:-

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

20. The Applicant stated that he would suffer substantial loss unless the execution of the impugned Ruling and Warrants of Attachment was stayed. That the decretal sum of Kshs 2,907, 920.50/= that the Respondent wanted to attach through his salary was substantial. He further stated that the Respondent would not be able to refund it in the event his Appeal succeeded.

21. In my view, the burden is on the Applicant to prove that the Respondent would not be able to refund the decretal sum. Shifting that burden to the Respondent who is the Judgment holder is unjust. I agree with Odunga J. (as he then was) in *Michael Ntouthi Mitheu v Abraham Kivondo Musau* (2021) eKLR where he held:-

“Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the defendants any sums paid in satisfaction of the decree.”

22. Similarly, the Court of Appeal in *Caneland Ltd Malkit Singhpandhal & another v Delphis Bank Ltd* (2000) eKLR held:-

“We now turn to apply these principles to the facts of the present case. Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits or otherwise that the respondent will be unable to refund to the defendants any sums of money paid in satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue.....”

23. The Applicant did not adduce any evidence or set out factual circumstances to demonstrate that it would suffer substantial loss if the execution was not stayed. However, it is my view that the impugned decretal amount of Kshs 2,907,920.50/= that the Respondent wanted attached and deducted from the Applicant’s salary represented a sizeable amount of income which would be a substantial loss to be incurred by the Applicant should his Appeal succeed. Therefore it is my finding that the Applicant has proved the substantial loss that he would suffer.

24. On the issue of unreasonable delay, the trial court delivered its Ruling on 2nd November 2023 and he brought the present Application on 11th December 2023. In my view, the Applicant brought the present Application within reasonable time as there was no inordinate delay.

25. Regarding security for the performance of the Decree, Gikonyo J in the persuasive case of *Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* (2014) eKLR 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.”

26. Similarly in *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* (2019) eKLR Nyakundi J. observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.....”

27. The Applicant stated that during the pendency of the Appeal he was willing to pay the children’s maintenance fees of Kshs 5,000/= per child, comprehensive medical cover for the children and Respondent and school fees that will arise during the pendency of the Appeal. He further stated his willingness to provide security for the performance of the Decree if so ordered by this court.
28. It is salient to note that the power of the court in deciding whether or not to grant a stay of execution is discretionary. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal held that

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

29. I have noted that the Applicant’s main reason for the prayer of stay of execution is that the decretal amount was inordinately high and was not quoted in the impugned trial court’s Ruling dated 21st November 2023. That he was apprehensive that the Respondent would be unable to refund him the decretal sum if the Appeal succeeded. I have also noted that the Respondent was the decree holder who should be enjoying the fruits of the Judgment. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice.

30. This principle was enunciated in the decision of Gikonyo J. in Absalom Dova v Tarbo Transporters (2013) eKLR, where he stated: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

31. In the final analysis, it is my view that the Applicant does not deserve to be driven away from the seat of justice as his right of appeal is enshrined in the Constitution of Kenya 2010. Further, I have taken into consideration the Applicant’s willingness to continue paying the school fees for his children and to provide them a medical cover even after attaining the age of maturity.

32. In the end, I grant stay of execution of the Ruling dated 21st November 2023 in Sotik Children’s Case Number 4 of 2009 and the Warrants of Attachment issued on 22nd November 2023 on the following conditions: -

- i. The Applicant shall pay maintenance fee of Kshs 5,000/= per child for his two children.
- ii. The Applicant shall provide comprehensive medical cover for his two children.
- iii. The Applicant shall continue paying verifiable school fees and meet reasonable educational expenses of the two children.
- iv. The Applicant shall take measures to prosecute his Appeal expeditiously.

33. This being a family matter, each family shall bear their own costs.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 5TH DAY OF JULY, 2024.

.....



R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Applicant acting in person, Mr. Bii for the Respondent and Siele (Court Assistant).

