



Warui v Nderi (Civil Appeal 77 of 2022) [2024] KEHC 9987 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 77 OF 2022
RM MWONGO, J
JULY 23, 2024**

BETWEEN

MATHEW NJAGI WARUI APPELLANT

AND

JACKSON KARURI NDERI RESPONDENT

RULING

1. The applicant notice of motion dated 31st August, 2022 seeks the following orders:
 1. Spent.
 2. This Honourable Court be pleased to issue an order staying the execution of the directives pursuant to the ruling and orders of execution issued on 3rd of August, 2022 and any other subsequent order(s)/decree thereto pending the hearing and determination of this application.
 3. That this Honourable Court be pleased to review, vary, rescind and/or set aside the orders pursuant to the ruling issued on the 3rd August, 2022 and any other subsequent order(s)/decree thereto.
 4. That this Honourable Court be pleased to issue any other order in the strict observance of the directives of this Honourable Court and in the interest of a speedy trial, justice and equity.
 5. That costs of this Application be in the cause.
2. The application is supported by the annexed affidavit of Mathew Njagi Warui.
3. The applicant deposed a supporting affidavit with the following major averments:
 - i. That the Honourable Magistrate, Baricho Law Courts (Hon. D. M Ireri) issued an order for execution of an exparte judgement dated the 1st of November, 2021 pursuant to a ruling dated the 3rd of August, 2022.



- ii. That the Honourable Magistrate overlooked the draft defense that had been filed by the advocate on record.
 - iii. That the Honourable Magistrate also overlooked the fact that the applicant had made a deposit in this Honourable Court as security hence was willing to pursue this case and justice be met.
 - iv. That the Honourable Magistrate at Baricho Law Courts also overlooked the fact that prior to the civil case there was a criminal case between the applicant and the Respondent wherein the applicant was convicted and paid the fine.
 - v. That the Respondent herein was already physically impaired before the civil suit was prosecuted hence, the applicant cannot be blamed 100% for his disability a fact that even the P3 form revealed.
 - vi. That the application herewith is for stay of execution, review and/or setting aside of the ruling and orders issued and delivered on 11th November, 2021.
 - vii. This application has also been brought without unreasonable delay.
4. On 20th September, 2022 the respondent deposed a replying affidavit with the following major averments:
- 1. That judgment in this case was rendered way back on 1st November, 2020 and he was awarded Kshs.880,223/=
 - 2. That he commenced the process of execution herein and the Appellant herein was arrested under warrant as envisaged by the annexed copy of notice to cause why execution should not issue dated 8th June, 2021.
 - 3. That the Appellant was arrested and was represented by the firm of Nduku & Co. Advocates and the court granted them a chance to make the relevant applications to set aside but this was never to be.
 - 4. That the Appellant /judgment debtor went mute again and through my advocates on record we again commenced the process of execution by arresting him the 2nd time.
 - 5. That as the successful party he should thus enjoy the fruits of the judgment.
 - 6. The applicant admits in the application dated 12th May, 2022; the appellant admits that he was served with summons to enter appearance but chose to do nothing.
 - 7. That should the court be minded to allow the appellant's application then it do so on the condition that the appellant does deposit to this court the sum of Kshs.1,000,000/=either in court or in an interest earning account of our joint advocates.
5. The parties filed written submissions as directed by the court.

Appellant's Submissions

6. The applicant submits that Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#) provides that:
- 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 order set aside.”

2. “No order for stay of execution shall be made under subrule (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.”
7. Thus, the appellant submits that the application was filed without any undue delay. The trial court delivered its Ruling on 3rd August, 2022. The appellant filed his Notice of Motion application dated 31st August, 2022 on 5th September, 2022.
8. He relies on the case of *Netplan East Africa Limited v Investment & Mortgages Bank Limited* [2013] eKLR, where it was held that:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. When such delay is established, unless it is well explained, it becomes inexcusable”
9. The appellant submits that the delay occasioned in filing the application for stay of execution and Memorandum of appeal does not amount to prolonged and inexcusable delay. The appellant thus seeks the courts indulgence not to lock him out of these proceeding and prays that the court extends the time for filing the said Notice of Motion application and Memorandum of appeal that is already in the courts record.
10. On the issue of substantial loss, it is the appellant’s submission that the reason behind the filing of this present application is that the honourable trial court through the ex parte judgement delivered on 1st November, 2021 wherein the trial court fully (100%) blamed the appellant for the deformity the respondent suffers from; the respondent had a limb way before the altercation with the appellant. In so doing, the trial court awarded the respondent a sum of Kshs.880,223/- despite the evidence contained in the P3 which is on the courts file.
11. It is the applicant’s case that a sum of Kshs.880,223/= awarded in the lower court, especially when the same is erroneously awarded, is a colossal sum of money that is likely to put an individual in financial crisis.
12. In *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No.1561 of 2007 as quoted in the case of Civil Appeal No.127 of 2018 *Polytanks Limited v Everlyne Wanza Musau & 3 others* [2019] eKLR, substantial loss was explained as follows:

“....The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to or different from that...The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”



13. According to the Applicant, the trial court failed to consider the proceedings in the criminal case and the contents of the P3 form produced in court thus necessitating the filing of this present application and Memorandum of Appeal. As a consequence of the trial courts shortcomings, the appellant is certainly going to face irreparable loss when the respondent executes the decree to the tune of Kshs.880,223/-

14. The appellant is cognizant of the fact that an order for stay of execution is of a discretionary nature. Accordingly, it is the appellants prayer that this appellate court stands guided by the court determination in *M M Butt v. Rent Restriction Tribunal Civil Application No.6 of 1979*, it was stated that:

“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.

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.

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.”

Respondent's Submissions

15. On his part, the respondent submitted that the court, in *RWW v EKW* [2019] eKLR, considered 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 for 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 respondent further submits, that the Applicant has not given any proposal as to his ability to repay the decretal sum in case the appeal succeeds and in light of the depositions by the respondent's counsel that they shall suffer substantial loss if stay is granted.

17. The respondent submits that an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2) aforementioned; namely, that substantial loss may result to the applicant unless the order is made. He asserts that he will suffer irreparable harm and a disadvantage as the respondent has been waiting for his payment since the judgement was delivered. The applicant has vexatiously continued to put off the payments without any efforts and reasonable explanation whatsoever.



That the application has been made without unreasonable delay, and

18. On unreasonability of delay, the respondent submits that the appeal itself was filed out of time the ruling having been delivered on 3rd August, 2021 and the appeal filed on 5th September, 2022. This he urges, is an unreasonable delay and granting a stay of execution will be perilous and a disadvantage to the respondent.
19. On security deposit the respondent relies on the case of *Ena Investment Limited v Benard Ochau Mose & 2 others* [2022] eKLR the court held that

“In the result, I grant the order for stay of execution on condition that the Applicants shall furnish security equivalent to the outstanding amounts in contention being Kshs.861.972/= The Applicants shall provide a Bank guarantee of Kshs.861.972/= from a reputable Bank within 15 days of today. The applicants shall take all necessary steps to ensure that the Appeal is properly filled and admitted within 45 days of today.”
20. The only issue for determination is whether stay of execution pending appeal should be granted.

Analysis and Determination

21. The Appellants motion seeks that the court do issue an order of stay of execution of the trial court's ruling issued on 3rd August, 2022. He further seeks that the court be pleased to review, vary, rescind and/or set aside the orders pursuant to the Ruling issued on 3rd August, 2022.

Whether the applicants be granted an order of staying execution against the respondents

22. In order to obtain stay of execution of a decree or order pending appeal, an applicant is obliged to satisfy the conditions set out in Order 42 Rule 6(2) aforementioned, namely:
 - a) That substantial loss may result to the applicant unless the order is made.
 - b) That the application has been made without unreasonable delay.
 - c) That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
23. The applicant's case is that the decretal sum of Kshs.880,223/-especially considering that the same is erroneously awarded, is a colossal sum of money that is likely to put an individual in financial crisis.
24. On his part the respondent urges that he will suffer irreparable harm and a disadvantage he has been waiting for his payment since the judgment was delivered. Nevertheless, the applicant has vexatiously continued to put off the payments without any efforts or a reasonable explanation whatsoever.
25. Clearly, substantial loss would befall the appellant if denied the opportunity to appeal.
26. On the issue of delay the appellant submits that the application was filed timeously. The trial court delivered its Ruling on 3rd August, 2022. The appellant filed his Notice of Motion application dated 31st August, 2022 on 5th September, 2022.



27. In *Netplan East Africa Limited v Investment & Mortgages Bank Limited* [2013] eKLR that:
- “The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. When such delay is established, unless it is well explained, it becomes inexcusable”
28. The respondent submits that the appeal itself was filed out of time the ruling having being delivered on 3rd August, 2021 and appeal would have been filed by 3rd September, 2022. Having been filed on 5th September 2022, this is obviously unreasonable delay and granting a stay of execution will be perilous and a disadvantage to the respondent.
28. In *RWW v EKW* [2019] eKLR, the court held:
- “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.”
29. What this court must do is to balancing the parties’ interests. In so doing I am inclined to agree with the applicant that the delay was neither prolonged nor inexcusable.
30. On what conditions should be imposed by the court if it grants time to appeal, the appellant submits that he is ready to abide by any condition that court deems necessary for it to grant the order. The respondent has proposed a security deposit of Kshs.1,000,000/= - deposited into a joint interest earning account.
31. In M M *Butt v Rent Restriction Tribunal* Civil Application No.6 of 1979, it was stated that:
- “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.”
32. In light of the foregoing, I think the proper orders to give, which I hereby make, are as follows:
1. The applicant’s application succeeds, and costs to abide the appeal.
 2. Stay of execution pending hearing and determination of appeal be and is hereby granted.
 3. The stay granted herein is conditional upon the applicant depositing in court the full decretal sum and costs within twenty (21) days from the date hereof.
 4. In default, execution to proceed.
 5. Orders accordingly.

DATED AT KERUGOYA THIS 23RD DAY OF JULY, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Ms. Mokaya - for Applicant

Wachira - holding brief for Kanyi for Respondent



Murage, Court Assistant

