



**Amicabre Travel Services Limited v Kilel & another (Civil Appeal  
E008 of 2024) [2024] KEHC 11120 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11120 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E008 OF 2024  
RL KORIR, J  
SEPTEMBER 23, 2024**

**BETWEEN**

**AMICABRE TRAVEL SERVICES LIMITED ..... APPLICANT**

**AND**

**HELIAS KILEL ..... 1<sup>ST</sup> RESPONDENT**

**RICHARD KIPKIRUI NG'ENO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant filed its Notice of Motion Application dated 11th April 2024 which sought the following Orders:-
  - I. Spent.
  - II. Spent
  - III. That this Honourable Court be pleased to grant stay of execution of the Decree and Judgement in Civil Suit No. 29 of 2019 Helias Kilel & Rosemary Chelangat Koech (suing as the personal representatives of Benson Cheruiyot Kilel (deceased) v Richard Kipkurui Ngeno as against the Appellant/Applicant pending the hearing and determination of this Appeal filed in the High Court at Bomet upon such terms as to security as the court may deem just.
  - IV. That the costs of this Application do abide by the outcome of the Appeal.
2. The Application was brought under sections 1, 1A, 1B and 3A of the *Civil Procedure Act* and, Order 42 Rule 6 of the *Civil Procedure Rules*. The Application was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Maxlide Mugaisi on 11th April 2024.



### **The Applicant's Case**

3. The Applicant stated that on 3rd April 2024, the trial court dismissed their Application to set aside Judgement. That he was dissatisfied with the Judgement and had appealed against it.
4. It was the Applicant's case that if the Judgement in the trial court is executed, IT would suffer irreparable and substantial loss. That the Respondents had already issued a Proclamation Notice.
5. The Applicant submitted that it had brought the Application without undue delay and was willing to abide by the terms given by this court. They further stated that the Respondents would not suffer any prejudice if the stay order was granted.

### **The Response**

6. The 1st Respondent swore a Replying Affidavit dated 26th April 2024 and stated that the Judgement delivered by the trial court on 16th November 2022 was proper and regular. That his Application (in the trial court) dated 27th November 2023 to have the said Judgement set aside was dismissed and that the current Application was meant to frustrate him from enjoying the fruits of his Judgement.
7. It was the 1st Respondent's case that the Applicant had not demonstrated the merits of his Appeal. That the Applicant did not serve him with the Notice of Appeal as required by the law. It was his further case that the Applicant had not demonstrated how its Appeal would be rendered nugatory or the substantial loss he would suffer if stay was not granted.
8. The 1st Respondent stated that the primary suit was filed in the year 2019 and had been pursuing justice since then. That he would be greatly prejudiced if the stay order was granted. He further stated that if the court is to grant the stay, then it should be conditional on the Applicant paying him half the decretal amount and the other half be deposited in a joint interest earning account in the joint names of their counsels within a reasonable period of time.
9. On 11th June 2024, I directed that the Appeal be heard through written submissions.

### **The Applicant's submissions**

10. Through its submissions dated 19th June 2024, the Applicant submitted that it had demonstrated the imminence of execution as the Respondents had already done a proclamation. That it stood to suffer substantial loss due to the attachment of its assets. It was the Applicant's further submission that the 1st Respondent had no demonstrable means of refunding the decretal sum in the event its Appeal is successful.
11. The Applicant stated that if security of costs was to be paid to the 1st Respondent, it would be paying for the 2nd Respondent's "sins" and this would render the Appeal nugatory and impede his right to access justice. That the court in *RWW v EKW* (2019) eKLR granted stay with no orders as to security.
12. It was the Applicant's submission that their Appeal raised arguable points of law and had a high chance of success. That they had filed and served their Appeal within reasonable time.
13. The Applicant submitted that all the above factors taken in totality pointed to substantial loss. It relied on *James Wangalwa & another v Agnes Chesoto* (2012) eKLR and *Magnate Ventures v Simon Mutua Muatha & another* (2018) eKLR.



14. It was the Applicant's submission that it should order security that is just and an order that would not render the Appeal nugatory. That if the order for security is given then the same be paid to this court or in a joint interest earning account.

### **The 1st Respondent's submissions**

15. Through his submissions dated 28th June 2024, the 1st Respondent submitted that the Applicant had not demonstrated how it would suffer loss. He relied on [James Wangalwa \(supra\)](#) and [Kenya Shell Limited v Kibiru](#) (1986) KLR 410.
16. It was the 1st Respondent's submission that the fact that a decree holder was not a person of means did not mean that he would be denied the fruits of his Judgement. That the general rule was that a court should not deny a successful litigant the fruits of his Judgement. He relied on [Machira t/a Machira & Co. Advocates v East African Standard](#) (No.2) (2002) KLR 63.
17. The 1st Respondent submitted that the issue of the ability of refunding the decretal sum was a matter of fact. That the financial ability of a decree holder was not a reason to deny stay. He relied on [Stephen Wanjohi v Central Glass Industries Ltd](#) Nairobi HCCC No. 6726 of 1991.
18. It was the 1st Respondent's submission that the court must always balance the interest of both parties and place them on an equal footing. That the Applicant should provide security as it is required for the due performance of the Decree. He relied on [Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others](#) (2015) eKLR. It was his submission that the issue of security exists so that courts do not assist litigants to delay executing Decrees through filing of vexatious and frivolous Appeals. That the Applicant had not demonstrated willingness to provide security.

### **The 2nd Respondent's submissions**

19. Through his submissions dated 9th September 2024, the 2nd Respondent submitted that the Application met the test for grant of stay of execution pending Appeal. That the Judgement in the lower court was obtained ex-parte and the Applicant's application to have the Judgement set aside was unsuccessful. He further submitted that it was in the interest of justice that stay is granted so that the status of the parties remain equal before the Appeal is determined.
20. It was the 2nd Respondent's submission that if execution was carried out, the Applicant would not be able to recover the decretal sum if its Appeal succeeded and this would make the Appeal nugatory. It was his further submission that the 1st Respondent would suffer no prejudice if the stay order was granted.
21. The 2nd Respondent submitted that the present Application was filed within reasonable time. He further submitted that the Applicant would be willing to offer such security as directed by this court.
22. I have gone through and considered the Notice of Motion dated 11th April 2024, the Replying Affidavit dated 26th April 2024, the Applicant's submissions dated 19th June 2024 and the Respondents' submissions dated 28th June 2024. The sole issue for determination was whether this court should issue stay of execution for the Decree in Senior Principal Magistrate's Court Civil Suit Number 29 of 2019.

### **Analysis**

23. 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.
24. 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.
25. Regarding the issue of substantial loss, Warsame J (as he was then) in [Samvir Trustee Limited v Guardian Bank Limited](#) (2007) eKLR held that:-

“It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”
26. Similarly, the Court of Appeal in the case of [Kenya Shell Limited v Benjamin Karuga Kibiru & another](#) (1986) eKLR, held that:-

“Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting 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.”
27. The Applicant stated that it would suffer substantial loss unless execution was stayed. It further stated that the Respondent would not be able to refund them the decretal sum in the event his Appeal succeeded because he had no demonstrable means of refunding it the decretal sum.
28. This court has always held that the burden to prove that the Respondent was a person of straw lay with the Applicant. 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.”

29. Similarly in the case of *ABN AMRO Bank v Lemond Foods Limited* Civil Application No.15 of 2002 the Court Appeal held that:-

“The burden is on the applicant to show that the appeal shall be rendered nugatory say by swearing upon reasonable grounds that the respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. . . .”

30. Additionally, execution is a lawful process and cannot be used as a ground for staying execution. I agree with Muchemi J. in *Ndungu v Mutua* (Civil Appeal E047 of 2024) [2024] KEHC 6276 (KLR) (30 May 2024) (Ruling), where she held:-

“It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory.....”

31. Flowing from the above, 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. The Applicant failed to discharge its burden of proof.

32. On the issue of unreasonable delay, the trial court delivered its Ruling on 3rd April 2024 and the Applicant filed the present Application on 11th April 2024 which was an approximate period of one week. In my view, the Applicant brought the present Application within reasonable time.

33. Regarding security for the performance of the Decree, Nyakundi J. in *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* (2019) eKLR observed:-

“Thirdly 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 fails.

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.....”

34. Similarly in *Ndubiu Gitabi v. Warugongo* [1988] KLR 621; 1 KAR 100; (1988-92) 2 KAR 100, the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal.....”

35. From my appreciation of the pleadings, the Applicant was undecided on the issue of security. On one hand, they stated that furnishing of the security was tantamount to paying for the sins of the 2nd Respondent and on the other hand, they stated that if the court directed that security be provided then it would pay the sum directly to the court of in a joint interest earning account.
36. The Respondents have the Judgment and Decree in Senior Principal Magistrate’s Court Civil Suit Number 29 of 2019. Though they did not attach the Judgement and Decree, I have gleaned from the pleadings that the decretal amount was Kshs 836,474/=.
37. The three elements as envisaged in Order 42 Rule 6 of the *Civil Procedure Rules* that have to be satisfied before stay can be granted have to be proved conjunctively and not disjunctively. As shown above, the Applicants did not prove how they would suffer substantial loss.
38. However, in the exercise of my discretion, it is my duty to balance the interest of both parties i.e. acknowledging that the Respondents are the Judgment holders and ought to enjoy its fruits and protecting the Applicant’s unfettered right to Appeal.
39. Flowing from the above, it is my finding that in the interest of justice, the Applicant should not be disadvantaged as it pursues its Appeal. However to ensure that the Respondents are not prejudiced, I shall grant stay of the execution of the Judgment and Decree in Senior Principal Magistrate’s Court Civil Suit Number 29 of 2019 under the following conditions:-
- i. The Applicant shall pay the Respondents half the decretal sum being Kshs 418, 237/= within 30 days.
  - ii. The Applicant shall deposit the other half (Kshs 418,237/=) in an interest earning account in the joint names of the parties’ advocates.
  - iii. The Applicants shall file the Record of Appeal within 30 days of today.
  - iv. Failure to meet the conditions above shall void the stay.

**RULING DELIVERED, DATED AND SIGNED THIS 23RD DAY OF SEPTEMBER, 2024.**

.....  
**R. LAGAT-KORIR**



## **JUDGE**

Ruling delivered in the presence of Mr Kipteting holding brief for Chebet for the 2nd Respondent N/A for Makori for the Appellant, N/A for Gacathi for the 1st Respondent and in the presence of Siele (Court Assistant).

