



**Bosibori v Ongworu (Civil Appeal E062 of 2023)
[2024] KEHC 12106 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E062 OF 2023
TA ODERA, J
SEPTEMBER 24, 2024**

BETWEEN

SEREBOMA BOSIBORI APPELLANT

AND

PETER KAUNDA ONGWORU RESPONDENT

RULING

1. The Applicant has moved this Court vide the application dated 24.11.23 seeking a stay of execution of the Judgment /decree in Kisii civil case no. 637 of 2021 delivered on 22.5.23 pending the hearing and determination of the appeal herein. The application is supported by the annexed affidavit of Serobina Bosibori sworn on 24.11.23 that outlines the grounds upon which the stay is sought. The Respondent filed a replying affidavit sworn by Musili Mbiti advocate for the respondent dated 24.1.24. Counsel indicated that he is not opposed to the application save that the applicant be ordered to pay ½ of the decretal sum and the other half be deposited in a joint interest earning account in the names of both counsel on record.
2. The applicant submitted that the appeal has high chances of succeed, that the application is based on Order 412 rule 6 of the civil procedure rules which provides for conditions of stay pending appeal; it was submitted that the applicant will suffer substantial loss as if the decretal sum of Kshs. 203, 550/= plus costs and interest is paid to the respondent and the appeal succeeds there is no guarantee that the money will be refunded. The applicant cited the case of G. N Muema P/A (sic mt view maternity & Nursing home v Miriam Maaliam Bishar and another [2018] KLR on this point. Also that the appeal will be rendered nugatory is the application is not allowed as the respondent who is a man of straw will be unable to refund the decretal sum.
3. The applicant told this court that the appeal was filed without unreasonable delay the judgment having been delivered on 22.5.23 and the application was filed on 26.6.23. She explained that this was due to the delay in typing of court proceedings.



4. On security, the applicant offered a bank guarantee for the decretal sum. The applicant relied on the case of Kiragi Travelers Sacco Society limited v Nicodemus George Nyandoro (2022) EKLKxxxx
5. It was further submitted that if the stay is not granted and judgment is executed the substratum of the appeal will be destroyed.
6. The respondent submitted that he is entitled to the fruits of the judgment having been in court since the year 2021. They cited the case of Edward Kamau & Another vs Hannah Mukui Gichuki where the court held that there is a need to balance the rights of the appellant with those of the respondent and that there should be non-discrimination in dealing with the applications for stay pending appeal.
7. In considering this application for stay pending appeal the court is guided by the provisions of Order 42 Rule 6 of the Civil Procedure Rules, which sets out the principles for granting a stay of execution pending appeal. These principles are:
 1. The application must be made without unreasonable delay.
 2. The Applicant must demonstrate that substantial loss may result if the order is not granted.
 3. The Applicant must offer such security for the due performance of the decree or order as the court may direct.

1. Timeliness of the Application

8. The first requirement under Order 42 Rule 6(2) is that the application must be made without unreasonable delay. Upon perusal of the record, the judgment was delivered on 22.5.23, and this application was filed on 24.11.23. The applicant has previously filed a similar application which was struck out for defect in form. The respondent did not question the timing of the application. The Court is satisfied that there has been no undue delay in filing this application.

2. Substantial Loss

9. The Applicant must show that they will suffer substantial loss if the stay is not granted. In this case, the Applicant has contended that execution of the judgment will cause irreparable harm, as the Respondent may be unable to refund the decretal sum if the appeal succeeds. This has not been challenged as the respondent has not provided sufficient proof of financial stability or ability to refund the decretal sum if required to do so. Therefore, the Court is persuaded that the Applicant may suffer substantial loss in the event the appeal is successful and the execution has already been carried out.

3. Security for Due Performance

10. The Court notes that the Applicant has expressed willingness to furnish a bank guarantee as security for the due performance of the decree, as required under Order 42 Rule 6(2)(b). The bank guarantee offered is not specific to this case but general. The bank guarantee is thus not a proper security in the circumstances. The Court is thus not inclined to direct the Applicant to deposit the bank guarantee as security but one half (1/2) of the decretal sum in a joint interest-earning account as a security.

Conclusion

10. Having considered the submissions, affidavits, and legal principles applicable to an application for stay pending appeal, the Court finds that the Applicant has met the threshold for the grant of the stay.



Orders

1. A stay of execution is hereby granted pending the hearing and determination of the appeal.
2. As a condition attached to order 1 above, the Applicant shall deposit one half (1/2) of the decretal sum in a joint interest-earning account in the joint names of the advocates for both parties herein within 30 days from today.
3. Costs to the respondents.
4. Mention on 25.10.24 before the Deputy registrar for compliance.

It is so ordered.

T.A ODERA

JUDGE

~~24.9.24~~

DELIVERED VIRTUALLY VIA TEAM'S PLATFORM IN THE PRESENCE OF:

No appearance for the applicant

No appearance for the respondent

Court Assistant Oigo

