



**Maina v Gikurumi (Miscellaneous Application 56 of 2023)
[2024] KEHC 11894 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 56 OF 2023
TW OUYA, J
SEPTEMBER 23, 2024**

BETWEEN

SAMUEL THUO MAINA APPLICANT

AND

FRANCIS MAINA GIKURUMI RESPONDENT

RULING

1. By a Chamber Summons Application dated 12th April 2023 the Applicant brought an application to court seeking from this court orders:
 - i. That this application be certified as urgent and be heard ex-parte in the first instance.
 - ii. That this Honourable court be pleased to stay execution of the Judgement and decree in Kangundo Magistrate Court Civil Suit No 4 of 2020 pending the hearing and determination of the application herein and the appeal lodged herein.
 - iii. That this Honourable court be pleased to stay execution of the Judgement and decree in Kangundo Court Civil Suit No 4 of 2020 pending the hearing and determination of the appeal herein.
2. The Application was brought Under Rules 17, 18 and 19 of the High Court of Kenya Organizational and Administrative Rules 2016, Order 22 rule 22, Oder 42 Rules 4, 6 and 7, Section 79G of the *Civil Procedure Act*, Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Section 3 and 3A of the *Civil Procedure Act*, Article 159 (2) (a) & (d) of *the Constitution* of Kenya, 2010 and all other enabling provisions of the law.
3. The Application was supported by the Affidavit of Samuel Thuo Maina the Insured and registered owner of Motor Vehicle Registration Number KBC 695D which was involved in a road traffic accident thereby giving rise to this Claim and the Appeal.



4. Judgement was delivered on 21st February, 2023 against the Applicant/ Appellant herein in which the Applicant was held 100% liable and ordered to pay the plaintiff Ksh. 600,000/= for General Damages and Ksh. 12,950/= for special Damages, plus costs and interest at court rate in the lower court for the Respondent against the Applicant/ Appellant as General damages. The Applicant/ Appellant being dissatisfied with the said Judgement appealed against the said Judgement.
5. The Application before this court is a Notice of Motion dated 11th April 2023 seeking orders for:
 - i. Stay of execution stay of execution of the lower court
 - ii. Judgement pending outcome of the Appeal.
 - iii. To issue a bank Guarantee for the Decretal sum as Security.
6. Notice for mention for directions was sent to both parties and mater was mentioned on 31st May 2024. There was no appearance for both parties but directions were given for both to file their submissions. A notice was specifically issued to Shem Kebongo Advocates to file submissions on or before 7th June 2024 when the matter was listed for hearing. When the matter came up on 7th June 2024, there was no appearance for both parties while the Appellant had complied and filed submissions. There is no indication as to whether or not the Respondent was served since there is no Affidavit of service on the record. Since the Advocate for the respondent had been Officially notified by the court, this court shall proceed to rule without their submissions.
7. It is therefore presumed that the Application is not opposed. This court has considered the memorandum of the appeal which is the basis for the instant Application. It raises several triable issues that:
 - i. The learned Magistrate erred in fact and law in finding that the Respondent was entitled to General Damages of kshs.600,000.
 - ii. The learned Magistrate erred in fact and law in finding that the Respondent was entitled to General Damages that were too high in view of evidence tendered and the Respondent did not have any future medical expenses nor did he suffer any medical disability and the fracture he suffered had already united.
 - iii. The learned Magistrate erred in fact and law in failing to consider the Appellant's evidence on quantum.
 - iv. The learned Magistrate erred in fact and law in failing to consider conventional awards in cases of similar nature.
8. In his submissions the Applicant argues that his appeal is arguable and raises serious points of law and fact that warrant this court's intervention on appeal.
9. He relies on a number of authorities:
 - i. In Bake 'N' Bite (Nrb)Limited v Daniel Mutisya Mwalonzi 2015 eklr the court emphasized that under order 42 rule 6(2) the court is given discretion to issue stay orders on a matter pending on appeal so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.



- ii. Havelock J, in *Esther Wamaitha Njihia & 2 Others v. Safaricom Limited* 2014 eKLR and *Shah Mbogo and Another* 1967 EA 116, and *Pithon Waweru Maina v Thuku Mugiria* civil Appeal No. 27 of 1982 all underscore the principle of discretion of the court.
10. On Stay of execution he relies on Order 42 rule 6(2) as also laid down in the case of *Tabro Transporters Ltd. v Abslom Ndova Lumbasi* (2012) eKLR:
- “Sufficient cause is established when the Applicant proves the following conditions on a balance of probabilities that:
- a. Substantial loss may result to the Applicant unless the order is made
 - b. The Application has been made without unreasonable delay and,
 - c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the Appellant has been given by the Applicant
- These conditions are the essence are the essence of Order 42 Rule CPR. They however share an inextricable bond such that, if one is absent, it will affect the exercise of the discrete of the court in granting the stay of execution. The court of Appeal in *Mukuma Vs Abwoga* (1988) EKL 645 reinforced this position. Each of the condition is examined below to see whether the circumstances neatly fit the scales.....”
11. Having considered the pleadings and submissions by the applicant, this court identifies the following to be the issues for determination:
- a. Whether the Applicants have demonstrated that substantial loss will occur unless stay is granted
 - b. whether the application has been made without undue delay
 - c. whether the Applicants are willing to furnish security as shall be sufficient to satisfy the decree ultimately and ultimately binding on the Applicant
12. In the supporting Affidavit the Appellant has demonstrated that his insurer is willing and has gone ahead to issue security in the form of Bant Guarantee for the Judgement amount to be held by the court pending the determination of the intended appeal.
13. On the other hand, the Appellant avers that the Respondent’s means are unknown and the likelihood of refunding the decretal amount in case of success in this appeal is dim. He relies on the authority of the case of *Tabro Transporters Ltd. v Abslom Ndova Lumbasi* (2012) eKLR which emphasizes inter alia the principle that:
- “.... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory....”
14. The judgement was delivered on 21st February 2023 and the Applicant moved to court on with Chamber Summons Applications dated 11th April 2023 under Certificate of Urgency. The Applicant since filed a memorandum of Appeal in the High Court and a notice of motion for the instant stay of execution application. This court is satisfied that the Applicant moved to court promptly for the purposes of mitigating risk and danger.



15. I have considered the pleadings and submissions by counsel and in totality annexures thereto. The annexure relating to security is a draft of a bank facility by Family Bank to Directline Assurance. It is neither dated nor fully executed and the court cannot therefore rely on it for security.

This Court therefore holds as follows:

- i. The Applicant has demonstrated that he would suffer irreparable loss if stay is not granted.
- ii. The Applicant is willing to furnish a sufficient and binding security
- iii. The Application for stay of execution was made in good time and without delay by the Applicant.

Orders

Based on the above findings, this court therefore orders that stay of execution of the judgement/ decree made on 21st February 2023 is granted on conditions that:

1. The Applicant deposits half of the decretal sum in a joint interest earning account held in the names of the two parties' advocates pending appeal and determination thereto.
2. The remaining half of the decretal amount to be paid to the respondent through their advocates pending appeal and determination thereto.
3. Numbers 1& 2 above to be affected within 30days from the date hereof.
4. In the event of default of any of the conditions the stay order lapse upon expiry of 30 days.
5. Applicants to file Record of Appeal within 30days from the date hereof.
6. Matter be mentioned before the Deputy Registrar Machakos for confirmation and for further orders or directions on 30th Srptember 2024.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF SEPTEMBER, 2024

ROA 14 days.

T. W. Ouya

JUDGE

For Plaintiff No Appearance

For Defendant No appearance

Court Assistant: Martin Korir

