



REPUBLIC OF KENYA



Kiprop v PA (Suing as the next friend and mother to CT) (Civil Appeal E174 of 2022) [2023] KEHC 900 (KLR) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E174 OF 2022
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

ABEL KIPLIMO KIPROP APPLICANT

AND

PA (SUING AS THE NEXT FRIEND AND MOTHER TO CT) RESPONDENT

(Being an Appeal from the judgment and decree of Hon. T.Mbugua(RM) delivered on the 28th day of October 2022 in Eldoret SCCC No. E149 of 2022 between PA (suing as the next friend and mother to CT) and Abel Kiplimo Kiprop)

RULING

Coram: Hon. Justice R. Nyakundi

Kimondo Gachoka & Co. Adv for Appellant

M/S/ Kimaru Kiplagat & Co. Adv for the Respondent

1. Before me for determination is the Applicant's Notice of Motion dated November 24, 2022 and filed in Court on January 1, 2022 seeking the following orders: -
 - 1) Spent.
 - 2) Spent.
 - 3) That there be stay of execution of the judgment and decree of Kshs 186,000/=plus assessed costs and interest delivered in Eldoret SCCC No E149 of 2022; PA (Suing as the next of friend and Mother to CT v Abel Kiplimo Kiprop pending the hearing and determination of this application inter-partes.



- 4) That as a condition of stay of execution pending the hearing and determination of this appeal, the Appellant/Applicant be and is hereby ordered to provide/issue security for the entire decretal sum/amount in the form of a Bank Guarantee to be issued by Family Bank Limited.
 - 5) That the costs of this application be provided for.
2. The application is premised on the grounds therein and is further supported by the affidavit sworn by Abel Kiplimo Kiprop, the Applicant on November 24, 2022.

The Applicant's case

3. The Applicant case is that on October 28, 2022, judgment was delivered in favour of the Respondent in Eldoret SCCC No E149 of 2022 where by the Respondent was awarded Kshs 180,000/= as general damages, Kshs 6,000 as special damages plus costs and interests thereon.
 4. Aggrieved by the said judgment the Applicant has since lodged an appeal on the issue of both liability and quantum.
 5. The Applicant contended that the financial ability is unknown and thus in the event the appeal succeeds then the likelihood of the Respondent to refund the decretal amount is unknown. The Applicant is apprehensive that he stands to suffer substantial loss and that the appeal is likely to be rendered nugatory if stay orders are not issued.
 6. The Applicant is willing and ready to offer security in the form of a Bank Guarantee issued by Family Bank Limited.
- The application is unopposed.

Determination

6. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. The main issue for determination is whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited.
7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(1) of the [*Civil Procedure Rules 2010*](#) which stipulates as follows: -

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.

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.

8. The factors to consider in stay pending appeal is set out in the Court of Appeal decision in *Butt v Rent Restriction Tribunal* [1982] KLR 417. The Court gave guidance on how a court should exercise discretion in such an application and held as follows: -
 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.
9. The power of the court to grant stay of execution pending appeal is a discretionary.
10. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
11. Under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.
12. Therefore, 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 (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (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. (See also *Visbram Ravji Halai v Thornton & Turpin* Civil Application No Nai. 15 of 1990 [1990] KLR 365.)



13. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... 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 Applicant herein is apprehensive that the Respondent would not be a position to refund the decretal amount in the event that the appeal succeeds and thus he would suffer substantial loss. Unfortunately, this instant application is undefended and thus the Court cannot establish whether the Respondent would be in a position to refund the decretal amount in the event the appeal succeeds.
15. The Applicant on the other hand is willing and ready to furnish the court security in the form of a Bank Guarantee issued by Family Bank Limited.
16. This application was timeously filed.
16. Having carefully considered the instant Application, the Court finds and holds that the Applicant has met the threshold to warrant the Court exercise of its discretion in his favour. This is in consonant with the criteria set out in the case of: *Ujagar Sign v Runda Coffe Estates Limited* [1966] EA 263 it was held:“...It is not normal for a court to grant stay of execution in momentary decrees but where there are special features such as the issue of the regularity if the judgement, the fact that the amount payable under the decree being substantial and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful.”
16. In the end the Notice of Motion dated November 22, 2022, is found to be meritorious. It is allowed. Consequently, an order for stay of execution pending appeal is granted on condition that the Appellant Applicant provides a Bank Guarantee from a reputable bank as security for the decretal sum pending the hearing and determination of the Appeal. In default the stay order shall automatically lapse.
17. Since the Respondent neither filed pleadings any pleadings to this application nor made any submissions, I make no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF FEBRUARY 2023.

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R. NYAKUNDI

JUDGE

