



**Kkuria v Michael (Civil Appeal E031 of 2022)
[2023] KEHC 887 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E031 OF 2022
AN ONGERI, J
FEBRUARY 10, 2023**

BETWEEN

ANN MUTHONI KKURIA APPELLANT

AND

OCHIENG ONYANGO MICHAEL RESPONDENT

RULING

1. The Application coming for consideration is the one dated July 11, 2022 seeking the following Orders:-
 - i. That this matter be certified urgent and heard ex-parte in the first instance and service thereof be dispensed with.
 - ii. That this Honorable Court be pleased to order a stay of Execution of the Judgment/Decree dated June 14, 2022 vide Kericho Cmcc No 206 Of 2018, Ochieng Onyango Michael (suing As A Personal Representative And Administrator Of The Estate Of Agnes Atieno Okoth -vs- Ann Muthoni Kuriapending the hearing and determination of this Application interpartes.
 - iii. That this Honorable Court be pleased to order a stay of execution of the Judgment/Decree dated June 14, 2022 vide Kericho Cmcc No 206 Of 2018, Ochieng Onyango Michael (suing As A Personal Representative And Administrator Of The Estate Of Agnes Atieno Okoth -vs- Ann Muthoni Kuria pending the hearing and determination of Kericho Hcca No E031 of 2022.
 - iv. That this Honorable Court be pleased to order that the Appellant furnishes security in the form of Bank Guarantee for the decretal sum of Kshs 990,000/= pending hearing and determination of this Appeal.
 - v. That the costs of this application be provided for.



2. The application is based on the grounds on the face of it and supported by the Affidavit of Ann Muthoni Kuriadated July 11, 2022 in which she avers that she is the Appellant and the owner of motor vehicle Registration Number xxxx and that Directline Assurance Co Ltd instructed the firm of M/s Kimondo Gachoka & Company Advocates to act for and on her behalf in this matter.
3. The Applicant avers that she was reliably informed by her advocates that judgement was entered against her vide Kericho Cmcc No 206 Of 2018 whereby the Plaintiff was awarded Kshs 990,000/= plus costs and interest at court rates.
4. The Applicant avers that she was reliably informed by her advocates that the stay period granted was set to lapse on the July 13, 2022 thus exposing the Applicant to an imminent risk of execution proceedings.
5. The Applicant avers that upon perusal of the file and analysis of the judgement with her advocates, she was aggrieved by the said judgement and she instructed her advocates to lodge an appeal against the judgement on both liability and quantum and consequently they lodged an appeal vide Kericho Hcca No 31 Of 2022.
6. The Applicant was cognizant that it is trite law that an appeal does not operate as stay of execution and the Applicant's moveable properties were thus exposed to execution proceedings by way of proclamation and attachment.
7. The Applicant was apprehensive that once the period of stay of execution lapses, the Respondent would proceed to proclaim the Applicant's goods and properties thus rendering the appeal nugatory.
8. The Applicant avers that she stood to suffer irreparable loss and damage if the orders sought in the application were not granted.
9. The Applicant avers that her insurer M/s Directline Assurance Co LTD was ready and willing to offer security in form of a bank guarantee for the full decretal sum of Kshs 900,000/= pending the hearing and determination of the appeal.
10. The Applicant implored the Court to adhere to natural justice, doctrine of equity and the Constitution in the matter as the Applicant will be condemned unheard if the Applicant is not granted an opportunity to defend the suit.
11. The Applicant aver that the application would not occasion any prejudice to the Respondent as the same can be compensated by an award of costs.
12. The application was opposed by the Respondent Ochieng Onyango Michaelwho filed a Replying Affidavit dated July 12, 2022 in which he avers that the application was an abuse of the due process of law and should be dismissed with costs since the intended appeal has no chance of success.
13. The Respondent avers that the annexures which were annexed to the application were not legally binding since the same were not fully executed by the parties, that is the lender and the borrower.
14. The respondent avers that the court cannot grant stay without proper security as per order 42 Rule 6 (2).
15. The Responded avers that the applicant had not demonstrated any injury she would suffer if the decretal sum was paid.
16. The Respondent avers that since the appeal was on quantum and liability, half of the decretal sum be paid to him and the balance be deposited in the joint interest earning account in the names of their advocates.



17. The Respondent avers that he was the deceased eldest son and lacked money to educate and cater for his siblings left behind by the deceased.
18. The Respondent avers that the Appeal and the Application for stay as filed by the Applicant was meant to delay justice since the applicant's insurer was a habitual litigant and had filed many appeals in all its matters just to delay justice and no appeal had ever succeeded.
19. The Respondent further avers that the bank guarantee as proposed by the applicant would not help the Respondent.
20. The parties filed Written Submissions which I have considered.
21. The Applicant submitted that the judgment herein was delivered on June 14, 2022 against the Applicant. The Applicant was held 100% liable and the plaintiff was awarded total damages of Kshs 990,000/=. The Applicant was dissatisfied with the judgment and filed an appeal on quantum vide Kericho Hcca No 31 Of 2022.
22. The Applicant contended that a decretal sum of Kshs 990,000/= was manifestly excessive as to amount to an erroneous estimate of damages. The Applicant argued that she had an arguable appeal with high chances of success and therefore if stay of execution was not granted the appeal would be rendered nugatory.
23. The Applicant contended that an excessive award was made by the lower court which was not proportionate to the injuries sustained and deserved to be relooked at. The Applicant therefore submitted that the appeal herein was arguable and raised serious points of law and fact that warranted the court's intervention on appeal.
24. The Applicant reiterated that in applications for stay pending appeal it is not a requirement to show that the appeal has high chances of success rather that it is arguable. The Applicants cited the Court of Appeal case of [*Kenya Revenue Authority v Sidney Keitany Changole & 3 Others \(2015\) eKLR*](#).
25. The Applicant reiterated that the Respondent's means were unknown and it was unlikely that the Respondent will be capable of refunding the decretal sum in the event that the appeal succeeds, in which case the applicant would suffer irreparable loss or damage. The Respondent had not disclosed nor furnished the court with any documentary evidence to prove his financial standing. The applicant cited the case of [*Edward Kamau & Another v Hannah Mukui Gichuki & Another \(2015\) eKLR*](#).
26. The Applicant submitted that she had approached the court as soon as possible and thus not guilty of laches since the judgement herein was delivered on June 14, 2022 and the Applicant filed her memorandum of appeal on June 28, 2022 which was well within the 30 days initial stay of execution period and that an application for stay pending appeal was filed on July 12, 2022.
27. The Applicant submitted that she was willing, ready and able to furnish security in the form of a bank guarantee for the decretal sum of Kshs 990,000/= pending hearing and determination of the appeal. The Applicant was opposed to having any sums being released to the Respondent on the ground that the liability was being challenged and further that the Respondent had equally preferred a cross appeal on the issue of liability. She cited the case of [*Samuel Chege Gitbua & Another v Sophia Nyokabi Wambui \[2011\] eKLR*](#)
28. The Applicant having satisfied all conditions set out in order 42 rule 6 implored the court to allow the application dated July 11, 2022 and that she be granted an order of stay of execution pending hearing and determination of the appeal.



29. The Respondent in opposing the application submitted that the Appellant/Applicant had not met the threshold of grant of stay of execution pending appeal under Order 42 rule 6 (2) of the [Civil Procedure Rules](#).
30. The Respondent contended that he was opposed to a bank guarantee as a mode of security and more specifically whereby the purported bank guarantee was not attached and its authenticity unknown.
31. The Respondent reiterated that the Appellant/Applicant had not demonstrated how she would suffer substantial loss by settling the decretal sum. That the applicant had just demonstrated that the appeal had been filed or she intended to file an appeal but had not demonstrated that the intended appeal had a chance of success. The Respondent cited the case of [Victory Construction v BM \(a minor suing through next friend one PMM\) \[2019\] eKLR](#), Machakos Civil Appeal 19 of 2019.
32. The Respondent contended that since the occurrence of the accident is not disputed and the applicant was only appealing on quantum, it was only fair and prudent to have part of the judgment sum released to the Respondent. The Respondent cited the case of [George Obonyo v Marcel Ochieng \[2019\] eKLR, Nairobi Civil Appeal 372 of 2019](#)
33. The sole issue for determination is whether the applicant is entitled to stay of Execution pending appeal.
34. The Governing Provision is Order 42 Rule 6 which states as follows:
 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 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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.



35. In *Antoine Ndiaye Versus. African Virtual University(2015), eKLR*, the court stated as follows: - 'The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:
- a) The application is brought without undue delay;
 - b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
 - c) 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.'
36. In *Francis Mboya Wambua Versus Agnes Ndinda Masai & Another(2017) eKLR*, the court stated that: - 'For a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 rule 6 (2) to the effect that:
- (a) The application for stay must be made without unreasonable delay from the date of the decree or order to be stayed;
 - (b) The applicant must show that he will suffer substantial loss if the orders of stay is not granted, and
 - (c) The applicant offers such security as the court may order to bind him to satisfy any ultimate orders the court may make binding upon him.'
37. The duty of this Court is to balance the interest of the parties. The Applicant has a right of appeal and the Respondent is entitled to the fruit of his Judgment.
38. In *Ruw Versus Ekw(2019) eKLR*, the court stated that: - '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 to ensure that no party suffers prejudice that cannot be compensated by an award of cost. 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.'
39. I allow the Application dated July 11, 2022 on the following grounds:
- i. That the appellant deposits half the decretal sum in an interest earning account held jointly by Advocates for both parties within 30 days of this date.
 - ii. That the Appeal be Expedited.
 - iii. That the costs of the Application to be borne by the Applicants

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

A. N. ONGERI

JUDGE

