



Kigen v Director of Public Prosecution & 2 others; Kiptolus (Intended Interested Party) (Petition E005 of 2022) [2023] KEHC 794 (KLR) (3 February 2023) (Ruling)

Neutral citation: [2023] KEHC 794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E005 OF 2022
RN NYAKUNDI, J
FEBRUARY 3, 2023**

BETWEEN

TITUS KIPKOECH KIGEN APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

CHRISTOPHER SUTER KIPTOLUS INTENDED INTERESTED PARTY

(Emanating from the judgement in Iten Chief Magistrates Case No E065 of 2022)

RULING

1. The applicant filed a notice of motion dated November 18, 2022 seeking the following orders;
 - 1) Spent
 - 2) That, this honourable court be pleased to order for stay of execution of the judgment made on 15th day of November, 2022 dismissing the petition and thereby exposing the applicant to criminal prosecution in Iten Senior Principal Magistrates Court Criminal Case No E068 of 2022 R v Titus Kipkoech Kigen pending hearing and determination of the intended appeal.
 - 3) Spent.
2. The application is premised on the grounds set out in the application and the contents of the affidavit sworn in support of said application.



Applicant's Case

3. The applicants' case is that is aggrieved by the decision of honourable court delivered on November 15, 2022 herein and have preferred an appeal before the Court of Appeal which raises serious matters of facts and law and which has overwhelming chances of success. He is apprehensive and gravely prejudiced that should execution proceed, he could be arrested and prosecuted in Iten Senior Principal Magistrates Court under criminal case no Eo68 of 2022 which is likely to render the intended appeal nugatory and a mere academic exercise.

Respondent's Case

4. The respondents did not respond to the application or file any submissions on the application.

Analysis & Determination

5. The applicant seeks an order of stay of execution on the judgment of this court that was delivered on November 15, 2022. The import of the judgment was that it dismissed the petition of the applicant herein where he sought a declaration to quash the criminal proceedings in Iten Chief Magistrates Case No E065 of 2022 R vs Titus Kipkoech Kigen.

It follows that the issues for determination that arise are;

Whether the court should grant orders of stay of execution

6. The application is expressed to be brought under order 42 rule 6(c) and order 40 rule 12 of the *Civil Procedure Rules*. Whereas there is no rule 6(c) under order 42, rule 6 states;
 - (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.
7. I further note that there is no provision such as order 40 rule 12 in the *Civil Procedure Rules*. The principles that guide court when deciding on application for stay of execution pending appeal are clearing set out under order 42 rule 6 (1) and (2) of the *Civil Procedure Rules*, which provides:
 - (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.



8. The law in terms of order 42 rule 6(1) of the *Civil Procedure Rules* is as of now settled as demonstrated in the case of *Deposit Protection Fund Board Suing as the Liquidator of Reliance Bank Limited (In Liquidation) v Panachand Jivraj shah and others*, Nairobi (Miliminai) High Court civil case number 1529 of 2001. It is here where the court expressed itself as follows: That stay of execution of a decree or a final order of the court does not ensue automatically but an applicant has to satisfy the threshold pertaining to the following conditions:
- i. That there is a sufficient cause for the grant of the order for stay of execution of the decree or order
 - ii. That the substantial loss may result to the applicant unless the order is made
 - iii. That the application has been made without unreasonable delay
 - iv. That security as to this court orders for the due performance of such decree order that is binding on the applicant has been given by the applicant
9. For an application of stay of execution to succeed, the clustered condition precedents must be satisfied by any overzealous litigant set to pursue his right of appeal as a constitutional right. Notwithstanding, it is also the legal policy framework as stated in the case of *National Bank of Kenya Ltd v Jivraj Raisbi & Brothers Ltd and others* Nairobi civil application number 153 of 2002 that is the duty of the court to safeguard the interest of both parties. In this regard the decision in *Kenya Commercial Bank v Alloys Kabihuru Kaven t/a Alloys Kaven & Co Bakery*, Nairobi Civil Application Number 296 of 2004 places considerable weight on the principle:
- a) The application for an application for stay pending appeal is bound to satisfy the court that its intended appeal is arguable and is not a frivolous one, and secondly, that if the court does not grant the stay orders sought the intended appeal, if it were to succeed would be rendered nugatory. (See *Odunga's Digest on Civil Case Law and Procedure* 3rd Edition Volume 9)
10. As set out in the applicant's affidavit one of the key anxieties is about the likelihood of being prosecuted for the offences already identified by the investigating officer which was the subject matter before this court. In essence the invocation for order 42 rule 6 by the applicant is to point out that in absence of stay of execution in the interim to enable him pursue the appeal to the court of appeal is likely to occasion substantial loss. I bear in mind that the stay of execution sought is not against a money decree but one aimed at the doctrine of exhaustion in our legal system to vindicate one's rights. It is the legal duty of the applicant to discharge the burden of proof on substantial loss which is not remediable by a quantum of damages. The case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR:
- “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.”
11. After considering the rival submissions under the circumstances of this case it is the view of the court that the root of the appeal be determined by the court of appeal given the fact that its underpinned within the basic structure in chapter 4 on the bill of rights of our constitution. The basis of this finding and exercise of my discretion is on a prospect of that memorandum of appeal being given a



differential legal typology in any event. Therefore, in absence of stay of execution the applicant's appeal may be rendered nugatory and substantial loss is likely to take effect. The petition subject matter of this application focused on the crucial role played by the constitution as a catalogue of the most important individual rights and guarantees concerning threats, violations, or infringements when it comes to implementation of the criminal law frame work. To that extent, the wider interpretation of order 42 rule 6(1) of the Civil Procedure Rules, section 1(A) 1(B) and 3(A) of the Civil Procedure Act ordains me to exercise discretion to allow the application with a rider that an appeal be filed within 30 days from today's date. this involves preparation of record of the appeal and have it served upon the respondents. in default the orders on stay of execution shall lapse unless reconsidered by the court of appeal.

I make no orders as to cost.

DATED, SIGNED AND DELIVERED ON THIS 3RD DAY OF FEBRUARY 2023

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R. NYAKUNDI

JUDGE

