



Karanu & another v Nyundo & another (Suing as the legal representatives of the estate of Zahra Umazi Idd (Deceased)) (Civil Appeal E076 of 2021) [2023] KEHC 774 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEHC 774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E076 OF 2021
GMA DULU, J
FEBRUARY 2, 2023**

BETWEEN

JOSEPH KARANU 1ST APPLICANT

BUSCAR EA LIMITED 2ND APPLICANT

AND

IDD KALIMBO NYUNDO 1ST RESPONDENT

AFUA MWIDADI 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ZAHRA
UMAZI IDD (DECEASED)**

RULING

1. Before me is an application dated December 15, 2022 by way of notice of motion brought under section 3A, 79G and 95 of the *Civil Procedure Act* (cap 21), and order 22 rule 22, and order 42 rule 6 as well as order 51 rule 1 and 2 of the *Civil Procedure Rules*.
2. The application has 8 prayers, some of which have been spent as follows:-
 1. (Spent)
 2. (Spent)
 3. That the court be pleased to stay execution of the judgment and decree in Makindu Chief Magistrates Court civil suit No 131 of 2018 pending hearing and determination of the application and hearing of High Court Appeal Makueni No 76 of 2021 filed herein.
 4. (Spent)



5. That the warrants of attachment and sale issued to Trophy Auctioneers on February 19, 2021 and proclamation dated December 9, 2021 or any form of advertisement or sale of the defendant's proclaimed properties be set aside and or lifted unconditionally.
 6. That the court allows the appellants/applicants to furnish the court with reasonable security in the form of a bank guarantee.
 7. (Spent)
 8. That the costs of the application abide the outcome of the appeal.
3. The application has grounds on the face of the notice of motion that judgment had been entered against the appellant in favour of the respondent for Kshs 2,325,525/= plus interest and costs, that attachment and sale warrants had been issued on February 19, 2021 and that the applicant had filed Makueni HCC No 76 of 2021 which is arguable and that unless execution is stayed, the appeal will be rendered nugatory.
 4. The application was filed with a supporting affidavit sworn on December 16, 2021 by Kevin Ngure the Deputy Claims Manager of Directline Assurance Co Ltd the insurers of the subject accident motor vehicle which amplifies the grounds of the application.
 5. The application has been opposed through a replying affidavit sworn on February 28, 2022 by Iddi Kalimbo Nyundo, one of the respondents, in which it was deponed that the initial stay of execution granted by court for 30 days ended on October 27, 2021 and that this application was filed two (2) months after that lapse, and that the intention of the application was to deny and delay the respondent from enjoying the fruits of the judgment.
 6. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka & Company for the applicants and K. Lughanje & Company for the respondents.
 7. This is an application for stay of execution of judgment or decree. That being so, it is governed by the provisions of order 42 rule 6 of the Civil Procedure Rules, especially rule 6(2) which states as follows:-
 - 6(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 filed 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. I note that the application herein was filed in December 2021, after an appeal was filed on October 26, 2021, and the initial stay of execution orders granted by the trial court lapsed on October 27, 2021. In my view, taking cumulatively the various actions taken by the applicant, it cannot be said that the application was filed after inordinate delay, even though it was filed after proclamation of sale of assets had been made.
 9. With regard to the second consideration whether the applicant might suffer substantial loss if the stay orders sought are not granted, my answer is in the affirmative, as this being money decree, if the decretal amount is paid and the appeal succeeds, from the facts disclosed to me, there might be difficulty in getting repayment of the amount from the respondents. However, the appeal herein being on quantum of damages, in my view, the applicant will have to pay part of the decretal amount to the respondents as a condition for this court granting stay orders.



10. With regard to provision of security, though the applicant has offered to provide a bank guarantee, in my view, the part payment of the decretal amount to be paid as above, is sufficient security.
11. I thus allow the application and order as follows:-
 - i. Stay of execution of decree or judgment or decree is hereby granted pending hearing and determination of appeal.
 - ii. Stay of execution of warrants of attachment and proclamation and sale herein is granted pending determination of appeal.
 - iii. The stay orders granted in (i) and (ii) above is subject to the applicant paying the respondent though counsel part of the decretal amount of Kshs 400,000/= within 45 days from today and in default the stay orders granted herein above will automatically lapse and have no effect.
 - iv. The costs of this application will abide the outcome of the appeal.

DELIVERED, SIGNED & DATED THIS 2ND DAY OF FEBRUARY, 2023, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

