



Maina v Dimbu (Civil Appeal 171 of 2022) [2023] KEHC 868 (KLR) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 171 OF 2022
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

JOSEPH BENARD MAINA APPELLANT

AND

CHARLES JOSHI DIMBU RESPONDENT

RULING

Coram : Before Justice R. Nyakundi

Kimondi Gachoks & Company Advocates

Mwinamo Lugonzo & co Advocates

1. The application before court is one dated November 17, 2012 and filed in court on November 23, 2022 seeking the following orders:
 1. That this application be certified urgent and be heard *ex parte* in the first instance
 2. That this honourable court be pleased to grant an interim order for stay of execution of the judgment and/or decree made on October 28, 2022 for Kshs 1,736,000/= pending the hearing and determination of this application *interparties*
 3. That this honourable court be pleased to grant order for stay of execution of the judgement and/or decree made on October 28, 2022 for Kshs 1,736,000/= pending the hearing and determination of the appeal in Eldoret High Court civil appeal No E117 of 2022
 4. That this honourable court be pleased to allow the appellant furnish security for the entire decretal amount being Ksh 1,736,000 by way of bank guarantee
 5. That this honourable court be pleased to allow the appellant furnish security
 6. That the costs of this application be provided for.



2. The application is based on the grounds that are crafted on the face of the motion and an affidavit sworn by Joseph Benard Maina dated November 17, 2022. From the background the averments the impugned judgement was delivered on October 28, 2022 for Kshs 1,736,000 with a stay of execution of 30 days before the lower court. However the applicant being aggrieved with the decision of this honourable court has lodged an appeal against the judgment of the trial magistrate delivered on October 28, 2022 for Kshs 1,736,000 in Eldoret High Court civil appeal No E171 of 2022 . That Eldoret High Court civil appeal No E71/22 raise triable issues and unless orders for stay of execution are granted the appeal herein stands to be rendered nugatory.
3. At the hearing application was canvassed by way of written submissions both counsels filed the aforesaid submissions for and against an order for stay of execution for a decree made by the Chief Magistrate at Eldoret.

Resolution

4. The principles governing the ground of stay of execution are based on order 42 rule 6(1) of the [Civil Procedure rules](#). Similarly, the power of this court in dealing with such applications is well settled. Some of the critical principles are illustrated in [RWW v EKW](#) [2019] eKLR considered the purpose of a stay of execution order pending appeal, in the following words.

“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 costs.
5. The key question is whether without stay the appeal will be rendered nugatory. That question was considered in the case of [Stanley Kagethe Kinyanjui v Tony Ketter & Sothers](#) [2013] eKLR “whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved”
6. In addition, the applicant is bound to satisfy the following conditions before any stay can be granted. This is what the court in [Hamisi Juma Mbaya v Amakecho Mbaya](#) [2018] eKLR that
 1. Substantial loss may result to the applicant unless the order is made
 2. The application has been made without unreasonable delay, and
 3. Such security as the court orders for the due performance of the decree of order as may ultimately be binding on the applicant has been given by the applicant”
7. It is quite clear from the notice of motion the applicant is dissatisfied with the exercise discretion on assessment of damages which appeared to go against the weight of the evidence adduced before the trial court. On the other hand, the respondent bears the burden of demonstrating that he has the capability to refund the decretal sum of 1,736,000/= in the event the appeal succeed. Unfortunately, in the instant case there is no averment to that effect which will prove to the applicant that the ground on substantial loss has been controverted. Given that perspective the applicant has put up a strong case for this court to exercise discretion to allow the notice of motion dated November 17, 2022 with the following orders to abide.



1. That the appellant be at liberty to deposit the decretal sum in a joint earning interests account of both counsels in a reputable financial institution or in the alternative provide a bank guarantee of the same amount within 45 days from todays ruling.
2. That the appellant to file and serve the record of appeal within the same stipulated period in clause 1
3. That in default of compliance with clause No 1 the stay orders of execution shall lapse
4. That further directions be taken on March 27, 2023

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

In the presence of Matekwa for Mwinamo for the Respondent.

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R. NYAKUNDI

JUDGE

