



REPUBLIC OF KENYA



KENYA LAW
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**Serem & another v Owaga (Civil Appeal E204 of 2022)
[2023] KEHC 806 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E204 OF 2022
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

CLEMENT KIBIRGEN SEREM 1ST APPELLANT

WILFRED KIPCHUMBA BIRGEN 2ND APPELLANT

AND

EUNICE ODHIAMBO OWAGA RESPONDENT

RULING

1. Before this court is a notice of motion dated December 23, 2022 seeking the remedy for a stay of execution of the judgement /decree arising out of the chief magistrate’s court at Eldoret in Civil Case No 710/2018. It is expressed to be brought pursuant to articles 48, 50, 19 159, and 162 of the Constitution 1A 1B 3A of the Civil Procedure Act, order 42 rule 6(1) (2), order 22 rule 22 and 25, rule 3 of the High court (Practice and Procedure) Rules order 9 rule 9 and order 51 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law)
2. I support of the application, is an affidavit deposed by Clement Kibirgen Serem. In addition, the brief grounds for the stay of execution are:
 - a) That following the judgement being delivered, a stay of execution of thirty days was issued which stay is about to lapse on December 24, 2022
 - b) That the plaintiff will be at liberty to execute against the applicants anytime from then
 - c) That the applicants are aggrieved by the judgement of this court and wants to proffer an appeal against it
 - d) The applicants have an arguable appeal with good prospects of success



- e) That in the event the plaintiff enforces the said judgement the intended appeal will be rendered nugatory
 - f) The applicant shall suffer irreparable loss and damage unless prayers sought herein are granted
 - g) The applicant has been made without undue delay
 - h) The plaintiff/respondent will not be prejudiced in any way if orders sought are granted
 - i) It is just and fair that the application be allowed and the applicant accorded and opportunity of being heard
3. Mr Oyaro leaned counsel of the applicant canvassed the notice of motion by way of written submissions outlining the basis of the appeal as against the judgement of the lower court. Mr Oyaro submitted that the court has an inherent jurisdiction to grant a stay of execution of the decree pending the hearing of an intended appeal. From the submissions, Mr Oyaro placed reliance on the principles in the following cases: *Kenya Tea Growers Association & Another vs Kenya Planers & Agricultural Workers Union Civil Application No 72 of 2001*, *Mainkam Limited and Another v Multicooice Kenya Limited [2020] eKLR*, *Lake Victoria Water Services Board & another v Alfred Odongo Amombo [2017] eKLR*, *Tropical Commodities Suppliers Limited and Others v International Credit Bank Limited (in liquidation) [2004] EA LR 331*, *Kenya Airports Authority v Mitu –Bell Welfare Society & Another [2014] eKLR* in his submissions Mr Oyaro argued that the grant of stay pending appeal is discretionary remedy and in view of the appeal it is likely to be rendered nugatory in absence of stay. Secondly it was his contention that the applicants have a reasonable prospect of success in their appeal as the mandatory award by all means is punitive and excessive. Thirdly that in the event stay is not granted the applicant will suffer substantial loss not capable of being compensated by way of damages.
 4. On the other hand the respondent counsel Mr Rioba Omboto vehemently opposed any grant of stay of execution for lack of satisfying the criteria outlined under order 42 rule 6 (1) (2) of the Civil Procedure Rules. This is because a successful party ought not to be deprived of the fruits of a judgement given in his favour. Mr Omboto relied on the following cases to buttress his arguments against this court exercising any discretion to grant the orders sought by the applicant. '*Hellen Waruguru Waweru v Kiarie Shoes Stores Limited [2015] eKLR*' See also *Kemfro Africa Ltd T/a Meru Express Services & Another v AM Lubia & Another*, Supra'
 5. That is the background upon which this application has to be determined by this court. In terms of jurisprudence courts have pronounced themselves on the jurisdiction and discretion to decline or grant stay of execution. One such case is *Kwa Hola pharmacy v copy Cat coast Ltd [2002] 2KLR 269* which the court held: Under order 41, rule 4(1) now order 42 rule 6(1) of the Civil Procedure rules, the court before which as application for stay is being considered will order for such a stay is sufficient cause is shown to it and /or if it is just to make such an order. However, the court making such an order will not make such an order unless it is satisfied that substantial loss may result to applicant unless the order is made and tht the application has been made without unreasonable delay and unless such security as the court will consider reasonable for the due performance of the decree or order may have been given by the applicant. The court has under the said order jurisdiction to grant temporary injunction restraining the decree holder from executing the decree until the appeal is determined. However, the principles governing the stay or such injunction' are the same. Underlined emphasis mine'
 6. This also the approach from the comparative jurisdiction with a common law heritage with Kenya as demonstrated in the cases of: *Marie Makhoul and Marguerita Dsire v Sabina James Alcide* In *Marie*



Makboul Madam Gorge Creque JA (as she then was) stated the principles in paragraph 3 to 5 of the judgement as follows:-

- ' 3. The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly, there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favor, particularly after a full trial on the merits.
4. The modern authority on the guiding principles the court employs in exercising its discretion to grant a stay is the case of *Linotype-Hell Finance Ltd v Baker* where Staughton LJ opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success. It must be emphasized that it is not enough to merely make a bald assertion to the effect that an applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.
5. The authority of *Hammond Suddard Solicitors v Agrichem International Holdings* is grounded in the same principle though formulated differently. In that case the court pointed out that the evidence in support of a stay needs to be full, frank and clear. They went on to state the principle thus: u whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other 6 SLUHCVAP No 30/2011 6 hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent?'

[14] Similarly, in the *Marguerite Desir* case the court held inter alia as follows: 'The court's jurisdiction to grant a stay is based upon the principle that justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the court is whether there is a risk of injustice to one or both parties if it grants or refused a stay. Further, the evidence in support of the application for stay of execution should be full, frank and clear. The normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting one. The mere existence of arguable grounds of appeal is not by itself a good enough reason.'

7. The essential elements on the grant of stay of execution is as stated in the case of: [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.

8. 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.'
9. I have had the opportunity of considering the factual matrix outlined in both the affidavit in support and on the other hand the replying affidavit in opposition to the notice of motion subject matter of this case. It is my considered opinion that order 42 rule 6(1) of the Civil Procedure Rules and the principles in the cited cases be given a harmonious reading in such a manner to allow the reliefs as premised by the applicant to reach a decision to grant stay of execution pending the hearing and determination of the intended appeal. Further that the applicant be at liberty to deposit the entire decretal sum in a joint earning interest account of both counsels seized of this subject matter within a period of 60 days from today's date. Thereafter the appellant do file a record of appeal and have it served upon the respondent within the same period captioned above. That the costs of this application abide the outcome of the intended appeal.

Orders accordingly.

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

In the presence of Oyaro for the Appellant

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R. NYAKUNDI

JUDGE

Coram: Before Hon. R. Nyakundi

M/s Rioba Omboto & co Advocates

M/s Oyaro & Co Advocates

