



**Akwima v Ngrine (Civil Appeal E151 of 2022)
[2023] KEHC 1627 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E151 OF 2022
EM MURIITHI, J
MARCH 9, 2023**

BETWEEN

LAWRENCE AKWIMA APPELLANT

AND

JAMES NGIRINE RESPONDENT

RULING

1. Before the court is an application under certificate of urgency dated 16/11/2022 seeking stay of execution of the judgment and decree of Tigania PMCC No. 68 of 2019 delivered on 6/10/2022 pending the hearing and determination of this appeal. The appellant, in his supporting affidavit avers that he will suffer substantial loss if the judgment of the trial court is not stayed, as the respondent is a man of straw who might be unable to refund the decretal sum if execution proceeds and his appeal eventually succeeds. He expresses his readiness to provide security for the satisfaction of the decree in the event his appeal does not succeed. In his view, the respondent will not suffer any prejudice if the application, which has been brought without undue delay, is allowed.
2. The respondent has opposed the application vide his replying affidavit sworn by Betty Kiyuki, his counsel on 22/11/2022. She avers that the respondent proved his case on a balance of probabilities and the judgment entered against the weight of the facts and evidence should not be interfered with. She accuses the appellant of failing to disclose the substantial loss or any sufficient cause to warrant stay of execution. According to her, there is no way the appeal can be rendered nugatory if the decretal sum is paid to the respondent, as the same would be recoverable without any substantial loss to the appellant, if at all the appeal were to succeed. She avers that there would be substantial injustice on the part of the respondent, as he would be indefinitely kept from enjoying the fruits of a valid judgment. Although she believes the application is unmeritorious, she is agreeable to conditional stay being granted upon release of half the decretal sum to the respondent and the deposit of the balance in a joint interest account.



3. The appellant faults the respondent for failing to depone as to what his means are and cites [Kenya Orient Insurance Co Ltd v Paul Mathenge Gichuki & another](#) [2014] eKLR. He urges that he preferred the appeal and the instant application hastily, without any delay and in good faith. He urges the court to grant unconditional stay, as the Respondent has not demonstrated that he can be entrusted with the decretal amount or any portion thereof.
4. The respondent feels that the appellant has not demonstrated that he shall in any way suffer substantial loss if the application is dismissed, and cites [Kenya Shell Ltd v Benjamin Karuga Kibiru & another](#) [1986] eKLR. He urges that the appellant has not furnished security, and cites [Meteine Ole Kilelu & 10 others v Moses K. Nailole](#) [2009] eKLR, [Paul Nderitu Mwangi & another v Jacinter Mbete Mutisya & another \(Suing as the legal Representatives of the Estate of William Mbithi Musonzo\(Deceased\)\)](#) [2018] eKLR, [Kenya Shell Limited v Kibiru](#) [1986] KLR 410 and [Machira T/A Machira & Co. Advocates v East African Standard \(No 2\)](#) [2002] KLR 63. He urges that the appeal has no chances of success especially because the trial court's decision was based on law and facts, and relies on [Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others](#) [2013] eKLR and [Mohammed Salim T/A Choice Butchery v Nasserpuria Memon Jamat](#) [2013] eKLR. He prays for the dismissal of the application with costs, but if the court is inclined to allow it, he prays that the entire decretal sum be released to him.

Analysis and Determination

5. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#), 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 appeal case of 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.
 - 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.”

Substantial loss

6. The cornerstone consideration for granting stay is substantial loss, which has been espoused by the Court of Appeal (Platt, AG JA) in [Kenya Shell Limited v Kibiru another](#) [1986] eKLR as follows: -

“If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be



prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

7. The appellant is worried that if the decretal sum is paid to the respondent, who is not a person of means, the same will be lost, and his appeal will be rendered nugatory. The respondent insists that the trial court’s decision was based facts and law and he should not be kept away from enjoying the fruits of his judgment. Although the respondent has not offered a rebuttal to the appellant’s assertion that he is not a man of means who is capable of refunding the decretal sum in the event the appeal succeeds, the decretal sum in issue is only Ksh. 100,000. The appellant, in his memorandum of appeal faults the trial court for finding him liable for defamation when the elements thereof had not been proved on a balance of probabilities. This court finds that the appeal is indeed arguable, which is not one which must necessarily succeed and neither is it for the court to go into the merits of the intended appeal.
8. The court must thus ensure that the intended appeal is not rendered nugatory, while also safeguarding the Respondent’s right to enjoy the fruits of his judgment.
9. The court finds that the application herein was filed timeously without any delay as the judgment sought to be appealed against was delivered on 6/10/2022.
10. The court appreciates the Appellant’s willingness to offer security for the due performance of the decree, and the Respondent’s inclination to accept either payment of half the decretal sum or deposit of the entire decretal sum in a joint interest account, as security.

Orders

11. Accordingly, for the reasons set out above, the court allows the appellant’s application dated 16/11/2022 in the following terms:
 1. An order for stay of execution of the Judgment and Decree in Tigania PMCC No. 68 of 2019 pending the hearing and determination of this appeal is hereby issued.
 2. The record of appeal to be filed within 60 days from the date hereof.
 3. The appellant shall pay to the respondent half the decretal sum being Ksh.50,000/= and deposit the balance thereof into an escrow account in the joint names of the advocates for the parties within 30 days from the date hereof.
 4. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
 5. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 9TH DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Nkunjia & Co. Advocates for the Appellant.

M/S Kithome Mutinda & Co. Advocates for the Respondent.

