



REPUBLIC OF KENYA



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**Kamau v Musau & another (Civil Appeal E137 of 2022)
[2023] KEHC 2411 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2411 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E137 OF 2022
MW MUIGAI, J
MARCH 16, 2023**

BETWEEN

DAVID KIBUGI KAMAU APPLICANT

AND

BENSON MUTUA MUSAU 1ST RESPONDENT

JOHN IRUNGU MWANGI 2ND RESPONDENT

*(Being an Appeal from the judgment delivered by Hon. W. Njuguna (RM)
in Kangundo, on 2nd September, 2022 in CMCC Case No. 29 of 2019)*

RULING

Notice Of Motion Application

1. The application dated the 26th of September 2022 under Section 3A, 79G and 95 of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rule 4, 6 and 7 Order 50 Rules 1 and 3 the Civil Procedure Rules, 2010, seeking the following orders, THAT;
 - a. Spent.
 - b. Spent.
 - c. This Hon. Court be pleased to order a stay of execution of the judgment/ decree delivered on 2nd September, 2022 by Hon. W. Njuguna (RM) Kangundo in CMCC 29 of 2019 pending hearing and determination of this Appeal.
 - d. This Hon. Court allow the Appellant to furnish the court with security in the form of a bank guarantee as from a reputable bank pending the full hearing and determination of this appeal.



- e. The application be heard interparties on such date and time as this Honorable Court may direct.
 - f. The cost of this application abide the outcome of the appeal.
2. The Application is supported by the affidavit of sworn by David Kabugu Kamau dated 21st of September, 2022 in which he deposed that he is the owner of Motor vehicle registration KBN 709G insured by Directline Assurance at the time of the accident. That judgment was delivered against him as follows; liability 100%, and the plaintiff was awarded general damages of Kshs 150,000/= plus cost and interest. He deposed that being aggrieved and dissatisfied with the said whole judgment he decided to appeal against the said judgment; that the appeal is merited, arguable and raises pertinent points of law and has overwhelming chances of success; deposing that the Respondent may levy execution against him should the 30 days stay granted the trial court lapses and the same may render the appeal nugatory and cause him suffer irreparable loss and damage. Deposing that judgment is for a substantial amount and is apprehensive that if the 1st Respondent is paid he may deal with the same in a manner prejudicial to him and if the appeal is successful, he might not be able to recover the same from the Respondent; that the Respondent has not furnished court with proof of his financial standing. Deposing that the insurance is ready and willing able to furnish the court with bank guarantee as security; that the application is made in good faith and will not prejudice the Respondents.

Respondents' Replying Affidavit

3. The Respondents filed a Replying Affidavit sworn by Benson Mutua Musau dated 19th October, 2022, in which she deposed that the instant application is scandalous, vexatious and an abuse of the Court process. That the appellant is not in any way blaming him for the accident. Deposing that the Application is fatally incompetent as no judgment nor decree has been attached and further that the purported Bank Guarantee does not meet the necessary legal requirements as provided by law; it has not been signed by the bank hence not a binding contract.; that said guarantee is meant to be for twelve months from 18/02/2022 hence would lapse on 17/02/2023 when the appeal would have not been concluded; that the applicant has not proved that he will suffer any substantial loss if the judgment is satisfied before the appeal is determined; that the allegation that he is a person of unknown means is unfounded and scandalous as he is in a gainful employment with stable income. Deposing that application is mischievous aimed at denying him the enjoyment of the fruits of the judgment; that in the event the application is successful half of the decretal sum be paid directly to him and balance be deposited in a joint interest earning account in the names the counsel in record. Deposing further that application be dismissed with cost to him.

The application was disposed of by way of written submissions.

The Applicant's Submission

4. The Appellants filed their submissions on 15th November, 2022, in which was submitted that issues for consideration is whether substantial loss will occur. As to this issue the affidavit of the Applicant was relied in which it was averred that the insurer is ready and willing to issue security in the form of a Bank Guarantee. It was submitted that the Respondent is the only one who can specifically show that he has means to repay the decretal if the court allows the filing of memorandum of Appeal and the said appeal succeeds. Reliance was placed in the case of Edward Kamau & Another vs Hannah Mukui Gichuki & Another (2015) eKLR R.E Aburili J on this issue opined as follows:

“This court appreciates that the applicants being a party seeking favourable exercise of the court's discretion is under a legal duty to place some material before the court upon which



such discretion should be exercised. In other words they should prove that the respondent is so impecunious that if the decretal sum is paid then they will not recoup should the appeal succeed, thereby rendering it nugatory. They have also argued that although the respondent is offering a bank guarantee, that is not deposited on her affidavit of means.”

5. It was further submitted that the learned judge was in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the Respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed. In the court of appeal holding of *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike* Court of Appeal Civil Application No. 238/2005 the Court Appeal held that:-

“This court has said before and it would bear repeating that while the legal duty is on the applicant to prove the allegations that the appeal would be rendered nugatory because the Respondent would be unable to pay back the decretal sum, it is unreasonable to expect that such an applicant to know in detail the resources owned by Respondent or the lack of them. Once the applicant expresses reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential must then shift to the respondent to show what resources he has since that is the matter which is peculiarly within his knowledge”

6. The applicant in submitting on substantial loss relied in the case of *Tabro Transporters Ltd vs Absalom Dova Lumbasi* (2012) eKLR Gikonyo J stated as follows: the Court of Appeal reinforced the centrality of substantial loss in the case of *Mukuma vs Abuoga* where it termed substantial loss as being the cornerstone of the discretion by the High Court in the granting of stay of execution under Order 42 of the CPR.
7. They submitted that judgment was delivered in favor of the Respondent against the Applicants for general damages of a sum of 150,000/= plus cost and interest as of the date of judgment against the defendant is challenged in the Memorandum of Appeal. They further opined that this was a substantial sum and in the event the Respondent is unable to repay the decretal sum, the Appeal will have been rendered nugatory and the applicant exposed to irreparable damage; that the court should exercise its discretion and order stay of execution.
8. On the issue of no delay to file the application, it was submitted that no inordinate delay on the part of the Applicant in appealing the matter. reliance was placed in supporting affidavit of David Kibugu Kamau. They submitted that there was no delay in filing the application.
9. As to the issue of the applicant being ready and willing to furnish security. It was submitted that the Applicant’s insurer is ready and willing to provide a Bank Guarantee as Security for stay of execution pending Appeal. They made reference to paragraph 10 of their supporting affidavit and further reference was made to the case of *Empower Installations Limited vs Eswari Electricals Ltd* interested party *Kenya Electricity Generating Co. Ltd* (2016) eKLR parties were allowed to issue a Bank guarantee from a reputable Bank as ordered by the court through its ruling within 30 days from the date of the ruling herein.
10. They finally submitted that having satisfied the conditions set in Order 42 Rule 6 CPR 2010 prayed to be granted an order of stay of stay of execution pending the hearing and determination of the said Appeal.

Respondents’ Submission

11. Respondents in their submissions filed on 14th December, 2022 raised the following issues:



- a. whether the Appellant has an appeal with the likelihood of success against the 1st Respondent.
 - b. Whether the Appellant will suffer irreparable loss if the application is not allowed.
 - c. Whether the Applicant has supplied security as per the law.
12. As to whether the Appellant has an appeal with the likelihood of success against the 1st Respondent they opined that Memorandum of Appeal reveals that the main contestation is that liability was high against the Appellant. Contending 1st Respondent was awarded Kshs 150,000 for general damages for soft tissue injuries; that this award cannot be said to be outside recent cases with similar injuries.
13. Whether the applicant has supplied security as per the law, in this issue reliance was placed on Order 42 Rule 6 (2) CPR 2010 of the Civil Procedure Rules 2010 which provides that:
- “No order for stay of execution shall be made under subrule (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.”
14. Respondents submitted that the Applicant failed to provide any security contending that the purported Bank Guarantee did not meet the necessary legal requirements under Section 3 (2) *Law of Contract Act*, which states that-
- “No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.”
15. It was submitted further that the purported bank guarantee has not been signed by either the Guarantor or Bank hence does not amount to a binding contract admissible as evidence of any agreement between the parties. It was contended that the security is not sufficient in terms of the duration as it is to last for 12 months which was granted in February 2022 to February 2023 and the Applicant is seeking to stay the order, meaning that the Bank Guarantee may expire before it is actually used.
16. As to whether the Appellant will suffer irreparable loss if the application is not allowed, it was submitted that there is no evidence of loss the Appellant stands to suffer if the 1st Respondent is paid directly the decretal sum by the said Directline Insurance Company.
17. Submitting that the application is unmerited and should be dismissed with cost to the Respondent. Conversely if the application is allowed there be a condition that half the decretal amount of 150,000/= be paid directly to the Respondent and balance thereof be deposited in a joint interest earning account in the names of the Counsel on record for both parties.



Analysis/determination

18. I have considered the application, affidavits in support and in opposition to and the written submissions and I find that the issue for determination is whether the Applicant is entitled to the orders sought in the said application.
19. The application is premised on Order 42 Rules 6 of the Civil Procedure Rules, 2010 it is stipulated as follows:
- “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.
20. The Applicant deposed that he is apprehensive 1st Respondent as a Decree Holder may proceed and levy execution against them should the 30 days stay period granted by the trial court lapse; that the same may render the Appeal nugatory and cause them suffer irreparable loss and damage since the respondent has not furnished the court with any evidence as to his financial standing. I have perused the records and found that the Appellants failed to demonstrate in particular the substantial loss that they would suffer if the decretal amount is paid to the Respondent. On the other hand, the Respondent has merely stated that he is gainfully employed earning stable income and has failed to give any prove of the same.
22. In Michael Kamau Kurumah and 2 Others vs Agness Mwikali Malonza HCC 181 OF 2021 that:
- “However, the mere fact that the Respondent’s means are unknown to the Applicant does not necessarily mean that if the appeal succeeds, he will not be able to refund the decretal sum. It is upon the Applicant to positively and satisfactorily prove that the consequences of releasing the decretal sum to the Respondent, would be that the same would be out of reach of the Applicant and would be irrecoverable or at least very difficult to recover in the event of the successful appeal”
22. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,
- “the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the



Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. Apart from that there is no basis for forming the view that the Respondent will not be able to refund the decretal sum if the same is paid over to him.”

23. In Gichuhi, Ag,JA (as he then was) in Kenya Shell Limited vs. Kibiru [1986] KLR 410, at 417 held:

“It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

24. In the forging, I find that none of the parties have shown what substantial loss they will suffer.

25. On the ground of time, Judgment in Kangundo CMCC No E29 of 2022 was delivered on 2nd of September, 2022 and the current application was filed on 27th of September 2022. I therefore find that this was done within reasonable time.

26. As to the issue of an arguable appeal, the Court of Appeal in Safaricom Ltd vs Ocean View Beach Hotel Ltd & 2 Others (2010) eKLR R.S.C. Omolo JA (as he then was) stated that:

“For my part, I would hold that the applicant has satisfied me that it has an arguable and not a frivolous appeal and I would repeat the caution that an arguable appeal does not mean an appeal that will or must succeed.”

27. Having perused Memorandum of Appeal and without going into the merits thereof, I find that the Appeal raises arguable issues that will be determined by the Appellate court

28. As regards the issue of deposit of security, the Applicants have offered to give a bank guarantee of Kshs. 50,000,000 from Family Bank that the Respondent contends that the Applicant has failed to provide security as the said Bank Guarantee does not meet the necessary legal requirement under the law of Contract being that it was not signed by the Guarantor or Bank. Further that the said Bank Guarantee is for a period of twelve (12) months.

29. This Court in Focin Motorcycle co. vs Ann Wambui Wangui & Another Civil Appeal No 22 of 2017, observed that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

30. From the record, the Family Bank Guarantee at Clause 2, “its duration is for twelve (12) months with an option to renew”. However, the same will be expiring at the time the matter will be proceeding to Appeal I have considered the same and find that the court is clothed with discretion to determine security.



31. The court, in *In Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates Justice Gikonyo (as he then was)* held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

Disposition

32. In the end, I issue the following orders;

- a. There be a stay of execution pending hearing and determination of this Appeal.
- b. The Appellants will provide security by deposit ½ decretal sum in a joint earning interest account in the name of the advocates for the respective parties on record within Ninety (90) days from the date of this Ruling.
- c. The Appellant to take out a Bond in favour of the Respondent individually or collectively with other Respondents/cases on appeal for the decretal amount and factors renewal clause for security during the hearing and determination of the appeal. Within 90 days.
- d. In default of (b) or (c) the appeal shall stand dismissed
- e. Costs shall abide in the appeal.

It so ordered.

RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 16TH MARCH 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M.W.MUIGAI

JUDGE

