



Kitova & another v JMM (minor) suing through BMP & another (Civil Appeal E136 of 2022) [2023] KEHC 2239 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E136 OF 2022
MW MUIGAI, J
MARCH 16, 2023**

BETWEEN

JULIANA NDUNGE KITOVA 1ST APPELLANT

STEPHEN KIMUYU KITOVA 2ND APPELLANT

AND

JMM (MINOR) SUING THROUGH BMP 1ST RESPONDENT

MACHAKOS COUNTY GOVERNMENT 2ND RESPONDENT

(Being an appeal from the judgment on quantum and liability of the Honorable Magistrate Brenda Bartoo, Senior Resident Magistrate in Machakos CMCC NO. E298 of 2021 dated and delivered on 1st September, 2022)

RULING

Notice Of Motion Application

1. The application dated the September 26, 2022 brought 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](#) seeking the following orders, that;
 - a. Spent.
 - b. Spent.
 - c. This Hon Court be pleased to order a stay of execution of the judgement in Machakos civil suit No 298 of 2021 delivered by Hon B Bartoo, Senior Resident Magistrate on September 1, 2022 pending hearing and determination of this appeal.



- d. The appellants/ applicant be allowed to furnish the court with bank guarantee as security from a reputable bank pending the hearing and determination of the appeal and the instant application.
 - e. The cost of this application abide the outcome of the appeal.
2. The application is supported by the affidavit of Stephen Kimuyu Kitova sworn but not dated and filed on November 27, 2022 in which he deposed that he is the owner of Motor vehicle registration KAZ 525U while the 1st appellant was his driver at the date of the alleged accident and he (driver) donated him the authority to swear this affidavit on behalf of the diver and himself; that judgment was delivered against them as follows; liability 100%, general damages 380,000/= special damages 8,100/= plus cost and interest. They deposed that being aggrieved and dissatisfied with the said whole judgment on liability and quantum they 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 them and the same may render the appeal nugatory and cause them suffer irreparable loss and damage. They further averred that if the decretal amount is paid over to the 1st respondent, the said respondent would be in no position to refund the same if the appeal was successful; that the application be allowed in the interest of justice.

Respondent's Replying Affidavit

3. The respondents filed a replying affidavit sworn by BMP dated October 4, 2022 in which she deposed that applicants' application is made in bad faith to deny her the fruits of her rightfully obtained judgment; that she is of substance and can repay back the decretal sum in the event the alleged appeal succeeds. Deposing that the applicants have not satisfied the condition for stay in that, no appeal with chances, the applicants has not shown they will suffer substantial loss if stay is not granted; that the applicants have not offered any security and the purported bank guarantee was obtained before judgment and not for this suit. She deposed that appeal in money decree are never rendered nugatory for one can sue for refund; that half of the decretal sum be paid since the appeal is on quantum.
4. The application was disposed of by way of written submissions.

The Appellants'/Applicants' Submissions

5. The appellants filed there submissions on November 21, 2022, in which they submitted that issues arising for determination is whether the appellant has an arguable appeal. As to this issue, they submitted that memorandum of appeal sets out the grounds upon which the applicants intend to appeal the decision of the lower court, that they are appealing on on quantum and liability as an excessive award was made by the lower court which is not proportionate to the injuries suffered. They further submitted that applications for stay pending appeal, in the subordinate courts it is not a requirement to show that the appeal has high chances of success the applicants only need to show he has an arguable appeal.
6. Reliance was placed in the case of *Kenya Revenue Authority v Sidney Keitany Changole & 3 others* (2015) eKLR where the court held:

“This court has further held that the applicant need only prove or establish one arguable point noting that an arguable appeal is not necessarily one that will succeed, but one that is not frivolous”



7. They submitted that the applicants appeal is merited and based on very strong grounds with high chances of success.
8. As to the issue of whether substantial loss will occur from refusal to grant, they opined that the deponent in his affidavit stated that the respondent means are unknown and unlikely that the respondent will be capable of refunding the decretal amount in the event the appeal succeeds since the respondent has not furnished the court with any documentary evidence to prove her financial standing. That respondent is the only one who can specifically adduce evidence that he has the means to repay the decretal amount if the court grants stay pending appeal.
9. Reliance was made to the case of *Edward Kamau & Anor v Hannab Mukui Gichuki & Anor* (2015) eKLR R.E Aburili LJ the court stated as follows:

“This court appreciates that the applicants being a party seeking favorable 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.”

10. It was submitted that in the absence of affidavit of means the respondent’s financial status is unknown and cannot be proved hence has no means to refund the decretal amount. They opined that section 112 of the *Evidence Act* is applicable to this case since the respondent has chosen not to show that she has financial resources to pay the decretal amount.
11. It was submitted on the issue of whether the application was done without unreasonable delay that the instant application is within the required time that it was filed soon after delivery of judgment, hence no inordinate delay on the part of the applicant.
12. As to the issue of whether the appellant are ready and willing to furnish security, it was submitted that the appellant is ready and willing to provide security in the form of a bank guarantee pending the hearing and determination of the appeal as this is acceptable mode of furnishing security.
13. Reference was made to the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* (2019) eKLR, the court observed that:

“...the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favor. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal.



Respondent's Submissions

14. Respondent filed the submission on October 12, 2022 in which it was submitted that for court to grant stay, it has be satisfied with the following:
 - a. There is an appeal with chances of success and if stay is not granted, the appeal will be rendered nugatory.
 - b. Substantial loss will be suffered if stay is not granted.
 - c. Application is made without unreasonable delay.
 - d. Such security as court may order in due performance of the decree.
15. On the issue of appeal with chances of success, it was submitted that the applicants failed to satisfy the conditions for stay in order to have the court to exercise its discretion and grant stay. That the applicants in this application has not satisfied that they have an appeal with high chances of success hence they submitted that court disallow the application for stay.
16. As to the issue of substantial loss, they submitted that order 42 rule 6 (2) of the *Civil Procedure Rules* upon which this application is grounded provides for substantial loss to be proved before the court can grant stay. It was further submitted that it is not enough for one to deposed that loss will be suffered, material particulars of loss must be placed before the court by way of affidavit. It was opined that the applicant did not deduce material particulars in which loss will be suffered in their affidavit.
17. Reliance was placed among other cases *Kenya Shell Limited v Benjamin Karuga & Ruth Wairimu Karuga* CA 1982-1988, *Mutua Kilonzo v Kioko David* HCCA No 62 of 2008 in which court in dismissing an application for stay held that:
 - i. Substantial loss must be proved
 - ii. Applicant must prove that the respondent is a man of straw.
18. It was submitted on the issue of half of decretal sum that the applicants failed to establish the conditions for stay. That the court in granting stay should not be designed to deny a successful litigant from enjoying the fruit of the rightfully obtained judgment; it was further submitted that in exercising its discretion court should recognize the rights of the appellant as to the appeal as well as those of the respondent who is entitled to enjoy the fruits of her judgment and balance the same without discrimination.
19. They submitted that court order that half decretal sum paid as a condition for stay and balance be deposited in court. Reference was made cases of *Mohan Meakin Ltd v Mutunga Kiundi* Court of Appeal CA No 252 of 2000, *Kioko Peter v Kisakwa Ndolo King'oku* HCCA No 31 of 2019. They submitted that in the above cases the court held that half decretal sum be paid as condition for stay.
20. On the issue of security, they submitted that the applicants proposal to give bank guarantee as security is no money and the same is not for this case as the same was obtained before this appeal was filed. They urged the court to dismiss the application with cost.

Analysis/Determination

21. 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.



22. The application is premised on order 42 rules 6 of the [Civil Procedure Rules, 2010](#) wherein 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.

23. The applicant deposed that the respondent may levy execution against them and the same may render the appeal nugatory and cause them suffer irreparable loss and damage and that the respondent would be in no position to refund them in the event the appeal succeeds. In addition, 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 not in her reply given any indication of being able to pay back the decretal sum in the event the appeal will succeed.

24. In [Visbram Ravji Halai v 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.

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

“It is not sufficient by merely stating that the sum of Kshs 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 judgement.”

26. In the upshot of the first ground, I find that none of the parties have shown what substantial loss they will suffer.



27. On the second ground of time, judgment in Machakos CMCC No E298 of 2021 was delivered on September 1, 2022 and the current application was filed on September 27, 2022. I therefore find that this was done within reasonable time.
28. As to the issue of an arguable appeal, the Court of Appeal in *Nairobi Women's Hospital v Purity Kemunto* [2018] eKLR:-
- “To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues.”
29. Having perused the memorandum of appeal and without going into the merits, I find that the appeal raises arguable issues that will be determined by the appellate court.
30. 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 said security is no money and the same had been obtained before the appeal was filed, however, no evidence was tendered on record by the respondent to substantiate the claim.
31. From the record, the Family Bank Guarantee at clause 2, “its duration is for twelve (12) months with an option to renew”.
32. The court, in In *Arun C Sharma v Ashana Raikundalia T/A Rairundalia & Co Advocates*; Justice Gikonyo 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

33. In the end, I issue the following orders;
- a. There be a stay of execution of the judgment in Machakos civil suit No 298 of 2021 delivered by Hon B. Bartoo (SRM) on September 1, 2022 pending hearing and determination of this appeal.
 - b. The appellants deposit half 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 or
 - 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
 - c. In default of (b) or (c) the appeal shall stand dismissed.
 - d. Costs shall abide in the appeal.

It so ordered.



**RULING DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF MARCH,
2023(PHYSICAL/VIRTUAL CONFERENCE)**

M.W MUIGAI

JUDGE

