



**Kangemi Matatu Owners & another v Eastern Produced (K) Limited (Civil Appeal E765 of 2022) [2023] KEHC 1968 (KLR) (Civ) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1968 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E765 OF 2022**

**JN NJAGI, J  
MARCH 10, 2023**

**BETWEEN**

**KANGEMI MATATU OWNERS ..... 1<sup>ST</sup> APPELLANT**

**ANTHONY MWANGI KAMAU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**EASTERN PRODUCED (K) LIMITED ..... RESPONDENT**

**RULING**

1. The applicant has filed an application dated October 11, 2022 seeking for orders that:
  1. Spent
  2. Spent
  3. That pending the hearing and determination of this appeal there be a stay of execution of the judgment and Decree of Honorable Keyne G Odhiambo Obura Senior Resident Magistrate (Mr) delivered on September 15, 2022.
  4. That costs of the application be provided for.
2. The application is premised on grounds on the face of the application and supported by the affidavit of the 2<sup>nd</sup> applicant, Anthony Mwangi Kamau. It is deposed that the judgment was entered against the Applicants in the sum of Kshs 183,620/- including costs and interest. That the Applicants were aggrieved by the decision of the trial Magistrate and filed the instant appeal. It is contended that the appeal has merit and is likely to succeed. That the respondent has commenced execution proceedings against the appellant.



3. The application was opposed by the respondent through the replying affidavit of the advocate for the applicants, Susan Wagaki Murage who deponed that the appeal does not raise triable issues and therefore it is not merited. That the same should be dismissed with costs.
4. The application was canvassed by way of written submissions. The Advocates for the applicants, Masaviru & Ketoo Advocates, submitted an applicant seeking for stay of execution has to satisfy the conditions laid out under order 42 rule 6(2) that:
  1. Substantial loss may result to him/her unless the order is made;
  2. That the application has been made without unreasonable delay; and
  3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
5. Counsel cited the case of *Nicholas Stephen Okako & another v Alfred Waga Wesonga* (2022) e KLR where it was observed that an application for stay of execution is not confined to the principles outlined above but that the court is also required to consider the overriding objective envisaged in section 1A, and 1B of the *Civil Procedure Act*. The Judge opined in that case that:

“...Stay may only be granted for sufficient cause and that the court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions”.
6. The Advocates submitted that the replying affidavit in this matter is sworn by an Advocate, for the respondent who has deponed on contested issues which offend Rules of Procedure in particular order 19 rule 3 and rule 9 of the *Advocates’ (Practice) Rules*.
7. The Advocates cited the case of *Simon Isaac Ngui v Overseas Courier Services Limited* [1998] e KLR where it was held that:

“.....The applicants’ counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge information and belief. It is not competent for a party’s advocate to depon to evidentiary facts at any stage of the suit.”
8. It was submitted that the matter deposed by the Counsel for the Respondents are matters she is not able on her own knowledge to prove and as such the court should reject the affidavit.
9. Counsel for the Applicant argued that the appeal raises triable issues in that the trial court erred in reinstating the suit outside the statutory period provided; that there was no insurance policy to give rise to a claim under the Principle of Subrogation and that the Respondent did not provide a log book to prove that the respondent owned the subject motor vehicle. Counsel referred to the case of *University of Nairobi v Ricatti Business East Africa* [2020] eKLR where it was observed that an arguable appeal is not one which must necessarily succeed but one which ought to be argued fully before the court and one which is not frivolous.
10. The Advocate for the Respondent on the other hand argued that the Applicants have not given any convincing reason as to why the application for stay pending appeal should be granted as it does not raise any arguable issue and is frivolous.



11. It was submitted that there was evidence to prove the Doctrine of Subrogation. That the applicants have not provided any evidence that they will suffer substantial loss if the prayers sought are not granted. The case of *Kenya Shell Limited v Kibur* [1998] e KLR 410 was referred to in that respect.
12. It was further submitted that if the court considers allowing the application, the applicants should be ordered to furnish adequate security to the extent that the respondent is able to realize the fruits of its litigation. The case of *Aran C sharma vs Ashna Raikondalia T/A A Raikundelia & Company Advocates & 2 others* e KLR was cited.
13. The applicant is seeking for stay of execution pending the hearing and determination of an appeal. An application for stay of execution pending appeal is required to satisfy the conditions set out in order 42 rule 6(2) of the *Civil Procedure Rules* 2010. These are that the Applicant must establish that:
  1. The application was filed without unreasonable delay.
  2. That the applicant may suffer substantial loss unless the prayers sought are granted.
  3. That the applicant has given such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant.
14. The applicant did not raise these issues in their application. Their application was instead based on the merits of the appeal.
15. The purpose of an application for stay of execution pending appeal to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded - See *RWW v EKW* [2019] eKLR. Although it is apparent from the record that the application was filed without unreasonable delay, it has not been established that the applicant will suffer substantial loss if the prayers sought are not granted. The Applicant has not offered security for due performance of the decree. In the absence of these, I do not think that the court should revert to the overriding objectives stipulated in sections 1A and 1B of the *Civil Procedure Act*. The grant or refusal of an application for stay of execution pending appeal is discretionary. There is no basis for me to exercise my discretion in this matter.
16. The upshot is that the application lacks merit and is dismissed with costs to the respondent.  
Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF MARCH 2023.**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

Mr Masaviru for Applicants

Miss Onyango holding brief for Miss Ondieki for Respondent

Court Assistant – Simon

30 days right of appeal.

