



REPUBLIC OF KENYA



**Odhiambo & another v Otieno (Miscellaneous Civil Application  
23 of 2022) [2023] KEHC 2097 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
MISCELLANEOUS CIVIL APPLICATION 23 OF 2022**

**RPV WENDOH, J**

**MARCH 16, 2023**

**BETWEEN**

**HILLARY ODHIAMBO ..... 1<sup>ST</sup> APPLICANT**

**GEORGE OTIENO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BEATRICE AOKO OTIENO ..... RESPONDENT**

**RULING**

1. The application for consideration is the one dated August 22, 2022 and filed in court on August 23, 2022 by the applicants Hillary Odhiambo and George Otieno. The applicants are seeking the following orders:-
  1. Spent;
  2. That this court be pleased to grant leave to the applicants to file and/or lodge an appeal out of time against the judgement of the Hon M Obiero (SPM) in Migori CMCC No 188 of 2019 rendered and/or delivered on July 14, 2022;
  3. That this court be pleased to grant an order of stay of execution of the judgement and decree in Migori CMCC No 188 of 2019 pending the hearing and determination of the intended appeal;
  4. That this court be pleased to order the applicant to secure the decretal sum of kshs 1,300,000/ = by way of a bank guarantee;
  5. Costs of this application abide the outcome of the intended appeal.
2. The grounds upon which the application is based, are found in its body and the supporting affidavit of George Otieno the 2<sup>nd</sup> applicant. He deponed that the judgement in Migori CMCC No 188 of 2019



was delivered on July 14, 2022 and the 30 days within which an appeal ought to be lodged have lapsed; that he is aggrieved by the judgement on liability and quantum and intends to lodge an appeal against the said judgement and hence this application seeking leave to lodge the appeal out of time; that the appeal ought to have been filed by August 12, 2022 but the delay in filing the appeal was a result of the indisposition of Ms Okwoyo advocate who was in conduct of this file.

3. It was further deposed that counsel came back to the office on August 15, 2022 when the 30 days statutory period had lapsed; that the failure to file the appeal within the statutory period was not the making of the applicants but due to the indisposition of the applicant's counsel; that the application has been filed without delay; that the applicant shall suffer irreparable loss and damage as there is a likelihood that his immovable property will be sold and he will be unable to recover the decretal sum in the event the appeal is successful.
4. The applicant deposed that his appeal is arguable and has a high chance of success; that the respondent will not suffer prejudice or any damage that cannot be compensated by way of costs if the application is allowed.
5. The application was opposed. The respondent swore and filed a replying dated September 28, 2022. The respondent deposed that she had been advised by her advocates on record that there is no basis on which the application is made since no decree has been extracted and therefore there is no possibility of an execution; that an appeal should not operate as stay of execution or proceedings under a decree or order; that therefore, the prayers sort are mere sham and intended to mislead this court; that there is no evidence that the applicant will suffer substantial loss if the stay is not granted since the defendant was insured by a corporation body and that the suit motor vehicle was insured against the injuries sustained; that if the application is allowed, the respondent will suffer irreparable harm as she has incurred expenses such as costs of prosecuting the suit.
6. The respondent further stated that she is a businesswoman capable of repaying the money if the appeal succeeds and the applicants fears that he may not recover the decretal sum if the appeal succeeds does not hold water. The respondent urged the court to order that the applicants release to her half of the decretal amount and the assessed costs totalling kshs 777,210/= and the other half be deposited in a joint interest earning account in the names of both parties' advocates. The respondent asked this court to dismiss the application with costs.
7. The court directed that the application be canvassed by way of written submissions. Both parties complied. I have duly considered the position taken by each party in their respective submissions.
8. The application is one of stay pending appeal and leave to appeal out of time. Order 42 Rule (6) (1) and (2) of the [Civil Procedure Rules](#) makes provision for stay pending appeal 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 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 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.”

For an order of stay of execution to issue, the applicant should demonstrate;

- a. He shall suffer substantial loss if stay is not granted;
  - b. That the application has been filed without unreasonable delay;
  - c. The applicant is willing to furnish security for the due performance of the decree;
  - d. The applicant has an arguable appeal.
9. On the issue of substantial loss, it is the applicants' case that the appeal is meritorious with high chances of success and if the orders sought are not granted, they are apprehensive execution will issue and render the appeal nugatory. In rebuttal, the respondent stated that she is a businesswoman who is capable and the fears of the applicants do not hold water. The respondent further asked this court to release half of the decretal sum to her and the other half be deposited in a joint account in the names of both parties. In case of *Silverstein v Chesoni* [2002] 1 KLR 867 cited in *Superior Homes (Kenya) Limited v Musango Kitbome* [2018] eKLR the Court of Appeal held as follows:-

“...issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory”

10. The assurance that the applicant will not suffer substantial loss is the ability of the respondent to refund the decretal sum if the appeal succeeds. In *Superior (Homes) Kenya Limited vs Musango Kitbome (supra//)*, the court held:-

“...The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”

11. A similar finding was made in *Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua* [2001] eKLR as follows:-

“...Of course, ordinarily the burden was on the corporation to show that were its appeal to succeed, the success would be rendered nugatory because the respondent would be unable to restore the decretal sum if that sum was immediately paid out to respondent immediately. But in a case such as this where it is alleged that the respondent has no known assets, the evidential burden must shift to him to show that he has assets from which he can refund the decretal sum. That must be so because the property a man has is a matter so peculiarly within his knowledge that an applicant such as the corporation may not reasonably be expected to know them. He did not do so. An undertaking to give security by way of a bank or insurance bond is, in the circumstances of this matter, not sufficient.”



12. The applicant deposed that he intends to appeal against the quantum and liability of the judgement delivered in the trial court. whether or not the judgement on quantum will be upheld, will depend on the outcome of the hearing and determination of the substantive appeal. The respondent deposed that she is a businesswoman and a man of means. However, there is no evidence produced in court in the form of bank statements or otherwise showing the income of the respondent. She has not discharged the evidentiary burden. Hence, the prayer that half of the decretal sum be released cannot be granted.
13. This was the observation of the court in the case of Superior (Homes) Kenya Limited (*supra*). The evidentiary burden lies with the respondent. In the absence of proof from the respondent that he is able to pay the decretal amount, the applicant is bound to suffer substantial loss and the appeal will be rendered nugatory.
14. The power to grant an application for stay of execution pending appeal is discretionary in that the court when granting a stay needs to balance the interest of the appellant with those of the respondent. In the absence of evidence on the source of means by the respondent, I decline to order for a release of half of the decretal amount to the respondent.
15. On whether there was unreasonable delay in bringing this application, Section 79G of the [Civil Procedure Act](#) provides that appeals from subordinate courts should be filed within thirty (30) days from the date of judgement. The judgement herein was delivered on 14/7/2022, the appeal ought to have been lodged on or about 14/8/2022. The instant application was filed on 22/8/2022. This is a period of about 8 days after the lapse of the statutory period of 30 days. The reason for the delay was that Counsel handling the matter, Ms. Okwoyo was taken ill. The applicant supported this assertion by producing annexures “GO 1” and “GO 2” being the medical reports of Ms. Okwoyo. There was no objection from the respondent on the said medical reports. This court is inclined to believe the explanation rendered by the applicants on the delay of failing to lodge the appeal within the statutory period. The applicants diligently moved with speed and filed this application. I therefore find there was no inordinate delay.
16. On security for the due performance of the decree, the respondent submitted that the security amount of kshs 1,300,000/= was already deposited by the applicants in a joint interest earning account in the name of both advocates. I find that the applicants have complied with the provision for a security for the due performance of the decree.
17. Whether the applicant has an arguable appeal: The applicant deposed that he annexed a draft memorandum of appeal “GO-3” but the same is not annexed to the affidavit. The applicant deposed that he is disputing the judgement on quantum and liability. This is arguable.
18. In the end, I find that the application has merit and I make the following orders: -
  1. There shall be a stay of execution of the decree/judgement delivered on July 14, 2022 in Migori CMCC No 188 of 2019 Beatrice Aoko Otieno vs Hillary Odhiambo & Another pending the hearing and determination of this appeal;
  2. The already deposited amount of kshs 1,300,000/= shall remain as so pending the hearing and determination of this appeal;
  3. The applicant to file and serve the Memorandum of Appeal within 7 days hereof after payment of the requisite court fees;
  4. The applicant to file and serve the record of appeal within 60 days hereof;
  5. Costs of this application do abide the outcome of the appeal.



6. Mention before deputy registrar on May 24, 2023 to confirm compliance.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 16<sup>TH</sup> DAY OF MARCH, 2023**

**R WENDOH**

**JUDGE**

**Ruling delivered in the presence of:-**

Ms Muji for the applicants

Ms Amondi for the respondent

**Nyauke** Court Aasistant\*\*\*\*

