



Kayika v Kerubo (Civil Appeal E008 of 2022) [2023] KEHC 3076 (KLR) (14 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3076 (KLR)

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

CIVIL APPEAL E008 OF 2022

AN ONGERI, J

APRIL 14, 2023

BETWEEN

SIMON OMUTWETU KAYIKA APPELLANT

AND

DAMARIS KERUBO RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated December 16, 2021 seeking stay of execution of the judgment delivered by Hon. D. O. Mbeja (PM) in Milimani CMCC no. 2340 of 2020 on 24/9/2021 pending appeal.
2. The application is based on the grounds on the face of it that the applicant is highly aggrieved by the judgment on quantum entered by the trial court. That judgement was delivered without notice to the appellant, that the appeal is arguable with high chances of success and unless the orders sought herein are granted execution shall issue anytime rendering the appeal nugatory.
3. The application is supported by the affidavit of Simon Omutwetu Kayika, the Applicant herein dated December 16, 2021 in it he deponed that he was informed by his advocate that judgement in the trial court was to be delivered on September 24, 2021 however judgement was not delivered in the said date. His advocate later learnt that from the respondent's advocate that judgement was delivered through their letter dated November 3, 2021. His advocate has tried checking from the e-filing portal to verify when judgement was entered but there was no status update.
4. He claimed that his advocate embarked on trying to peruse the physical file which they did successfully on December 14, 2021 where they managed to obtain a copy of the judgment. He indicated that the failure to appeal within the time allowed was not intentional but due to the lack of notice from the court on when the judgment was to be delivered.
5. It was his averment that that his appeal is arguable with high chances of success and is apprehensive that the respondent having made a demand for payment of the decretal sum may proceed to execute



anytime. He indicated that he has no knowledge of the respondent's financial capability and thus worried that if the appeal succeeds the respondent would not be able to refund such sums that will become due. He indicated that he is however willing to provide security as may be required by this court.

6. The application was opposed by the replying affidavit of Damaris Kerubo, the respondent dated June 14, 2022. In it she deponed that the application herein is an afterthought intended to deny her the opportunity to enjoy the fruits of the judgement delivered by the trial court in her favour. It was her claim that the appellant was notified of the contents of the judgment on November 3, 2021 which was 5 days after its delivery.
7. She indicated that the averments by the applicant that they failed to locate the physical file are not supported by any evidence to prove the same therefore his claim is unfounded.
8. That the prayer for stay of execution should be declined for the reason that it is yet to materialize as no decree has been attached or intentions to execute explained and finally the allegation that she would not be in a position of refunding the sum due is baseless and as such the application lacks merit and should therefore be dismissed with costs.
9. The parties filed written submissions as follows; the applicant in his submission argued that it is not denied that he was not notified of the judgement. He however moved to court within two months from the date of learning that judgement had been delivered a time which was reasonable and not inordinate.
10. The applicant indicated that the amount awarded was Kshs.1,004,480 plus costs and interest. That execution of the said amount would create a state of affairs that will occasion substantial loss to him and render the appeal nugatory. That he has a genuine appeal raising arguable issues with high chances of success. He also claimed that he did not know of the respondent's physical address or her financial status and has reason to believe that she will be unable to refund the decretal sum herein.
11. It was submitted that the application herein was filed on January 11, 2022 while judgement was delivered by the lower court on 2 October 9, 2021 without notice to the applicant that occasioned the delay herein. It was his argument that the delay herein is not inordinate as it is under two months since the period as from 21st December to the 13th of January is omitted from the computation. In support the applicant cited the case of *Paul Muthini Kimongo v Flex Pac International Limited* [2019] eKLR where Njuguna J held what amounts to inordinate delay as discussed by the court in *Mwangi S. Kimenyi v Attorney General & Another* [2014] eKLR where the court held thus;

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable....”
12. The sole issue for determination in this application is whether the applicant is entitled to stay of execution pending appeal.
13. The governing legal provision is order 42 rule 6 of the *Civil Procedure Rules* which states 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.

14. The court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

15. It is the duty of this court to balance between the applicant’s right to appeal to the Court of Appeal and the respondent’s right to enjoy the fruits of her judgment.

I grant stay pending appeal on the following conditions:

- i. That half the decretal sum is deposited in court within 30 days of this date.
- ii. That the appeal is filed within 30 days of this date.
- iii. That the appeal is expedited.
- iv. The costs of the application to abide the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 14th day of April, 2023.

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A. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

