



**Kimori & another v Kwamboka (Civil Appeal E030 of 2022)
[2023] KEHC 3215 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E030 OF 2022
WA OKWANY, J
APRIL 13, 2023**

BETWEEN

SAMUEL NYAKUNDI KIMORI 1ST APPELLANT

DARSON TRADING LIMITED 2ND APPELLANT

AND

ESTHER KWAMBOKA RESPONDENT

*(Being an Appeal against the Judgment of Hon. M. C. Nyigoi – PM
Nyamira dated and delivered at Nyamira on the 25th day of May 2022 in
the original Nyamira Chief Magistrate’s Court Civil Case No. 1 of 2020)*

RULING

1. This ruling is in respect to the application dated June 24, 2022 wherein the appellant/applicant seeks, *inter alia*, stay of execution of the judgment/decree delivered on May 25, 2022 in Nyamira CMCC No 01 of 2020.
2. The application is supported by the appellant’s affidavit and is premised on the following grounds: -
 1. That the learned trial magistrate erred in law and in fact in failing to consider the appellants defence and evidence which confirmed on a balance of probability that the plaintiff’s injuries and treatment notes tendered as proof thereof had been fabricated.
 2. That the learned trial magistrate erred in law and in fact in finding and holding that the respondent/plaintiff had proved his case and the injuries sustained on a balance of probability notwithstanding the treatment notes were fraudulent.



3. That the learned trial magistrate erred in law and in fact in failing to consider the appellants defence and evidence which confirmed on a balance of probability that the plaintiff's injuries were not as a result of road traffic accident.
 4. That the learned trial magistrate erred in law and in fact in finding in favour of the respondent/plaintiff notwithstanding the appellants/defendants having established overwhelming evidence challenging the respondent's case.
 5. That the learned trial magistrate erred in law and in fact in failing to consider the appellants/defendants written submissions on the twin issue of liability and quantum awardable therefore.
 6. That the learned trial magistrate erred in law and in fact in disregarding the appellants/defendants evidence on record disproving that the plaintiff sustained head injury.
 7. That the learned trial magistrate erred in law and in fact in the assessment of quantum thereby giving an award on quantum on general damages of Kshs 250,000/= that was overly in excess in the circumstances of the case.
 8. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.
3. The respondent opposed the application through her replying affidavit dated July 25, 2022 wherein she states that the application does not meet the conditions for the granting of orders of stay of execution as spelt out under order 42 rule 6 of the [Civil Procedure Rules](#).
 4. Parties canvassed the application by way of written submissions which I have considered.
 5. When the application came up before me for hearing on November 30, 2022, Mr Orayo, learned counsel for the respondent intimated to court that his client was agreeable to the granting of the orders sought in the application as long as the entire decretal sum is deposited in an interest earning account as security for the due performance of the decree.
 6. The appellant, on the other hand, insisted that he could only offer security in the form of a bank guarantee, as a condition for stay.
 7. Order 42 rule 6 of the Civil Procedure Rules stipulates as follows: -
 6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 referred 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.



- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application
 - (4) For the purposes of this rule an appeal to the court of appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
8. In the present case, it is clear that parties are in agreement on the granting of the orders for stay of execution pending appeal. Their point of departure, as I have already stated in this ruling, is the nature of security to be offered by the applicant as a condition for the stay as while the appellant insists on giving a bank guarantee, the respondent maintained that she would only accept the deposit of the entire decretal sum.
 9. Courts have taken the position that in an application for stay of execution pending an appeal, the court must balance the interests of both the appellant and respondent. This is to say that while the respondent is entitled to the right to enjoy fruits of decree, the appellant, on the other hand, is entitled to the right to access justice by pursuing the appeal.
 10. In balancing the competing interests of the parties to this application, I will allow the application for stay of execution pending appeal, but on condition that the appellant pays half of the decretal sum to the respondent and deposits a bank guarantee in court for the other half of the decretal sum, within 30 days from the date of this ruling.
 11. In the event of failure to comply with the above condition for stay, then the stay orders issued herein above shall automatically lapse and the respondent shall be at liberty to proceed with the execution.
 12. The costs of this application shall abide the outcome of the appeal.
 13. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS
13TH DAY OF APRIL 2023.**

W. A. OKWANY

JUDGE

