



Omondi v Atito (Civil Appeal E016 of 2022) [2023] KEHC 3955 (KLR) (24 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3955 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E016 OF 2022**

JN KAMAU, J

APRIL 24, 2023

BETWEEN

EUNICE OMONDI APPELLANT

AND

CLARIS AWUOR ATITO RESPONDENT

*(Being an appeal from the Ruling of Hon. S. N. Telewa (SRM) delivered at
Kisumu in Chief Magistrate's Court Case No 41 of 2015 on 1st February 2022)*

RULING

Introduction

1. In her Notice of Motion dated and filed on 3rd March 2022, the Appellant herein sought for orders that the Ruling and consequential orders of the lower court made on 1st February 2022 by Hon S. N. Telewa be stayed pending hearing and determination of this appeal.
2. She swore an Affidavit in support of the said application on 3rd March 2022. She averred that the Respondent took out a warrant of arrest in execution of a decree against her for the sum of Kshs 1,161,350/= and that she filed an application dated 23rd August 2019 seeking among other orders that the warrant be lifted and the balance which she had estimated at Kshs 200,000/= be liquidated in monthly instalments of Kshs 10,000/= until payment in full. She added that the said application was dismissed by the Learned Trial Magistrate on 1st February 2022. She pointed out that having been aggrieved by the said decision she lodged the appeal herein.
3. She asserted that her appeal had good chances of success and that if the Respondent proceeded to execute against her, her Appeal would be rendered nugatory. She stated that the thirty (30) days stay of execution granted by the Learned Trial Magistrate upon delivery of the impugned Ruling had since lapsed and the Respondent may execute against her before the appeal was heard and determined.



4. She contended that she had made her application herein without unreasonable delay and that it was in the interest of justice that the impugned Ruling be stayed pending hearing and determination of her appeal.
5. In opposition to the said application, on 9th May 2022, the Respondent herein swore a Replying Affidavit. The same was filed on even date. She averred that in her Ruling of 1st February 2022, the Learned Trial Magistrate found that the Appellant owed her Kshs 893,250/=. She stated that the Appellant was arrested for failure to pay the decretal sum whereupon they entered into a settlement agreement in which she had so far paid her a sum of Kshs 475,000/= as at February 2021.
6. She contended that the Appellant gave her three (3) cheques which bounced on presentation as a result of which her advocate incurred banking charges of Kshs 3,500/=. She also transferred the sum of Kshs 90,000/= by way of mpesa. It was her contention that the sum that the Appellant owed her was Kshs 893,250/= as the Learned Trial Magistrate found.
7. It was her averment that the issues that had been raised in the Appeal herein had conclusively been dealt with by the Learned Trial Magistrate and that the present application was brought in bad faith, bereft of truth, misconceived in law, lacked merit and that it was a means of delaying justice and aimed at wasting the precious courts time and hence should be dismissed. She was emphatic that she would suffer prejudice if the application is allowed.
8. On 2nd June 2022, the Appellant swore a Supplementary Affidavit. The same was filed on even date. She averred that her Appeal challenged the Respondent's assertion that she owed her a sum of Kshs 893,250/=. She asserted that at the time of the impugned Ruling, she had paid the Respondent a total sum of Kshs 773,000/= and out of a sum of Kshs 870,000/= that she (the Respondent) was awarded, she had only been left with a balance of Kshs 97,000/=.
9. In that regard, she gave a breakdown of the payments she had done through mpesa, cheques, direct bank deposits, and cash through her Advocate, Mwamu & Company Advocates and through her former Advocate Ken Omollo & Company Advocates.
10. She stated that the Respondent was denying payments that she received without any basis or evidence including payments that she had receipted and that she had not adduced any evidence as to the alleged bounced cheques issued by her. She added that the Respondent had also not adduced evidence of the charges her advocate incurred as a result of the alleged bounced cheques. She urged the court to grant her an order of stay of execution pending appeal.
11. The Appellant's Written Submissions were dated and filed on 2nd June 2022 while those of the Respondent were dated 3rd October 2022 and filed on 13th October 2022. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

12. The Appellant relied on the case of *RWW v EKW* [2019]eKLR where it was held that the purpose of an application for stay of execution pending an appeal was to preserve the subject matter in dispute so that the rights of the appellant who was exercising the undoubted right of appeal were safeguarded and if the appeal was successful, it would not be rendered nugatory.
13. She relied on the case of *Butt v Rent Restriction Tribunal* [1979] where the Court of Appeal held that the power of the court to grant or refuse an application for a stay of execution was discretionary and the discretion had to be exercised in such a way so as not to prevent an appeal and/or to render it nugatory



and that the court would consider if there might be a better remedy at the end of the proceedings, special circumstances and unique requirements.

14. She also invoked Order 42 Rule 6 of the [Civil Procedure Rules](#), 2010 and referred to the case of [Visbham Ravji Halai vs Thorton & Turpin](#) [1990] eKLR where it was held that the High Court's jurisdiction under Order 42 Rule 6 of the [Civil Procedure Rules](#) was fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss, furnishing of security and that the application must be made without unreasonable delay.
15. She further placed reliance on the case of [James Wangalwa & Another vs Agnes Naliaka Cheseto](#) [2012] eKLR where it was held that substantial loss was what had to be prevented by preserving the status quo because such loss would render the appeal nugatory. In that respect, she submitted that she would suffer substantial loss as the Respondent's claim was an attempt to make her pay more than the decretal sum of Kshs 870,000/= which she had already paid in full.
16. She pointed out that her application was brought without unreasonable delay as it was filed within thirty (30) days after the delivery of the impugned Ruling.
17. The Respondent also invoked Order 42 Rule 6 of the [Civil Procedure Rules](#) 2010 and placed reliance on the case of [Kenya Shell Ltd v Kibiru & Another](#) [1980] KLR 410 where it was held that for a stay of execution to be granted, an applicant must satisfy the conditions stated in Order 42 Rule 6 (2) of the [Civil Procedure Rules](#).
18. She further cited the case of [Mohammed Salim T/A Choice Butchery v Nasserpurial Memon Jamat](#) [2013] eKLR where it was held that the right to appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour.
19. She further relied on the cases of [Mukuma v Abuoga](#) [1998] KLR 645 where it was held that substantial loss could render the appeal nugatory and [Butt vs Rent Restriction Tribunal](#) (Supra) and argued that the Appellant had not discharged the burden to prove that she would suffer substantial loss in the event the orders sought were not granted.
20. She added that the present application had not filed timeously and no justifiable reason for the delay had been given.
21. She further asserted that the Appellant had not furnished security for the performance of the decree as was held in the cases of [Meteine Olekilelu & 19 Others vs Moses K. Nailole](#) Nairobi Civil App No 340 of 2008 eKLR citation not given) and [Kenya Shell Ltd vs Kibiru & Another](#) (Supra).
22. She pointed out that costs follow event as provided for under Section 27 of the [Civil Procedure Act](#) Cap 21. In that regard, she placed reliance on the cases of [Hussein Jan Mohammed & Sons vs Twentsche Overseas Trading Co Ltd](#) [1967] EA 287 and [Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another](#) [2016] eKLR where the common thread was that the issue of costs was at the discretion of the court and was used to compensate the successful party for the trouble taken in prosecuting the case or defending the case and not to penalize the losing party. She urged the court to grant the successful party herein the costs of this application.
23. Notably, before an order for stay pending appeal under Order 42, Rule 6(2) of the [Civil Procedure Rules](#), 2010 could be granted, an applicant had to demonstrate the following:-
 1. That substantial loss may result unless the order is made.
 2. That the application had been made without unreasonable delay.



3. Such security as the court orders for the due performance of the decree has been given by the applicant.
24. The three (3) conditions for the grant of an order for stay of execution had to be met simultaneously as they are conjunctive and not disjunctive.
25. This court perused the Ruling that was delivered by the Learned Trial Magistrate on 1st February 2022 and noted that the Appellant herein was said to owe the Respondent herein a sum of Kshs 893,250/= . The Respondent did not file an Affidavit of Means to demonstrate that she was able to refund the Appellant the said sum in the event the Appellant was successful in her Appeal herein. The same was colossal.
26. In the case of Dr *G. N. Muema t/a Mt. View Maternity & Nursing Home vs Miriam Maalim Bisbar & Another* [2018] eKLR, this very court held that the rigours of recovering sums of money could amount to substantial loss because of the resources that would be put in recovering the same.
27. It was for that reason that this court found and held that the Appellant had satisfied the first condition of being granted an order for stay of execution pending appeal.
28. The Ruling the Appellant wished to appeal against was delivered on 1st February 2022. The present application was filed on 3rd March 2022. This court found and held that a period of one month from 1st February 2022 was not inordinate. There was therefore no delay in the filing of the present application. The court hence found and held that the Appellant had satisfied the second condition for being granted an order of stay of execution pending appeal.
29. In her affidavit, the Appellant was not clear on whether or not she was ready and willing to abide by any condition of this court. Be that as it may, the failure to state so was not fatal as the court had power to order that the Appellant provide security for the due performance of the decree or such order as may be ultimately binding on her.
30. As the issue of whether or not the Appellant had paid the Respondent the entire decretal sum was in dispute, it was in the interests of justice that the Appellant be granted an opportunity to ventilate her Appeal while an order for stay of execution pending appeal was in place. Indeed, this court found and held that the Appellant was likely to suffer more prejudice if the Respondent executed against her and the court determined after hearing the Appeal that she had paid the Respondent herein over and above the decretal sum.
31. Having said so, this court noted that the Respondent had acknowledged a sum of Kshs 475,000/= out of the decretal sum of Kshs 893,250/=. The Appellant had averred that only a balance of Kshs 97,000/= was left. She had asserted that as at the time she filed her application dated 23rd August 2019, she estimated the outstanding amount to have been Kshs 200,000/=.
32. As this court could not determine how much she owed the Respondent, if at all as that was an issue that could only be dealt with on appeal, this court cut a balance and determined that a sum of Kshs 200,000/= ought to be the security that the Appellant ought to furnish for the due performance of the decree as would be binding upon her pending the hearing and determination of the Appeal herein.

Disposition

33. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated and filed on 3rd March 2022 was merited and the same be and is hereby allowed in the following terms:-



1. That an order for stay of execution of the Ruling of Hon S. N. Telewa (SRM) that was delivered at Kisumu in Chief Magistrate's Court Civil Case No 41 of 2015 on 1st February 2022 be and is hereby granted pending the hearing and determination of the appeal on condition that the Appellant shall deposit the decretal sum of Kshs 200,000/= into an interest earning account in the joint names of his advocate and the Respondent's advocates herein within ninety (90) days from the date of this Ruling.
2. For the avoidance of doubt, in the event the Appellant shall default on Paragraph 33(1) hereinabove, the conditional stay of execution shall automatically lapse.
3. To progress this matter further, the Appellant be and is hereby directed to file and serve its Record of Appeal within one hundred and twenty (120) days from date of this Ruling. In the event the proceedings of the lower court and the lower court file will have been placed in the file herein and the Appellant shall have failed to file her Record of Appeal as aforesaid, the Appeal herein will stand as automatically dismissed.
4. Since the Appellant does not have control of the typing of proceedings and placing of the lower court file, the Registrar of High Court Kisumu be and is hereby directed to facilitate the typing of said proceedings and placing of the said lower court file within ninety (90) days from date of this Ruling.
5. This matter will be mentioned on 27th September 2023 to confirm compliance and/or for further orders and/or directions.
6. Costs of the application herein will be in the cause.
7. Either party is at liberty to apply.
34. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 24TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL 2023

M. SHARIFF

JUDGE

