



Odhiambo v Kioko (Suing as the legal reps of the Estate of Kiilu Mwika Mwavu) & 2 others (Civil Appeal E075 of 2022) [2023] KEHC 17716 (KLR) (15 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E075 OF 2022
TM MATHEKA, J
MAY 15, 2023**

BETWEEN

LAMBO ODHIAMBO APPELLANT

AND

**WINFRED MBEKE KIOKO (SUING AS THE LEGAL REPS OF THE ESTATE OF
KIILU MWIKA MWAVU) 1ST RESPONDENT**

UNITES SSIAISS INVESTMENT LTD 2ND RESPONDENT

CHARLES NZIOKA MUIINDE 3RD RESPONDENT

RULING

1. Before me is the application dated 16th January 20123 filed under certificate of urgency under Order 21 rule 1B, Order 22 Rule 22, Order 40 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules (CPR), Sections 1A, 1B & 3A of the Civil Procedure Act, Article 159(2) (a) & (d) of the Constitution of Kenya, 2010 seeking the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That this honorable Court be pleased to grant stay of execution of the judgment and/or decree issued by Hon Mutegi (Mr) Principal Magistrate dated and delivered on December 7, 2022 in Tawa-PMCC No 41 of 2020 pending the hearing and determination of this appeal
 - d. That this honorable court allows the applicant to furnish the Court with security in the form of a bank guarantee from a reputable bank pending the hearing and determination of this appeal.
 - e. That the costs of this application abide the outcome of the appeal.



2. The application is supported by the grounds on its face and the applicant's Affidavit sworn on the same day where he depones to the fact that the subordinate court apportioned liability at 50:50, special and general damages in favour of the respondents and he has appealed against it. He has annexed a copy of the Memorandum of Appeal. He is apprehensive that the respondent will commence execution proceedings thus rendering the appeal nugatory. A copy of the demand is exhibited with the application That his Advocate has informed him that the respondent is not a man of means hence it will be difficult to recover the decretal sum.
3. He depones that his insurer, Directline Assurance Co Ltd, is ready, willing and able to furnish the court with a bank guarantee from a reputable bank a copy of which is exhibited annexed to the application That the application has been made in good faith and will not occasion any prejudice to the respondent.
4. The application is opposed through the 1st respondent's replying affidavit sworn on February 6, 2023 where he depones that the application does not meet the basic requirements for an application for the orders sought and should be dismissed. That the security proposed is not proper as it has been used in numerous applications countrywide and there is no proof that it has not reached its limit. Further, the court has judicial notice about several banks in Kenya which have collapsed leading to huge losses at the expense of innocent citizens.
5. He depones that if the court is inclined to allow the application, half of the amount should be released to his Advocates for onward transmission to him and the balance be deposited in a joint interest earning account.
6. The application was canvassed through written submissions.

The Applicants' Submissions

7. Relying on Order 42 Rule 6(2) of the [Civil Procedure Rules](#) he submits that the pertinent questions in determining an application for stay are:-
 - a. Whether or not the Memorandum of Appeal raises arguable issues;
 - b. Whether the Appellant/Applicants have demonstrated that substantial loss will occur unless stay is granted;
 - c. Whether the Defendants/Applicants are ready to furnish such security as shall be sufficient to satisfy any decree that might ultimately be binding on the applicant.
8. On whether the appeal is arguable, he submits that the apportionment of liability is disputed as he was not to blame for the accident. He relies on [Kenya Revenue Authority vs Sidney Keitany Changole & 3 Others](#) (2015) eKLR where the Court of Appeal held:

“This court has further held that the applicant need only prove or establish one arguable point noting that an arguable appeal is not necessarily one that will succeed but one that is not frivolous.”
9. On whether substantial loss will occur, he submits that his deposition about the respondent's unknown means was not disputed in the replying affidavit. He contends that the respondent is the only one who can specifically show whether she has means to repay the decretal amount. He relies on



the case of *Edward Kamau & Anor vs Hannah Mukui Gichuki & Anor* (2015) eKLR where the court (Aburili J) opined that:

“I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed.”

10. He submits that in the absence of an affidavit of means, the respondent’s financial status is unknown and has not been proven.
11. As for security, he submits that his insurer is ready and willing to provide a bank guarantee.
12. The 1st Respondent did not wish to file any submissions choosing to rely on their response. The other respondents did not participate in the trial.

Analysis and Determination

13. The principles for grant of stay of execution pending appeal are spelled out under Order 42 Rule 6 of the *Civil Procedure Rules*, :whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and whether the applicant has furnished security for the due performance of the decree.
14. The Judgment in the subordinate court was delivered on December 7, 2022, the Memorandum of Appeal was filed on December 20, 2022 and this application was filed on January 16, 2023. There was a slight delay that cannot be said to be inordinate.
15. As for substantial loss, the appellants are apprehensive that if the decretal amount is released to the respondent, they might not recover the same if the appeal succeeds. The trial Magistrate found the appellants 50% liable and awarded the respondent Kshs 3,456,000/= for loss of dependency, Kshs 30,000/= for pain & suffering, Kshs 150,000/= for loss of expectation of life and Kshs 120,000/= for special damages.
16. As correctly submitted by the appellant, the respondent did not controvert the apprehension that he would not be able to refund the decretal sum if paid, by filing an affidavit of means. It is not disputable that, that information about her means is exclusively in her possession.
17. As for security, the applicants offered a Bank Guarantee from Family Bank and its purpose is indicated as “...for providing security for awards and or costs awarded in various Court cases/claims pending before Court”. The guarantee is dated February 18, 2022 and its duration is indicated to be “12 months with an option to renew”. Evidently, the guaranteed has lapsed and the Court was not informed as to whether renewal was done. It is also probable that the guarantee has been used in numerous applications countrywide as I have also encountered it severally. In my view, the Bank Guarantee is not appropriate.
18. This court is obligated to balance the competing interests of the two parties herein; a respondent who has judgment whose fruits she expected to be enjoying when it was handed to her, and an appellant who feels that the judgment was not fair to him and wants to pursue his constitutional right to appeal. I do not have the benefit of the judgment from the subordinate court. It is therefore difficult to assess the arguability of the appeal.
19. That besides it is only right that the applicant deposits security for the performance of the decree. The alleged bank guarantee does not exist.
20. The following orders will issue;



- a. An order be and is hereby issued staying the execution of the judgment and/or decree issued by Hon Mutegi (Mr) Principal Magistrate dated and delivered on December 7, 2022 in Tawa-PMCC No 41 of 2020 pending the hearing and determination of this appeal
- b. The applicant to deposit half the decretal sum in a joint interest earning account in the names of both Advocates on record in a reputable bank pending the hearing and determination of this appeal.
- c. The costs of this application to abide the outcome of the appeal.
- d. Orders accordingly

DATED SIGNED AND DELIVERED VIRTUALLY THIS 15TH MAY 2023

MUMBUA T MATHEKA

Judge

Applicant's Advocates

Kimondo Gachoka & Co Advocates

Respondent's Advocates

M/S Ann Thiong'o & Co Advocates

