



**Orwaru & another v Mwanzia (Civil Appeal E111 of 2021)  
[2023] KEHC 3848 (KLR) (Civ) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3848 (KLR)

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

**CIVIL**

**CIVIL APPEAL E111 OF 2021**

**JN MULWA, J**

**MAY 3, 2023**

**BETWEEN**

**ALBERT OSOORO ORWARU ..... 1<sup>ST</sup> APPELLANT**

**NEWTON KUNGU WARUI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARY GORETI MWANZIA ..... RESPONDENT**

**RULING**

1. Before the court is a motion dated April 12, 2022 brought by the Appellants.

The Appellants seek two orders from the court:

- a. Stay of execution of the trial court's judgment delivered on 3/02/2021 pending hearing and determination of the application and the appeal filed herein, and
- b. Costs of the application.

2. By the judgment dated 5/03/2021 in CMCC No. 9911 of 2018, the Respondent was awarded general damages of Kshs. 250,000/= special damages of Kshs. 5,500/- and liability apportioned at 90% against the Appellants in a road traffic accident wherein the Respondent was injured while a passenger in the Appellants motor vehicle.

3. The Appellants being dissatisfied with the award of general damages, being excessive, filed this appeal on 8/03/2021.

The application is opposed by a replying affidavit sworn by the Respondent from which both parties filed their written submissions that the court has considered.



4. In their submissions dated 10/08/2022, the Appellants urged the court for grant of stay orders putting forth reasons that substantial loss may result unless the orders are made, and offering security for the due performance of the decree as the court may determine. They also argue that the appeal has high chances of success.

On her part, the Respondent submits that the Appellants have not met the threshold for grant of the orders sought and therefore the application ought to be dismissed with costs.

5. Order 42 rule 6(2) Civil Procedure Rules provides for the conditions that an applicant must meet for an order of stay of execution pending appeal being:
- a. and
  - b. Such security as the court orders for the due performance of such decree or may ultimately be binding on him has been given by the applicant.
  - c. That 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;

6. On the matter of delay, the court finds that the judgment appealed against having been delivered on the 5/03/2021, the statutory 30 days period lapsed on the 5/04/2021, and this application having been filed about 7 days thereafter, the delay is not inordinate.

7. On substantial loss, it is trite that substantial loss is the cornerstone for this type of application. The applicants must establish what loss they would incur that would irreparably affect or negate the very essential core of the applicant- James Wangalwa & Another vs. Agnes Naliaka (2012) eKLR.

Further, in the case Mukuma V. Abuoga (1988) KLR, the Court of Appeal held that:

Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

See also Sarah Chepkurui Birechi V. Plastico Industries Ltd (2023) eKLR.

8. While the Appellants submit that if the decretal sum is paid out to the Respondent she may not be able to pay back should the appeal succeed, they have not offered any evidence of the said financial inability of the Respondent.

It is trite that the evidential burden would only shift to the Respondent once the applicant has laid sufficient basis for its submission. That is what the court in Tarbo Transporters Ltd V. Absalom Dora Lumbasi (20213) eKLR held, and I fully concur with the holding.

9. The decree appealed against is a money decree. It is not a subject that may get wasted or damaged pending the hearing of the appeal. The Appellants having failed to tender sufficient evidence of the Respondent's inability to repay the same, the Applicants have not satisfied that condition.

10. On the matter of security for the due performance of the decree, the Respondent suggests that the full decretal sum be deposited in a joint interest earning account to await the outcome of the appeal.

The Appellants have stated that they will comply with whatever conditions the court finds fit to grant.

11. In Mwaura Karuga T/A Limited Enterprises V. Kenya Bus Services Ltd & 4 others (2015); and Arun C. Sharma V. Ashana Raikundalia T/A Raimuda & Co. Advocates & 2 others (2014) eKLR, the courts



rendered themselves on the purpose of security needed under order 42; thus to guarantee the due performance of such decree or order but not to punish the applicant.

12. Having considered the relevant underpinnings, the court finds that the application dated April 12, 2022 has some merit that cannot be ignored.
13. Consequently, the application is allowed upon the following conditions being complied with by the applicants/appellants: -
  - a. There shall be stay of execution of the decree of the trial court pending hearing and determination of the appeal subject to: -
  - b. The appellants depositing 50% of the judgment sum into an interest earning account in the parties Advocates names within 40 days of this ruling.
  - c. The appellants shall pay to the Respondent through his advocates on record the balance of 50% of the judgment sum within 40 days of this ruling.
  - d. Should the appellants fail to comply with any of the above orders, within the stated timeframe, the stay orders shall lapse automatically.
  - e. Costs of the application shall be borne by the appellants.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MAY 2023.**

**J. N. MULWA**

**JUDGE**

