



REPUBLIC OF KENYA



Wahome v Juma (Civil Appeal 2 of 2022) [2023] KEHC 18880 (KLR) (17 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18880 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 2 OF 2022
SM GITHINJI, J
MAY 17, 2023**

BETWEEN

DUNCAN KARUKU WAHOME APPELLANT

AND

ZIPPORAH KASEMBI JUMA RESPONDENT

(Being an appeal from the judgment and decree of the learned Resident Magistrate Hon. S.D.Sitati in Civil Suit No.159 of 2020 delivered on the 20th December, 2021 in the Magistrate's Court at Kilifi)

RULING

CORAM: Hon. Justice S. M. Githinji

Ms Gichira for the Respondent

Mr Nyabero Advocate for the Respondent

1. On December 20, 2021, judgment was entered against the Appellant by Hon SD Sitati in Kilifi CMCC No 159 of 2020. The trial magistrate apportioned liability to the Appellant at 100% and proceeded to award the Respondent Kshs 1,102,865/- as general damages, loss of earning, special damages and costs. Dissatisfied with the said judgment, the Appellant preferred the present appeal on liability and quantum. They filed after the memorandum of appeal, a Notice of Motion application dated January 27, 2022 seeking the following orders which are the subject of this ruling; -

1. Spent.
2. Spent.
3. That upon hearing this application inter parties this Honourable Court be pleased to grant a stay of execution of the judgment/decree of the Honourable Court delivered on December 20, 2021 by the Honourable SD Sitati, resident



magistrate in Kilifi CMCC No 159 of 2020 pending the hearing and determination of the instant appeal.

4. That upon hearing the application inter parties this Honourable Court be pleased to allow the Applicant to furnish the Court with security in the form of a Bank Guarantee from the Family Bank within the provisions of section 5 of the *Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013* (Cap 405) which caps the amount paid by the Insurance to 3 million.
 5. Costs.
2. The application is supported by the affidavit sworn by Kelvin Nguire, the Deputy Claims Manager at Directline Assurance Company, the Insurer of the subject motor vehicle xxxx. He was apprehensive that the appeal has high chances of success and should the decretal sum be paid over to the Respondent, the appeal will be rendered nugatory. He added that the insurer is ready and willing to provide a Bank Guarantee as security for stay of execution during the pendency of this appeal.
 3. In opposing the application, the Respondent swore an affidavit on February 11, 2022 in which she deposed that the appeal is frivolous and intended to delay justice since liability is not denied. The judgment sum is commensurate to the injuries she suffered. She avers that the appeal will not be rendered nugatory since she could comfortably pay back the judgment sum.
 4. The Respondent asserted that the Appellant had not met the conditions to grant an order for stay and this court should dismiss the application. However, should the court find it reasonable to allow the application, then it should be on condition that the Appellant deposit the entire decretal sum plus costs due in court within 30 days or any reasonable time; or deposit half of the decretal sum or a substantial part thereof in an interest earning account in the joint names of the parties' advocates and release the other half plus costs to the Respondent within 30 days. That should the Appellant fail to comply with the set conditions, then the Respondent be at liberty to proceed with execution.

Analysis and Determination

5. I have considered the application, the supporting affidavit, the replying affidavit, the submissions filed as well as the authorities relied upon.
6. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:
 - ' (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.'

7. Further to the above, stay may only be granted for sufficient cause and in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#). The court is enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#).
8. It is clear therefore that this court's jurisdiction to grant a stay pending appeal is to a good extent fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
9. The present application was made without unreasonable delay, however we must determine whether the Appellant has met the other crucial conditions.
10. As to what substantial loss is, it was observed in [James Wangalwa & Another v Agnes Naliaka Cheseto \[2012\] eKLR](#), that:

' No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.'

11. I have gone through the decision of the Court of Appeal cited to me by the Respondent, [Kenya Shell Limited v Benjamin Karuga Kibiru and another \[1986\] eKLR](#) where the judges explained; -

' It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money...

It is not sufficient by merely stating that the sum of Kshs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.

12. In this case, the Appellant was only apprehensive that he will not be able to recover the decretal sum which is a substantial amount since the Respondent may deal with the same in a manner prejudicial to the Appellant. To him, this will render the appeal nugatory causing him substantial loss. In my view, this does not demonstrate he is likely to suffer substantial loss. The Respondent swore that she was a woman of means with several business and would not have a problem paying back the decretal sum should the appeal succeed. It is not sufficient to merely state that the decretal sum is a lot of money and



the applicant would suffer loss if the money is paid. To this end, I am not convinced that substantial loss has been demonstrated by the Appellant.

13. The next issue for consideration is security. Under Order 42 rule 6 above, the appellant is required to offer security for the due performance of the decree. I agree with the position in *Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 Others [2015] eKLR*, where it was held that:

' The security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words 'ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.'

14. The Appellant urges that he be allowed to furnish a bank guarantee from Family Bank. I am not certain of how the guarantee will specifically shield the Respondent. However, I note that the Respondent was willing to accept any other form of security. In the circumstances of this case, I will grant a stay of execution of the decree herein on condition that the Applicant pay to the Respondent half of the decretal sum and deposit the remaining half together with costs and accruing interests to a joint interest earning account in the names of the advocates herein. These conditions to be met within 30 days from the date of this ruling; in default the stay orders lapses and the Respondent will be at liberty to execute.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17TH DAY OF MAY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Alasa for the Applicant

Mr Gichira for the Respondent

