



**Crown Bus Services & another v SH (Minor suing through mother and next friend)
ESH (Civil Appeal E003 of 2022) [2023] KEHC 18870 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E003 OF 2022
TM MATHEKA, J
JUNE 5, 2023**

BETWEEN

CROWN BUS SERVICES 1ST APPELLANT

RODGERS LEZENI ISAMA 2ND APPELLANT

AND

SH (MINOR SUING THROUGH MOTHER AND NEXT FRIEND)

ESH RESPONDENT

RULING

1. Before me is the application dated 17/01/2022 filed under certificate of urgency. It is brought under Order 21 Rule 1B, Order 22 Rule 22, Order 42 Rule 6, Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010, Sections 1A, 1B & 3A of the [Civil Procedure Act](#), Article 159 (2)(a) & (d) of the [Constitution](#) of Kenya, 2010 and all other enabling provisions of the law. It seeks the following orders: -
 - a. Spent.
 - b. That this honorable Court be pleased to order a stay of execution of judgment and/or decree issued by C.A Mayamba, Principal Magistrate on 24/12/2021 pending the hearing and determination of this application.
 - c. That this honorable Court be pleased to order a stay of execution of judgment and/or decree issued by C.A Mayamba, Principal Magistrate on 24/12/2021 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 the Diamond Trust Bank and/or Family Bank.
 - e. That the application be heard inter- partes on such date and time as this honorable Court may direct.



- f. 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 Affidavit of the 2nd applicant sworn on the same day. He depones that the appeal has high chances of success as the respondent did not prove liability hence not deserving of the quantum of damages awarded. The memorandum of appeal is exhibited as CMM-1. He depones that the respondent has not furnished Court with documentary evidence of his financial standing hence the apprehension that he will not be in a position to refund the decretal sum if the appeal succeeds; that his insurer, Directline Assurance Company, is ready, willing and able to furnish the Court with a Bank Guarantee as security. A copy of Bank Guarantee is exhibited as CMM-2; that the application is made in good faith and will not occasion any prejudice to the respondent.
 3. The application is opposed through the respondent's replying affidavit sworn on 07/04/2022. She depones that the applicants have not satisfied the conditions for grant of stay that they have not demonstrated how they will suffer substantial loss and have offered an expired bank guarantee as security.
 4. The application was canvassed through written submissions.

The Applicant' Submissions

5. The applicants submit that the appeal is arguable and their main ground is 'conventional awards given for similar injuries'. They contend that the appeal only needs to be arguable as there is no requirement for it to have high chances of success.
6. They submit that substantial loss will occur because the respondent's means are unknown and it is highly unlikely that she will be capable of refunding the decretal sum if the appeal succeeds. They contend that the respondent has not furnished Court with any documentary evidence to prove her financial standing. They rely on the case of Edward Kamau & anor v Hannab Mukui Gichuki & anor (2015) eKLR where the Court (Aburili J) opined as follows:-

“This Court appreciates that the applicants being a party seeking favorable exercise of court's discretion is under a legal duty to place some material before the Court upon which such discretion should be exercised. In other words, they should prove that the respondent is so impecunious that if the decretal sum is paid then they will not recoup should the appeal succeed, thereby rendering it nugatory. They have also argued that although the respondent is offering a bank guarantee, that is not deposited on her affidavit of means. 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”

7. With regard to security, they submit that the insurer is ready and willing to provide a Bank Guarantee.

The Respondent's Submissions

8. With regard to whether the applicants will suffer substantial loss, she submits that no evidence has been adduced to support the assumptions about her financial capacity or lack thereof. She relies on the case of Grace Wangui Ngenye v Capital Group Ltd (2019) eKLR where the Court stated that:-

“My view is that while there lies truth in such argument, it is also relevant to appreciate that the evidence laid by the applicant should meet the prima facie standard at the very least.



It is not sufficient for the applicant to merely state that the respondent lacks the financial capability to refund the requisite amount.”

9. She submits that the probability of success of the appeal is not a factor to be put into consideration at this stage of proceedings.
10. It is also her submission that the appeal only challenges the decision on quantum as the judgment on liability was entered by consent. Accordingly, she contends that no prejudice will be suffered if execution is carried out because either way, she will not leave the Court empty handed.
11. She concedes that the motion was tabled before Court without undue delay.
12. As for security, she submits that the Bank Guarantee proposed by the respondent has expired.
13. Having looked at the application, the supporting affidavit, the replying affidavit and the rival submissions, the only issue for determination is whether the application is merited.

Whether stay of execution should be granted

14. Under Order 42 Rule 6 of the *Civil Procedure Rules*, the grant stay pending appeal will depend on; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.
15. This application was filed without delay and the respondent has conceded as much.
16. 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 learned trial Magistrate found the appellants 100% liable and awarded the respondent Kshs 700,000/= as general damages for pain and suffering and Kshs 3,550/= as special damages. The respondent did not make any deposition on her financial position and did not file any affidavit of means. Accordingly, this Court has no way of knowing whether the respondent has capacity to refund the decretal sum.
17. As for security, I have looked at the exhibited Guarantee from Family Bank. The limit is 50 million 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 31/08/2021 and its duration is indicated to be “12 months with an option to renew”. Evidently and as correctly submitted by the respondent, the alleged guaranteed has expired and the Court was not informed as to whether renewal was done.
18. Be that as it may, the Court has a duty to balance the competing interests between the parties. While it is the appellant’s right to pursue an appeal, the respondent should also enjoy the fruits of winning the first round.
19. In conclusion, the application is merited and the following orders issues:-
 - i. That there be an order a stay of execution of judgment and/or decree issued by C.A Mayamba, Principal Magistrate on 24/12/2021 in Kilungu MCC no 122 of 2020 pending the hearing and determination of this appeal.
 - ii. That the applicant to pay to the respondent one third of the total decretal sum within 30 days hereof and the balance be deposited in a joint interest earning account in the names of both counsel within 45 days hereof. In default of either the order of stay will lapse.
 - iii. That the costs of this application to abide the outcome of the appeal.
 - iv. Orders Accordingly



DATED, SIGNED AND DELIVERED VIA EMAIL THIS 5TH JUNE 2023

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MUMBUA T MATHEKA JUDGE

