



**Ndavi v Kioko (Civil Appeal E59 of 2022) [2023] KEHC 18872 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18872 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E59 OF 2022**

**TM MATHEKA, J**

**JUNE 5, 2023**

**BETWEEN**

**JOSEPH MUTUKU NDAVI ..... APPELLANT**

**AND**

**PAUL MBITHI KIOKO ..... RESPONDENT**

**RULING**

1. The application before me is the notice of motion dated November 18, 2022. It was filed under certificate of urgency and is brought under order 22 rule 22, order 42 rules 4, 6 & 7, order 50 rule 6, order 51 rules 1 & 3 of the [Civil Procedure Rules 2010](#), sections 3A, 79G & 95 of the [Civil Procedure Act](#) 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 delivered by the trial court on November 10, 2022 pending the hearing and determination of this application.
  - c) That this honorable court be pleased to order a stay of execution of judgment delivered by the trial court on November 10, 2022 pending the hearing and determination of the intended appeal.
  - d) That the application be heard inter partes on such date and time as this honorable court may direct.
  - e) That the appellants/applicants be allowed to furnish the court with bank guarantee as security pending the hearing and determination of the intended appeal and the instant application.
  - 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 applicant sworn on the same day. He depones that the judgment on quantum is excessive and the appeal has high chances of success. The memorandum of appeal is exhibited as JMN-1. He deposes that the respondent is a person of unknown means hence apprehensive that the appeal will be an academic exercise if the decretal sum is paid out. It is also his deposition that his underwriter, Directline Assurance Company, is ready, willing and able to furnish the court with a reasonable bank guarantee as security copy of which is annexed as JMN-2. Further, he deposes that the application has been presented without inordinate delay.
3. The application is opposed through the replying affidavit of the respondent sworn on January 10, 2023. He depones that the appeal does not raise any triable issues for consideration by this court since the decision of the trial court was well reasoned and the defence did not adduce any evidence; that the appeal is a waste of time because the judgment sum is within the range awarded by most courts; that the applicant is not a party to the bank guarantee and there is no evidence that it is for this specific matter; that he is gainfully employed and is able to refund the entire decretal sum; that the application has not met the conditions set out in order 42 rule 6 of the [Civil Procedure Rules](#).
4. The application was canvassed through written submissions.

### **The Applicant's Submissions**

5. It is submitted for the applicant that the judgment is substantial and he stands to suffer irreparable harm because the respondent's ability to refund the decretal sum is unknown. He submits that failure to grant the orders sought will amount to denying him the opportunity to exhaust his legal remedies.
6. That the respondent has not filed an affidavit of means thus there is a risk of failure to compensate him if the appeal succeeds. It is also his submission that there is no inordinate delay as the judgment being appealed was delivered on November 10, 2022.
7. That a bank guarantee is an acceptable way of furnishing security as was held in the case of [Justin Mutinga David v China Road & Bridge Corporation \(K\) Ltd](#) [2019] eKLR.

### **The Respondent's Submissions**

8. With regard to whether the applicant will suffer substantial loss if stay is not granted, it is submitted for the respondent that he is a person of means who is gainfully employed hence able to refund the decretal amount. He relies on the case of [Michael Ntouthi Mitheu v Abraham Kivondo Musau](#) [2021] eKLR where the court (Odunga J) stated that:

“What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view, even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success. Suffice to say as was held in *Stephen Wanjohi v Central Glass Industries Ltd* Nairobi HCCC No 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay. It is enough that the decree holder is not a dishonorable miscreant without any form of income.”

9. With regard to security, the respondent submits that the purported bank guarantee has an expiry date of February 18, 2023 and there is no certainty of being renewed. He contends that it is a general bank guarantee and there is no evidence that it has been facilitated for this specific matter. He relies on the



case of *Nobel Trading Co Ltd & 2 others v Peter Odhiambo Marega* [2022] eKLR where the court (Chemitei J) stated that:-

“On the third condition of security, the applicant has offered a bank guarantee. There is an agreement exhibited between Diamond Trust Bank and the directors of Directline Assurance Company Limited who are the insurers of the applicants. The same is for a sum of Kshs 30 million. It is for a period of 12 months and it is expiring on November 30, 2021. This court takes note of the fact that applicant is not a party to the said agreement and that there is no evidence that the said guarantee is for the benefit of this matter specifically. Moreover, there is no evidence that as at the time of this ruling, the same had been renewed.”

10. The respondent submits that the applicant has failed to satisfy this court on two cardinal principles for grant of stay of execution hence the application is devoid of merit and should be dismissed with costs.
11. I have carefully considered the application, the rival affidavits and submissions, and the only issue for determination is whether the application is merited;

### **Whether Stay Of Execution Should Be Granted**

12. Under order 42 rule 6 of the *Civil Procedure Rules*, the grant stay pending appeal will depend on whether the applicant has established; 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.
13. The judgment appealed from was delivered on November 10, 2022, the memorandum of appeal was filed on November 22, 2022 which is within the 30 days period provided for filing appeals from the subordinate court to the High Court. This application was filed on November 18, 2022, evidently, there is no delay.
14. 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 100% liable and awarded the respondent Kshs 100,000/= as general damages and Kshs 6,200/= as special damages. The respondent deposed that he is gainfully employed but did not file an affidavit of means. The decretal sum is not substantial if a need for its recovery arises.
15. As for security, I have looked at the said bank guarantee 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 December 18, 2022 and its duration is indicated to be “12 months with an option to renew”. Evidently and as correctly submitted by the respondent, the guarantee has expired and the court was not informed as to whether renewal was done.
16. In addition the document headed application for additional banking facilities annexed as JMN2 in the replying affidavit indicates its purpose as “...for providing security for awards and or costs awarded in various court cases/claims pending before court”. it bears the date stamp received February 23, 2022 Family Bank Moi Avenue. It is undated but its duration is indicated to be “12 months with an option to renew”. However, the same appears to be incomplete. The part for the bank official’s initials is not signed, it is not dated or sealed by the directors and many parts are unsigned. It is not a document this court can rely upon as clearly it is incomplete.
17. The judgment of the subordinate court was not annexed to the application. I have however noted from the memorandum of appeal that the main complaint by the applicant is the quantum of damages being excessive, and the 100% liability. The respondent deposed that he was a passenger in the accident



motor vehicle. That part was not contradicted by the applicant. Neither is the applicant saying that the finding on liability was erroneous in total. The respondent has a valid judgment and expects to enjoy the fruits of that judgment. The court has a duty to balance the competing interests between the parties, the appellants' right to pursue their appeal, and the respondent to enjoy the fruits of winning the first round. Accordingly, I am inclined to agree with the respondent that the court needs to make a finding on whether some of the decretal award should be released to her and what should happen to the rest.

18. In the circumstances I find that the application has merit. It is allowed in the following terms:-
- a. Stay of execution of the judgment and/or decree issued by Honorable Otieno J Senior Resident Magistrate on November 10, 2022 be and is hereby issued pending the full hearing and determination of this appeal in Makueni.
  - b. The applicants to release to the respondent half of the total decretal sum within 30 days hereof in default the order of stay to lapse automatically
  - c. The balance of the decretal sum be deposited in a joint interest earning account in the names of the advocates of the parties within 30 days hereof. In default thereof the order of stay to lapse automatically
  - d. The applicants to file and serve the record of appeal within 60 days hereof.
  - e. The costs of this application to abide the outcome of the appeal.

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

.....

**MUMBUA T MATHEKA**

**JUDGE**

