



**Jemaiyo v SO (Minor suing through SOO) (Civil Appeal
186 of 2022) [2023] KEHC 20434 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 186 OF 2022
RN NYAKUNDI, J
JULY 17, 2023**

BETWEEN

BEATRICE JEMAIYO APPELLANT

AND

SO (MINOR SUING THROUGH SOO) RESPONDENT

RULING

Coram: Before Hon. Justice R. Nyakundi

M/s Chepkwony & Co. Advocates

M/s Isiaho Sawe & Co. Advocates

1. By a Notice of Motion dated 5th December, 2022 the Applicant, Beatrice Jemaiyo seeks the following orders: -
 1. Spent.
 2. That pending the hearing and determination of this application inter-partes, there be stay of execution of the decree issues in Eldoret CMCC No. 1164/2016 and/or all its consequential orders.
 3. That pending the hearing and determination of this appeal, there be stay of execution of the decree issues in Eldoret CMCC No. 1164/2016 and/or all its consequential orders.
 4. That the costs of this application be in the cause.
2. The application is premised on the grounds therein and is further supported by the affidavit sworn by Beatrice Jemaiyo on 5th December, 2022.



The Applicant's Case

3. The Applicant being dissatisfied with the ruling of the trial Court delivered on 18th November, 2022 has since lodged this instant appeal against the entire decision. According to the Applicant, the Respondent herein has already commenced execution and thus she is at the risk of being committed to civil jail in the event that she is unable to pay the entire decretal amount in full.
4. The Applicant deposed that she has already filed a declaratory suit against her insurer vide Eldoret CMCC No. E643/2022 which suit is pending hearing and determination. The Applicant further maintains that the indemnity provided to her under Section 4(1) and 5(b) of Cap 405 Laws of Kenya is what forms the gist of the pending appeal hence rendering the stay orders necessary.
5. The Applicant contends that unless stay orders are granted then her pending appeal will be rendered nugatory.
6. According to the Applicant the appeal is meritorious with very high chances of success.

The Respondent's Case

7. The application is opposed by the Respondent vide the Replying Affidavit dated 13th January, 2023. The Respondent's position is that this instant application is only meant to deny him from enjoying the fruits of his judgment. The Respondent contends that he stands to suffer irreparable loss if stay orders herein are granted.
8. According to the Respondent the issues between the Appellant/Applicant and her insurance should not be visited upon him. The Respondent further maintains that this instant application is only meant to delay execution.
9. The Respondent further contends that the purported suit filed by the Applicant herein has no bearing on his case and further does not afford him protection against the liabilities arising out of the Applicant's negligence against him. The Respondent urged the court to decline the application for want of merit.
10. The application was canvassed vide written submissions. The Applicant on 21st March, 2023 filed her submissions through her Counsel Ms. Isiaho whereas the Respondent on 14th March, 2023 equally filed his submission through his Counsel Mr. Chepkwony.

Analysis & Determination

11. The Applicant seeks orders of stay of execution against the decree issued Eldoret CMCC No.1164/2016 pending the hearing and determination of appeal herein. The main issue for determination is whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited.
12. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

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.

13. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in Sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions.
14. On whether this application has been filed timeously. The judgment herein was delivered on 13th May, 2022. The Applicant vide the motion dated 22nd August, 2022 filed at the trial Court sought orders of stay pending appeal which application was dismissed vide its ruling delivered on 18th November, 2022. Consequently, the Applicant filed the application herein on 6th December, 2022 which in my view has been brought without unreasonable delay.
15. With regard to substantial loss. The Applicant contends that unless the order for a stay of execution is granted, the Respondent will move to recover the judgment sum from her and yet she is of the view that it is her insurer; who ought to settle the claim brought by the Plaintiff in the primary suit.
16. The Respondent on his part is of the view that the Appellant is intent on hindering him from enjoying the fruits of his judgment and yet she can still make payment and then pursue a refund from the said insurer.
17. 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.”

18. Further to the above, the legal position is that substantial loss entails that which has to be prevented by maintaining the status quo of the parties involved, otherwise the appeal will be rendered nugatory.
19. The Court, in RWW v EKW [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”



20. Upon considering the rival positions above, I am of the view that in the circumstances of this case, the plaintiff has reasonably demonstrated the manner in which he stands to suffer substantial loss if an order for a stay of execution is denied. However, it is noteworthy that upon considering the interest of the interested party who already has a judgment in her favour of which she is entitled to enjoy the fruits, it is imperative for the hearing and prosecution of the declaratory suit to be expedited.
21. As to security of costs, I note that the Applicant has not offered to make any provision for security for the due performance of the decree or for security for costs. The law is clear that the provision of security for the due performance of the decree is a mandatory requirement in the granting of an order for a stay of execution. However, this court is not bound by the type of security offered by an Applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
22. In the end therefore, the Motion dated 5th December, 2022 is hereby allowed, giving rise to the following orders: -
 - i. There shall be a stay of execution of the judgment delivered on 13th May, 2022 in Eldoret CMCC No. 1164 of 2016 on the condition that the Appellant/ Applicant herein deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within (30) days from today, failing which the order for stay shall automatically lapse.
 - ii. Costs of the application to abide by the result of the appeal.

It is hereby so ordered.

DELIVERED , DATED AND SIGNED AT ELDORET THIS 17TH DAY JULY JULY 2023

In the Presence of:

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R. NYAKUNDI

JUDGE

