



REPUBLIC OF KENYA



**Koech & another v Mbusya (Civil Appeal E111 of 2021)
[2023] KEHC 22498 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22498 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E111 OF 2021
RN NYAKUNDI, J
SEPTEMBER 25, 2023**

BETWEEN

DANIEL KIRWA KOECH 1ST APPELLANT

CAROLINE JEPKOECH KIPLAGAT 2ND APPELLANT

AND

MUNYAO MBUSYA RESPONDENT

RULING

Coram: Before Justice R. Nyakundi

Mwaura & Wachira Advocate for the appellants

Keter Nyolei & Co. Advocates for the respondent

1. Before me for determination are two applications, the first application is dated 29/11/2022, filed by the Appellants whereas the second application is dated 14/3/2023 filed by the Respondent.

The 1st application

2. By a Notice of Motion dated 9/3/2023, the Appellants/Applicants seeks the following orders:
 1. Spent.
 2. That a stay of execution of the judgment delivered on 7/11/2022 be granted pending the hearing and determination of this application inter partes.
 3. That a stay of execution of judgment delivered on 7/11/2022 be granted pending the hearing and determination on the appeal.
 4. That costs of this application be provided for.



3. The application is premised on the grounds therein and is further supported by the affidavit sworn by Robert S. Namunane, the National Co-ordinator COMESA Yellow Card Kenya on 29/11/2022.

The Applicant's Case

4. The Applicants' case is that on 7/11/2022 the Court herein delivered judgment in favour of the Respondents and in absence of the parties Advocates. That upon the delivery of judgment no orders of stay were granted and hence execution can issue at any time.
5. The Applicant further deposed that the Respondent herein has already taken steps to execute the judgment against them through a letter that was served upon their Advocate.
6. The Applicants being dissatisfied with the said judgment have instructed their Advocates to file an appeal to the Court of Appeal against the said judgment. The Applicants maintain that they have since filed and served the Notice of Appeal and the letter requesting for proceedings for purposes of lodging an appeal.
7. According to the Applicants they have an arguable appeal with high chances of success.
8. The Applicants are apprehensive that in the event payment is made they will be unable to recover from the Respondent in the event that they succeed in the appeal and this will result in their substantial loss.
9. The Applicants maintain that they have already deposited a substantial amount of the decretal sum to the tune of Kshs.4,000,000/= in a joint interest earning account as security and are thus deserving of the orders.
10. According to the Applicants no prejudice will be suffered by the Respondent in the event that this application is allowed.

The 2nd Application

11. In the application dated 14/3/2023, the Applicant seeks orders that:
 1. Spent.
 2. The sum of Kshs.4,000,000/= plus all accrued interest held in the joint account in the names of Mwaura & Wachira Advocates, Keter Nyolei & Company Advocates Account Number 100xxxxxxxxxx Consolidated Bank, Koinange Street Branch be released immediately to the firm of Keter, Nyolei & Company Advocates Account Number 661xxxxxxx Eco Bank Eldoret Branch.
 3. Costs of this application be provided.
12. The application is anchored on the ground therein and is further supported by the affidavit sworn by Munyao Mbusya on 14/2/2023.

The Applicant's Case

13. The Applicant's case is that on 29/9/2020 judgment was delivered in his favour for the sum of Kshs.4,031,335/= plus costs and interest. That being aggrieved by the said judgment the Appellants herein filed an appeal to the High Court in Eldoret. Further that prior to filing the appeal the Appellants filed an application seeking extension of time within which to appeal and for stay of execution pending the hearing of the appeal.



14. The Applicant further deposed that by its ruling, the Court granted the order for extension of time and granted a conditional stay of execution to the effect that the decretal sum be deposited in a joint interest earning account in the names of both advocates on record pending the hearing and determination the appeal. Consequently, a bank account number 100xxxxxxxxxxx in the names of Mwaura & Wachira Advocates, Keter, Nyolei & Company Advocates, Consolidated Bank Koinange Street Brach was opened and the decretal sum deposited therein.
15. The Applicant maintain that the appeal at the High Court has now be determined in his father but the Appellants/Respondents Advocates have declined to execute the necessary forms for release of fund deposited in the joint interest earning account to his Advocates.
16. The Applicant maintains that he sustained life threatening injuries from which he has never recovered and no longer works. The Applicant further deposed that he suffered serious permanent disabilities. The Applicant maintains that the compensation ordered by the Court ought to be paid to him as he has been suffering since 2017 when he sustained the injuries and he is yet to receive compensation.
17. According to the Applicant there is no valid reason why the sum deposited should not be released to him as it was deposited as security for the due performance of the decree upon conclusion of the appeal. The Applicant further contends that that the continued delay in releasing the sum deposited is now an injustice to him.

The Respondent's Case

18. The application is opposed by the Respondents vide the Replying Affidavit sworn by Robert S. Namunane on 29/5/2023.
19. The Respondents contend that the application herein has been filed in bad faith, the Applicant having been served with the application dated 29/11/2022 seeking stay of execution pending the appeal and which application the Court had granted interim stay. The Respondents further contend that the said orders could not be extracted because Court proceedings were missing from the record and which information the Application were aware of.
20. The Respondents maintain that there is no deliberate refusal by them through there Advocates to deny the Applicant the decretal sums held in the joint account in view of there being temporary stay orders of the judgment delivered herein.
21. The Respondents maintained that being dissatisfied with the judgment of this Court delivered on 7/11/2022, they have instructed their Advocates to appeal to the Court of appeal and thus the Court ought to balance their right of appeal
22. According the Respondents their appeal is arguable with high chances of success.
23. The Respondents are apprehensive that in the event that payment is made then they will be unable to recover the same from the Applicant in the event that the appeal is successful.
24. According to the Respondents the Applicant herein will suffer no prejudice if this instant application is dismissed as a substantial amount of the decretal sum has been held as security which will be to the Applicants benefit at the conclusion of the appeal.
25. Both applications were canvassed vide written submissions. Both parties filed their respective submissions.



Analysis and Determination

26. I have carefully considered the two applications currently before this Court, one by the Appellants as well as the one by the Respondent. I have equally perused and considered the written submissions filed by the respective parties.
27. With regard to the application dated 29/11/2022 it is clear that the Applicants seek stay of execution orders against the judgment of this of this Court that was delivered on 7/11/2022. Aggrieved by the said judgment the Applicants are desirous of pursuing an appeal to the Court of appeal.
28. 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 sub rule (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.
29. In a nutshell, the applicant must prove that;
- a. that substantial loss may result to the applicant unless the order is made;
 - b. that the application has been made without unreasonable delay;
 - c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
30. In Butt v Rent Restriction Tribunal [1979] eKLR, the court held following:
- a) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal;
 - b) The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion;
 - c) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings; and
 - d) The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
31. With regard to substantial loss, the Court is guided by case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, where the court observed as follows:
- “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.”

32. The Applicants herein are apprehensive that in event that the appeal successful they will not be able to recover the decretal amount from the Respondent. The decree herein is of the sum of Kshs. 6,583,335/= . While it is not enough to say that the Respondent is a man of straw, the Respondent has not shown that he is in a position to refund the decretal sum. He should at least have filed an affidavit of means. In the absence of the same I opine that the Appellants are likely to suffer substantial loss if orders of stay are not granted. In National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another (UR) C.A. 238/2005 the Court stated: -

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

33. On whether there was unreasonable delay in bringing this application. The decision being appealed against was delivered on 7/11/2022. The Applicants filed the present application on 29/11/2022. I opine that there was no unreasonable delay.

34. With regard to security this requirement has been satisfied as there is already a joint account interest earning in the names of Mwaura & Wachira Advocates, Keter Nyolei & Company Advocates Account Number 100xxxxxxxxx Consolidated Bank, Koinange Street Branch.

35. With regard to the application dated 14/3/2022 it is evident that the Applicant herein seeks that the sum of Kshs.4,000,000/= plus all accrued interest held in the joint account in the names of Mwaura & Wachira Advocates, Keter Nyolei & Company Advocates Account Number 100xxxxxxxxx Consolidated Bank, Koinange Street Branch be released immediately to the firm of Keter, Nyolei & Company Advocates Account Number 661xxxxxxxxx Eco Bank Eldoret Branch.

36. In view of allowing the application dated 29/11/2022, the orders being sought herein cannot issue because the substratum of the appeal needs to be preserved. From a cursory perusal of the Memorandum of appeal it is clear that the appeal is mainly on the issue of damages and such releasing the said amount will render the appeal nugatory in the event that it is successful.

37. On arguability of the intended appeal, the Court herein is guided by the decision in the case of Athuman Nusura Juma vs. Afwa Mohamed Ramadhan[2016] eKLR wherein the Court held as follows:

“whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word “possibly”.

38. For the foregoing reasons, I hereby order as follows: -



1. The application dated 29/11/2022 is hereby allowed. Costs shall abide the outcome of the appeal.
2. The application dated 14/3/2023 is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF SEPTEMBER 2023.

.....

R. NYAKUNDI

JUDGE

