



REPUBLIC OF KENYA



**Kanja v Njoroge & 2 others (Civil Appeal E204 of 2022)  
[2023] KEHC 23564 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23564 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E204 OF 2022  
DO CHEPKWONY, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**GEOFFREY NJIRU KANJA ..... APPELLANT**

**AND**

**PETER MACHARIA NJOROGE ..... 1<sup>ST</sup> RESPONDENT**

**KAHIKO JOHN ..... 2<sup>ND</sup> RESPONDENT**

**JACOB KARIUKI MURAGU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The court is called upon to determine the notice of motion application dated September 14, 2022 filed pursuant to order 42 rule 5 of the *Civil Procedure Rules*. The application seeks the following orders;
  - a. Spent;
  - b. Spent;
  - c. That this honourable court be pleased to grant a temporary stay against the judgment delivered by Honourable L.K Nyabando on August 16, 2022 pending the hearing and determination of the appeal.
  - d. The costs of the application be provided for.
2. The application is based on the grounds set out on its face and the supporting affidavit of Geoffrey Njira Kanja sworn on September 14, 2022. The applicant has deponed that the 1<sup>st</sup> respondent had filed a road accident claim suit against him in the subordinate court at Kikuyu *vide* SPMCC No 299 of 2013 and that he instructed his advocates M/S Wangai, Wanjui Advocates to defend him but they failed to file his defence, a result of which judgment was entered against him without his knowledge.



3. It is the applicant's contention that he had sold the subject motor vehicle being motor vehicle registration number KAN 366K, to Geoffrey Mucheru Nyoike in 2011, but he failed to effect transfer of the motor vehicle and therefore at the time of the accident, he was not in possession of the motor vehicle. The applicant states that the said buyer, Geoffrey Mucheru Nyoike is now deceased and his estate was the proper party to be sued as a third party in his place.
4. Being dissatisfied with the judgment of the subordinate court, the applicant filed the present appeal and the application seeking stay orders on the ground that he is at risk of having his properties attached if it is not granted. The applicant also states that the appeal raises serious issues which require the determination of the court. Further, the applicant states that he is willing to furnish reasonable security to court for the due performance of the decree and therefore urges the court to allow his application.
5. In response, the 1<sup>st</sup> respondent filed replying affidavit sworn on November 3, 2022 opposing the application for being an abuse of the court process. The 1<sup>st</sup> respondent holds that in the subordinate court, consent on liability at 100% was entered on March 19, 2018 and therefore the court was only required to determine quantum of damages and the applicant cannot challenge the issue of liability on appeal.
6. Further, the 1<sup>st</sup> respondent has averred that the argument that the applicant had sold the motor vehicle was an afterthought since he has not appealed on the test suit being PMCC No 187/2013 which judgment was entered against him and he did not raise the issue. According to him, the appeal is not arguable and that the applicant has not met the conditions for stay of execution, hence the application should be dismissed. The 1<sup>st</sup> respondent holds that he owns 5 acres of land in Muranga worth Kshs 10,000,000/= and he is therefore able to pay back the decretal sum.
7. The applicant filed a further affidavit sworn on December 8, 2022 and reiterated that he was not aware of the existence of the subordinate court case. He also states that the 1<sup>st</sup> respondent has not attached the alleged consent entered into on March 19, 2018 on his replying affidavit or the pleadings to show that he participated in the test suit of PMCC No 187 of 2013. He maintains that he has an arguable appeal since he was not in possession of the suit motor vehicle at the time of the accident.
8. The court gave directions that the application be disposed off by way of written submissions. The applicant filed the submissions dated April 17, 2023 whereas the 1<sup>st</sup> respondent filed his dated May 9, 2023 whose contents this court has read through for consideration in its determination of the application herein.

### **Determination**

9. Having read through and considered the application, the supporting and replying affidavit thereto alongside written submissions by either party, this court finds for determination being whether the applicant has satisfied the threshold required to warrant an order for stay of execution.
10. The law on stay of execution is enshrined under order 42 rule 6 of the [\*Civil Procedure Rules\*](#) which provides as follows:

- “6(2) 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”

11. On the purpose of an application for stay of execution pending appeal the court in *RWW v EKW* [2019] eKLR, held:

“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.”

12. It is therefore trite law that for the court to grant stay of execution orders, three conditions must be met:

- a. The application has been made without unreasonable delay.
- b. The applicant will suffer substantial loss
- c. The applicant has offered security for due performance of the decree.

13. In regard to the first condition, the court record shows that the judgment was delivered on August 16, 2022 and the present application filed on September 16, 2022 which this court finds was timely and without unreasonable delay hence this condition has been fulfilled.

14. On the second condition of suffering substantial loss, the applicant has stated that he is likely to have his properties attached in execution of the decree from the trial court if stay order is not granted. The court in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR held,

“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”

15. The court has carefully read through the applicant’s affidavits and finds that the applicant, apart from stating that he is likely to suffer substantive loss if stay of execution order is not granted since he had not been in possession of the suit motor vehicle at the time of the accident. He has not demonstrated the exact loss he is likely to suffer and the effect thereof for the court to weigh the same against the prejudice the respondents who are to be put on hold and thus denied a chance of enjoying the fruits of its judgment. It is not enough to just say that he is at risk of having his properties attached.

16. Lastly, on the issue of security for the due performance, the applicant has stated that he is willing to provide security as the court may offer. The issue of security was discussed in the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where the court held:

“...the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the



opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails...”

17. In the instant case, the applicant has only fulfilled one out of the three conditions for the stay of execution orders to issue, which is offering to provide security for the performance. It is also noteworthy that at this juncture, although the court is not required to interrogate and consider the merits of the appeal to determine whether or not it will succeed or not, it is required to establish whether the appeal is arguable or not. The Court of Appeal in the case of *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Limited & 2 others* [2009] eKLR had the following to say on arguable appeals held:-

“... On our part, after considering the rival submissions by the parties, the ruling of the learned judge below together with pleadings we are satisfied that the appeal is indeed arguable. This, in essence, does not mean an appeal which must necessarily succeed, but of course, one which ought to be argued fully before the court.”

18. Having read through the grounds set out in the memorandum of appeal, the court finds that the issues raised therein by the applicant are serious issues hence arguable and require to be canvassed for a determination to be reached.
19. In the circumstances, the notice of motion application dated September 14, 2022 is hereby allowed on condition that:
- a. The applicant deposits half ½ the decretal sum of Kshs 435,500 together with costs and interest of the suit in court within sixty (60) days from the date of this ruling.
  - b. Failure to comply with condition (a) above, the application herein shall stand dismissed and stay of execution orders discharged accordingly.
  - c. The costs of the application shall be in the cause.
  - d. Mention on November 22, 2023 for parties to confirm compliance.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**D.O CHEPKWONY**

**JUDGE**

In the presence of:

M/S Muriungi holding brief for Mr. Mugambi for Appellant

Mr. Muindi counsel for Respondent

Court Assistant – Martin

