



Mediheal Hospital & Fertility Centre & another v Imailuk & another (Civil Appeal 56 of 2023) [2023] KEHC 22524 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 56 OF 2023
RN NYAKUNDI, J
SEPTEMBER 25, 2023**

BETWEEN

MEDIHEAL HOSPITAL & FERTILITY CENTRE APPELLANT

AND

MEDIHEAL HOSPITAL & FERTILITY CENTRE APPLICANT

AND

JOHN OKIDO IMAILUK 1ST RESPONDENT

JOHN OKIDO IMAILUK 2ND RESPONDENT

RULING

The applicant approached this court vide an application dated 26th April 2023 seeking the following orders;

1. Spent
2. There be an interim stay of execution, of Judgment delivered on 20/03/2023 in ELDORET SMALL CLAIMS CASE NO. E262 OF 2022 pending the hearing and determination, of this application inter-partes.
3. There be a stay of execution of Judgment delivered on 20/03/2023 in ELDORET SMALL CLAIMS CASE NO. E262 OF 2022 pending the hearing and determination of the appeal herein.
4. Costs of this application be in the cause.

The application is premised on the grounds set out therein and the contents of the affidavit of Hillary Biwott.

Applicant's case



Learned counsel for the applicant filed submissions on the application, stating that substantial loss will occur to the Appellant/Applicant in the event that the application is not allowed and consequently rendering the appeal nugatory. Counsel urged that whereas the Respondent who is the decree holder has deponed in his response that he is a police officer, he will find it difficult to return the decretal sum in the event that the appeal succeeds. Further, that this Honourable Court is vested with the requisite discretion to allow the application before this Honourable Court. He cited the case of David Ouma Gor v Molyn Credit Limited 6 & another (2021) eKLR in support of this submission.

Respondent's case

Learned counsel for the respondent opposed the application and filed submissions on 17th may 2023. He submitted that the principles guiding grant of an order for stay of execution pending Appeal are settled under Order 42 Rule 6(2) of the Civil Procedure Rules 2010. Further, that the allegations by the Applicant that the intended Appeal would be rendered nugatory if the execution proceeds is not an automatic ground for an order for stay of execution. The Applicant has to prove that if the order for stay is not granted and the intended Appeal finally succeeds then the same will be rendered nugatory. He urged that the intended Appeal filed by the Applicant is frivolous and vexatious which intends to delay execution of the Decree and/or delay the Respondent opportunity to enjoy fruits of his judgment. He relied on the case of KENYA HOTEL PROPERTIES LIMITED VS WILLESDEN INVESTMENT LIMITED (2007) eKLR and JAMES WANGALWA & ANOTHER VS AGNES NALIKA CHESETO in support of this submission.

The respondent urged that he is a person of means and is capable of refunding the decretal amount should the Appeal succeed. That he is a police officer and he is not a pauper, he will refund the decretal amount in case of a successful Appeal and in case of default by the Respondent to refund, then the subject premises can be sold.

The respondent submitted that judgement was delivered on 20/3/2023 and the Applicant filed the Application on 26/4/2023, 38 days after the judgement was delivered. He urged that the Application has not been filed timely as the same was filed after the stipulated timeline of 30 days. The Application is therefore an afterthought and the same should be dismissed.

Counsel urged that the Applicant has not provided any security for grant of the orders sought. The Respondent prays that the entire decretal amount, interest and assessed costs of Kshs. 79,300 be paid to his account or his Advocates' account. In the Alternative % decretal amount, interest and assessed costs be deposited to the Respondent's or his advocate's account and the balance be deposited to a joint interest earning account in the name of both advocates on record.

The respondent urged the court dismiss the application for lack of merit.

Analysis & determination

Upon consideration of the application and submissions thereto, the following issues arise for determination;

1. Whether the orders for stay of execution should be granted

Whether the orders for stay of execution should be granted

The principles guiding the grant of a stay are well settled and provided under Order 42 Rule 6(2) of the Civil Procedure Rules, which provide as follows:

Sub rule (1) unless –



- (a) The court is satisfied that substantial loss may result to the applicant unless the order is made 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 been given by the applicant

Whether the applicant shall suffer substantial loss

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.”

The judgment sum in question is Kshs. 806,000/-. The applicant is apprehensive that the applicant will not refund the sum if the appeal succeeds. 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.”

The respondent has stated that he is capable of refunding the decretal sum but has not provided any proof that he is in a financial position to do the same. In the premises, substantial loss is proved.

Whether the application was filed without unreasonable delay

The impugned judgement was delivered on 20th March 2023, the application was filed on 23rd April 2023. It is my considered view that the application was filed without unreasonable delay.

Security

The applicant has not proposed any security to be deposited as per the requirements of order 42.



Upon considering the application, responses and submissions, I find that the application. I hereby order as follows;

1. Stay of execution of the judgement delivered on 20th March 2023 is granted on condition that the applicant deposit half the decretal amount in a joint-interest earning account in the names of both parties' advocates within 21 days of this order.
2. In the alternative the applicant be at liberty to secure a bank guarantee of equal amount within the same period of time declared in clause 1 of this order.
3. The record of appeal be filed and served within 14 days from today's date.
4. Each party to be at liberty to apply.
5. Costs to the applicant

It is so ordered.

DELIVERED, VIA EMAIL AT ELDORET ON 25TH DAY OF SEPTEMBER 2023

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R. NYAKUNDI

JUDGE

kcandkigenIip@gmail.com , imaluk.john1@gmail.com

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