



REPUBLIC OF KENYA



KENYA LAW
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**Osicho v Rono (Civil Appeal E010 of 2023)
[2023] KEHC 22340 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E010 OF 2023
F GIKONYO, J
SEPTEMBER 20, 2023**

BETWEEN

JOHN MAYBINE OSICHO APPELLANT

AND

JOYCE CHEPKOECH RONO RESPONDENT

RULING

1. Before the court is the appellant’s application dated May 02, 2023. The application is expressed to be brought under order 42 rule 6 of the [Civil Procedure Rules](#). The significant orders sought are:
 - i. Stay of execution in Narok Chief Magistrate’s court in civil suit No E074 of 2021 pending the hearing and determination of this appeal; and
 - ii. Costs of the application.
2. The application is supported by the affidavit of the legal officer of Occidental insurance co ltd, Rahab Njeri Kagiri sworn on May 02, 2023. The grounds on the face of the application and the supporting affidavit are that judgement in this matter was delivered on April 24, 2023; that a memorandum of appeal has been filed in the high court of Kenya at Narok against the said judgement; that the respondent/decree holder is not a person of means as per her evidence in court and as such if the decretal sum is paid to her, the appeal will be rendered nugatory as it will be well-nigh impossible to recover the decretal amount from the respondent/ decree holder if the appeal succeeds; that the applicant is willing to furnish security as the honourable court may order for the due performance of the decree including depositing half of the decretal amount in an interest earning account in the names of both counsels.; that the decree holder will not be prejudiced in the event the application is allowed; that the intended appeal has good chances of success; and that the application has been brought without unreasonable delay.
3. The respondent did not file any replies.



4. The application was canvassed by way of written submissions. Both parties filed their submissions.

The applicant's submissions.

5. The applicant expounded the grounds set out in the application and the supporting affidavits. Save, they emphasized that, the respondent being a person of no means will not be able to refund the decretal amount which is a huge amount in the sum of Kshs. 2,778,130/= . Thus, causing the applicant to suffer irreparable loss unless stay is granted.
6. The applicant submitted further that the application for stay has been made without unreasonable delay as the judgment appealed against was delivered on April 24, 2023, and the memorandum of appeal was filed on May 02, 2023 together with the application herein.
7. The applicant submitted that they have met the provisions of Order 42 rule 6 of the civil procedure rules. The applicant cited the cases of in the high court of Kenya at Machakos, civil appeal no. E052 of 2021, *Michael Ntouthi Mitheu V Abraham Mussu*, In The High Court Of Kenya At Kakamega, Civil Appeal No. 20 of 2020, *H G F V SM* and in the high court of Kenya at Kisii , civil appeal no. 9 of 2020, *Rana Auto Selection Ltd V Lilian Osebe Moses*.
8. The appellant proposed that Kshs 700,000/= be paid directly to the respondent and that the balance be kept by the applicant pending hearing and determination of the appeal.

The respondent's submissions.

9. The respondent submitted that they are opposed to the application herein on the ground that there was a consent on liability and there are minimal chances of success.
10. The respondent submitted that the jurisdiction to grant stay pending appeal is discretionary but such discretion must be exercised judiciously balancing the interests of both parties; the appellant's right to appeal and the respondent's right to enjoy the fruits of the judgment. The respondent relied on the case of *Kenya Tanzania Uganda Leasing Co. Ltd V Mukenya Ndunda* [2013] eKLR.
11. The respondent submitted on quantum and suggested that given the nature of injuries sustained by the respondent, the decretal sum can only be slightly varied in the unlikely events that the appeal succeeds. That in the circumstances herein, to balance the interest of the parties, the respondent should be given half the decretal sum which is Kshs. 1,389,065/= and the remaining half deposited in the joint account. The respondent relied in the cases of *Stephen Mutisya Muumbi Vs Peter Mutuku Katuli* [2005] eKLR and *Electric Link (East Africa) Limited & Another Vs Mary Mueni Kioko & Another* [2015] eKLR.
12. The respondent urged this court to direct that costs awarded to the respondent be assessed and paid to the respondent since the same are not subject of the appeal and cannot be subject to stay. The respondent relied in the case of *Francis Kabaa Vs Nancy Wambui & Another* (NRB C.A. Civil Application No. 295 of 1996 (113/96/ UR).

Analysis and Determination

13. After due consideration of the application, and the submissions, the only issue that arises for determination is whether there is a just or sufficient cause to order stay of execution pending appeal.
14. Under Order 42 rule 6 (1) and (2) of the Civil Procedure Rules:

“(1)...the court to which...appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just...



- (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.”
15. The words ‘to make such order thereon as may to it seem just’ used in order 42 rule 6(1) of the Civil Procedure Rules denotes discretion but to be guided by what is fair, equitable, just and in the interest of justice in the circumstances of the case. Such constitute just or sufficient cause.
16. This discretion and exercise thereof was explained in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 thus:
- “ 1. 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.
 2. The general principle 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 that appeal court reverse the judge’s discretion.
 3. 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.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under order xli rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

Timeous application

17. Judgement appealed from was delivered on April 24, 2023. The applicant filed the present application on May 3, 2023. Accordingly, the application was filed without unreasonable delay.

Of Substantial Loss

18. It is now generally accepted that substantial loss under order 42 rule 6(2) (a) of the CPR, refers to loss of real value or worth. According to the applicant, substantial loss is in the fact that the respondent being a person of no means will not be able to refund the huge decretal sum if the appeal succeeds. Surely, such is loss of real value for, it leaves a successful appellant with a barren success.
19. The respondent did not argue this ground.



Of security

20. Nevertheless, there is some convergence between the parties that stay may be granted as long as suitable security is provided.
21. Parties seem to follow the invaluable advice in *Kiambu County Council vs. Coffee Board of Kenya & Others* [2011] eKLR (Mwera J), where the court held:

“Security for due performance of the decree: The law states that an applicant should furnish such security as the court may order. But a prudent applicant will do well to propose of his own to the court and the respondent what will be attractive, as security.”
22. On the one hand, the applicant has proposed to pay the respondent Kshs 700,000/= and retain the balance pending the determination of the appeal.
23. On the other hand, the respondent has proposed to be paid one half of the decretal sum and the other half to be deposited in a joint interest earning account.
24. The court has noted that the respondent said nothing about the allegation that she is a person of no means. Be that as it may, the applicant has proposed to pay a sum of Kshs 700,000 to the respondent. Judgment on liability was by consent. Therefore, in the circumstances of this case it is fair, equitable and just that, and the court orders stay of execution pending determination of the appeal on condition that the applicant pays one half of the decretal sum to the respondent within 30 days of today. The other half shall be retained by the respondent pending determination of the appeal.
25. Before closing, the court noted that the respondent urged this court to direct that costs awarded to the respondent be assessed and paid to the respondent since the same are not subject of the appeal and cannot be subject to stay.
26. The submission is quite innovative. Except, costs follow the event; yet, quantum of damages is subject of this appeal. Of significance, however, the order of the court relates to ‘decretal sum’. Decretal ‘Of, relating to, or involving a decree’ (Black’s Law Dictionary. 10th Ed, Bryan A. Garner eds)
27. Given the nature of the arguments presented by the parties and the ultimate decision of the court, each party shall bear own costs of the application.
28. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 20TH DAY OF SEPTEMBER, 2023.

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F. GIKONYO

JUDGE

In the presence of:

1. M/s Kirindo for the appellant
2. No appearance for Khan and Associates for the respondent
3. Mr. Muraguri - CA

