



Omwerema & another v Namunyak Nkurrinah Advocate (Civil Appeal E002 of 2022) [2023] KEHC 22364 (KLR) (18 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E002 OF 2022
F GIKONYO, J
SEPTEMBER 18, 2023**

BETWEEN

JOSEPH OMWEREMA 1ST APPELLANT

OCCIDENTAL INSURANCE COMPANY 2ND APPELLANT

AND

NAMUNYAK NKURRUNAH ADVOCATES RESPONDENT

RULING

Stay Pending Appeal

1. The significant orders sought in the Notice of Motion dated 21.3.2023 and filed on the 422.3.2023 which is expressed to be brought under the provisions of Sections 1A,1B and 3A of the [Civil Procedure Act](#), Order 42 Rule 6, an Order 51 Rule 1 of the Civil Procedure Rules,2010 are: -
 - a. Spent
 - b. Spent
 - c. That there be a stay of execution of the decree herein pending the hearing and determination of the appellants' intended appeal to the court of appeal.
 - d. That costs of this application be provided for.
2. The application is supported by the affidavit of one Rebecca Juma for the appellants /applicants sworn on 21.03.2023 as well as the supplementary affidavit sworn on 17.04.2023.
3. The applicants' case is that they are aggrieved by the judgment of this court delivered on 16.3.2023 in favour of the respondent against the appellants for general damages in the sum of Kshs. 6,720,000 plus



- costs and interest and have since lodged an appeal challenging the judgment and decree in the court of appeal.
4. They further aver that the respondent does not have any known assets capable of reimbursing the appellants in the event that the intended appeal succeeds and as such the appellants are apprehensive that they will suffer substantial loss unless the stay sought is granted. The appellants argued that the application has been made without unreasonable delay. It is their case that their appeal raises substantial points of law relating to professional indemnity insurance for lawyers which are arguable.
 5. The applicants aver that respondent is already adequately covered by the decretal sum of Kshs. 6,720,000/= currently held at KCB Narok Branch in an interest earning account in the joint names of the advocates on record for the parties herein. That the applicants will abide by such terms as the court may set as conditions for stay.
 6. In opposition to the application for stay pending appeal, the respondent filed a replying affidavit dated 28.03.2023. The major argument is that the respondent is an advocate and a counselling psychologist with a stable income from various businesses including the respondent firm which has been operational for the last 6 years.
 7. It is the respondent's case that the decretal amount at the trial court is at Kshs. 11,506,300 and not Kshs. 6,720,000 as claimed. That kshs. 4,786,300 and cost of the high court is yet to be deposited as order 42 rule 6(2)(b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted. The respondent therefore contends that the condition for grant of stay has not been met as the applicants have not shown and met the condition of payment of security for due performance of the decree. Further that the appellants were served with the decree on 04.03.2021 and have not demonstrated any willingness to top up the difference but have instead sought for a stay solely based on the deposits made at the time of appeal which was not sufficient for due performance of the decree. That granting the stay of execution solely based on the current security will be prejudicial to the respondent herein as it continues to incur costs despite getting favourable judgment at the trial court and high court.
 8. The respondent avers that this court should consider the interest of both parties and that this matter has been in court for 5 years cumulatively, 4 years at the trial court and 1 year at the appellate court.
 9. The respondent avers that the instant application is unmeritorious, defective, bad in law and an abuse of the court process as the same ought to have been made before the court of appeal.
 10. The respondent prayed that the security of cost currently held at KCB bank A/C number 1295068478 be immediately released to the respondent. That further kshs. 4,786,300 together with cost of the high court be deposited in a joint interest earning account held by advocates for both parties within 30 days pending the hearing and determination of the appeal at the court of appeal. That in default of the above any orders for stay be vacated and the respondent be at liberty to execute the decree.
 11. In response to the respondent's replying affidavit, the applicants filed a supplementary affidavit sworn by Rebecca Juma on 18.04.2023.
 12. The applicants averred that the respondent's affidavit does not meet the requirements of an affidavit of means as the affidavit does not indicate the respondent's source of income, expenses any bank statements for her office account or her annual returns filed with Kenya Revenue Authority.
 13. The applicants averred that the m- pesa statements provided by the respondents for mobile no. 0719 376 338 and 0723 623 744 shows money paid in and money paid out and is not clear if any of the sum represented the respondent's income.



14. The applicants averred that no valuation reports have been provided for motor vehicle KBV 441R and KCF 170V. That further vehicles are depreciating assets and therefore no guarantee that by the time the appeal is concluded these vehicles will still be in ownership or possession of the respondent.
15. The applicants averred that there is no indication of the actual parcels of land owned by the respondent and their values. Further that there is no indication of value of her cryptocurrency investment and how stable the said investment is.
16. The applicants averred that the extracted decree of the trial court cannot be Kshs. 4,312,000 as the interest should run from 17.02.2022 the date of the judgment. Therefore, the same is erroneous.
17. The applicants averred that they have acted in good faith by depositing the Kshs. 6,720,000 in the joint account of advocates on record.

Directions of the court

18. On 8.3.2022, Mr. Masinde informed the court that the parties have agreed to a stay on condition that the decretal sum is deposited in a joint interest earning account in a reputable bank. Consent on stay dated 7.3.2022 was adopted as an order of the court on 15.3.2022.
19. On 14.6. 2022, this court allowed the appellant to file and serve amended memorandum of appeal within 14 days.
20. On 19.09.2022, this court issued directions that the appeal be canvassed by way of written submissions.
21. On 16.02.2023, Judgment was delivered.
22. Mr. Ohaga for the appellant orally sought for stay for 30 days arguing that the respondent is safe as decretal sum is already secure. The court allowed stay of execution for 30 days.
23. The applicants' application dated 21.3.2023 was canvassed by way of written submissions.
24. This court ordered a stay of execution until determination of this application.

Appellants/applicants submissions.

25. In their written submissions, the applicants aver that they have satisfied the threshold and are deserving of the orders for stay sought. The applicants have relied on the cases of *Shah Vs Mbogo* [1967] E.A., *Nicholas Stephen Okaka & Another Vs Alfred Waga Wesonga* [2022] eKLR cited in the case of *James Wangalwa & Another Vs Agnes Naliaka Cheseto* [2012] eKLR, *RWW VS EKW* [2019] eKLR and *Soroya Investments Limited Vs Boniface Masinde T/A Bonface Masinde & Co. Advocates & Another* [2019] eKLR.
26. The applicants submitted that application was made without unreasonable delay as, the application was made on 22.03.2023 which was five days after the initial order of stay granted on 16.02.2023 lapsed on 17.03.2023.
27. The applicants submitted on provision of security for the performance of any decree that may be ultimately be binding upon the applicants- that this requirement has also been satisfied in that the judgment sum of Kshs. 6,720,000/= is already deposited in an interest earning account in the joint names of the parties' advocates. The deposit was made pursuant to a consent that was entered into by the parties and adopted as an order of this court on 15.03.2022. Further, that it is the discretion of the court to impose any terms of stay that will appropriately balance the scales of justice as between the parties.



28. The applicants submitted that they have sufficiently demonstrated that they will suffer substantial loss if the stay is not granted. That the respondent has not provided sufficient evidence to show that she has resources to refund the decretal sum. That the respondent has not shown any evidence that she has good income arising from her practice of law or any other source, and that the m-pesa statements provided cannot be taken as good evidence. The applicants have relied on the cases of Kenya Women Microfinance Limited Vs Martha Wangari Kamau [2020] eKLR And Kenya Shell Limited Vs Benjamin Karuga Kibiru & Another [1986] eKLR.

Respondents' submissions.

29. The respondent submitted that the applicants have not demonstrated what kind of loss they would suffer. The respondent relied on order 42 rule 6(2) of the Civil Procedure Rules, cases of Kenya Shell Limited Vs Kibiru [1986] KLR 410 And Jamii Bora Bank Limited & Another V Samuel Wambugu Ndirangu (Civil Appeal No. E030 of 2021).
30. The respondent submitted that the trial court in awarding its judgement was categorical that interest granted was from the date of filing suit till payment in full. That the matter had been in court for 4 years and 7 months that is 55 months as at the decretal rate. The interest was at the rate of 14% p.a. for the period aforementioned. Thus, the sum of Kshs. 4,312,000 interest is correctly calculated. That the appellants have not made an application for review of the decree. The said security was provided based on a consent recorded after the delivery of the judgment by the trial. The courts did not have to order for the inclusion of interest and cist as part of the security as the parties to the suit were agreeable as to the stated amounts. In the absence of any sums not provided as security for cost based on the previous hardships and difficulties in recovering any sums from the appellants as demonstrated by ;a) failure by the appellant to pay Kshs 10,000 to the respondent to date despite the existence of valid orders issued on 15.12.2020 and 09. 03.2021 and b) not honouring the consent dated 07.03.2022. That whereas the parties herein agreed by way of consent that the decretal amount be deposited within 30 days. the 30 days lapsed on 08.04.2022. That the appellants did not honour the terms of the consent or offer any explanation/communication as to why the same could not be deposited within the stipulated time. The said amounts were deposited on 21.04.2022 in total disregard to the consent by the parties and thus contrary to the principle of good faith. The respondent relied on the cases Gianfranco Manenthi & Another Vs Africa Merchant Assurance Co. Ltd [2019] eKLR , Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 Of 1997, Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Limited (No. 2) [1970] E.A 469 At 475 , Spry And Godfrey Ajuang Okumu Vs Nicholas Odera Opinya HCCC NO. 337 Of 1996.
31. The respondent submitted that this court should balance the rights of the two parties and consider whether there is a just cause for depriving the respondent the right to enjoyment of the judgment. The burden to prove that the respondent will not be able to refund the decretal sum is upon the applicants to prove and poverty is not a ground for such denial. The respondent relied on the cases of Mohammed Salim T/A Choice Butchery Vs Nassepuria Memon Jamat [2013] Eklr , Portreitz Maternity Vs James Karanga Kabia Civil Appeal No. 63 Of 1991, Kenya Shell Limited Vs Kibiru [1986] Klr 410, Machira T/A Machira & Co. Advocates Vs Ease African Standard (No 2) [2002] Klr 63, Caneland Ltd & 2 Others Vs Delphis Bank Ltd . Civil Application No. Nai 344 Of 1999, Stephen Wanjohi Vs Central Glass Industries Ltd. Nairobi Hccno. 6726 Of 1991, Justus Kyalo Musyoka V John Kivungo [2019] eKLR And Vishram Ravji Vs Thornton & Turpin Civil Application No. Nai. 15 Of 1990[1990] KLR 365
32. The Respondent submitted that should this court be inclined to grant any form of stay, she prays that the amounts be released to her and the difference from the amounts paid and decretal amounts be



deposited in a joint interest earning account. The respondent relied on the case of Michael Ntouthi Mitheu V Abraham Kivondo Musau [2021] eKLR.

33. In the end the respondent prayed that the entire decretal amount of Kshs. 11,506,100 be considered in the ruling and the application be dismissed in its entirety with costs to the respondent. I) the sum being Kshs. 6,720,000 and interest thereon held as security for cost at KCB account 129506478 be released to the respondent (Namunyak Nkurrurah Advocates) and ii) the respondent be at liberty to execute the sum of Kshs. 4,312,000 being the difference from the decretal amount pending the hearing and determination of the appeal.
34. The respondent prayed in the alternative that a stay of execution pending the hearing and determination of the appeal be issued conditional upon; i) part of the decretal sum being kshs. 6,720,000 and interest thereon held as security for cost at KCB account number 129068478 be released to the respondent (Namunyak Nkurrurah Advocates) and ii) the sum of Kshs. 4,312,000 being the difference in the decretal amount be deposited in a joint interest earning account within 30 days from the date of the ruling and that in default the respondent be at liberty to execute the decree.

Analysis and Determination

35. Arising from the application, the affidavits filed and the rival submissions of parties is a single issue: -
- i) Whether it is just for the court to order a stay of execution of the decree herein pending appeal.
36. An application for stay of execution pending appeal presents a kind of a squirm. On the one hand, there is the respondent's right to immediate enjoyment of the fruits of judgment. On the other hand, the appellant's constitutional right of appeal. The competing rights are calling for recognition and enforcement which plunge the court into a judicious balancing act of the rights using the tools provided in law in a manner not routing any of the rights. The art of balancing of rights was cast in Absalom Dova vs. Tarbo Transporters [2013] eKLR that:
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant has right of appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder has right to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”
37. Thus, stay of execution pending appeal is only granted for a just or sufficient cause. Just or sufficient cause draws upon the facts of the case, the overriding objective in sections 1A and 1B of the [Civil Procedure Act](#) as well as presence or otherwise of factors in order 42 rule 6(2) of the Civil Procedure Rules.
38. According to Order 42 rule 6(2) of the Civil Procedure Rules:
- “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.



Timely application

39. The stay of execution was granted by the court lapsed on 17.3.2023, and this application was filed on 21.03.2023 which is barely 5 days thereafter. On that basis, the court is satisfied that there was no inordinate delay in making the application.

Of substantial loss

40. It is generally accepted that, substantial loss under order 42 rule 6(2) of the CPR: -
‘...refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal’ (Sewankambo Dickson vs. Ziwa Abby HCT-00-CC MA 0178 of 2005, the High Court of Uganda at Kampala).
41. Loss of real value or worth in the sense of order 42 rule 6(2) of the CPR therefore, entails ‘...a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal’ (James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR,). In other words, the appeal will be rendered nugatory, which is tantamount to routing of the right of appeal. This is the loss which an order for stay of execution pending appeal seeks to prevent (RWW v EKW [2019] eKLR).
42. In the instant case, the applicants aver that they stand to suffer substantial loss of over Kshs. 6,720,000 as well as costs and interest if stay of execution is not granted. They further aver that the respondent has not demonstrated that she is able to refund the sum if the appeal succeeds. The appellants have also pleaded that they are able to comply with any order as to security of costs.
43. In this case, the Respondent has given material as to his ability to repay the decretal sum in case the appeal succeeds. The respondent is an advocate of the High Court of Kenya and was recently appointed as a magistrate. There is therefore nothing to show she is a person of straw. But, this case is unique as security had already been deposited in a joint interest earning account which really should be the focus of the court.

Security for performance of decree

44. The appellants have already deposited a sum of Kshs. 6,720,000 in a joint interest earning account. They are, however, willing to comply with any condition on security for the due performance of the decree appealed from. Quite an appreciation that this court is not bound to a particular type of security offered by an applicant. It can make appropriate orders which serve the interest of justice. It is worth noting that a deposit of money depreciates unless it is kept in an account that earns interest for the period of the appeal. It is therefore, encouraged that deposits of money which serves as security for the performance of a decree that might ultimately be binding on the applicant should follow after the practice developed within anti-corruption and anti-money laundering legal regimes; deposit in an interest earning account. The rationale is that the person entitled to the money gets the deposit plus the interest.
45. The court takes note that the respondent has argued that the deposit is not sufficient for the due performance of the decree herein. The court nevertheless, notes with approval that: -

“...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts” (Sewankambo



Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005, the High Court of Uganda at Kampala)

46. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, the court orders stay of execution pending the hearing and determination of the appeal herein. The sum of money deposited in a joint interest earning account at KCB shall be held therein as security pending determination of the appeal; for the due performance of the decree that may become binding upon the applicant.
47. Accordingly, I hereby allow the applicant/appellants' application dated 21.03.2023 in the foregoing terms.
48. Costs be in the cause.
49. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 18TH DAY OF SEPTEMBER, 2023.

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F. GIKONYO

JUDGE

In the presence of:

1. Mr. Masinde holding brief John Ohaga (SC)
2. No appearance for Namunyak for the Respondent
3. Mr. Muraguri - CA

