



**Tawakal Airbus Limited v KCK (Suing as next friend and mother to AM (Minor)  
(Civil Appeal 128 of 2022) [2023] KEHC 22415 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22415 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 128 OF 2022  
SM GITHINJI, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**TAWAKAL AIRBUS LIMITED ..... APPELLANT**

**AND**

**KCK (SUING AS NEXT FRIEND AND MOTHER TO AM  
(MINOR) ..... RESPONDENT**

*(Being an Appeal from the Ruling of the Hon E.Usui – CM at Malindi  
CM’s Court Civil Suit No.181 of 2021 delivered on 28th October, 2022)*

**RULING**

**CORAM:** Hon. Justice S. M. Githinji

Kimondo Gachoka Advocates for the Appellant/Applicant

Victor Omburo & Co. Advocates for the Respondent\*\*\*\*

1. For determination is the application dated 30<sup>th</sup> November, 2022 by the Defendant/ Applicant seeking the following orders;
  1. Spent.
  2. That this Honourable Court be pleased to grant stay of execution of the exparte judgment entered on the 20<sup>th</sup> day of April, 2022 by Hon Usui in Civil Suit E181 of 2021 Malindi for Kshs. 5,745,755 plus costs and interest pending hearing and determination of this application.
  3. That this Honourable Court be pleased to grant stay of execution of the exparte judgment entered on the 20<sup>th</sup> day of April, 2022 in Civil Suit E181 of 2021 Malindi for Kshs. 5,745,755 plus costs and interest pending the hearing and determination of this appeal.



4. That this Honourable Court be pleased to further set aside the exparte proceedings and judgment entered and/or endorsed against the defendant/applicant in Civil Suit E181 of 2021 Malindi Chief Magistrate court for Kshs. 5,745,755 plus costs and interest.
  5. That this Honourable Court be pleased to order that civil suit E181 of 2021 Malindi be set down for hearing afresh inter partes.
  6. That the costs of this Application be in the cause.
2. The application is supported by the affidavit sworn by Thakib Shabbir on the 30<sup>th</sup> day of November, 2022. He deposed that at the onset of the suit herein, he was not aware of the suit proceedings in the lower court and that the matter subsequently proceeded in his absence and the Plaintiff/ respondent obtained an exparte judgment. He also deposed that unless stay of execution is granted the respondent may levy execution against them and that will render the appeal nugatory; according to him, there is good and sufficient cause for stay to be granted and the exparte judgment herein to be set aside and/or vacated.
  3. In response, the respondent filed a replying affidavit sworn by Kabibi Charo Kandhili on the 27<sup>th</sup> day of February, 2023. She stated that she was aware that an application for stay of execution and setting aside the proceedings and judgment of the lower court was dismissed by the trial court for lack of merit on October 28, 2022. She asserted that she is opposed to the present application for stay of execution of the ruling and the judgment as the same is only meant to frustrate her endeavor to seek justice. She added that the fact that the process of execution has been put in motion does not amount to substantial loss.

### **Determination**

4. I have considered the application dated November 30, 2022, the response, as well as the written submissions by counsels.
5. In my view and noting the history of this matter, the issue for determination is whether this court ought to grant stay of execution of the exparte judgment entered on April 20, 2022 and whether this court should set aside the exparte proceedings and judgment in Civil Suit E181 of 2021.
6. 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:
  - 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.
7. Further to the above, stay may only be granted for sufficient cause and the Court in deciding whether or not to grant a stay, in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are enjoined to give effect to the overriding objective in their exercise of powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
8. Section 1A(2) of the [Civil Procedure Act](#) provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding



objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.”

9. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), aforementioned: namely; -
  - a. that substantial loss may result to the applicant unless the order is made,
  - b. that the application has been made without unreasonable delay, and (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. As was held in *Antoine Ndiaye v African Virtual University* [2015] eKLR.
10. 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.”
11. In the instant case, the applicant avers that they stand to suffer substantial loss if stay of execution is not granted. He further avers that the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds. I am of the view that the fact the process of execution has been put in motion as is the case here, does not amount to substantial loss. Accordingly, I am not persuaded that substantial loss has been established.
12. As to security for costs, the appellant has made provision for a Bank Guarantee from DTB Bank as security; however, it is trite that a court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
13. As to whether to set aside the alleged default judgment, this court ought to consider the nature of defence that has been presented before it, the period of delay, any prejudice the applicant is likely to suffer if the default judgment is set aside and the overriding objective. I have had a chance to peruse the intended statement of defence by the applicant and I note that the same is in reference to a totally different matter making it difficult to ascertain whether the same has any triable issues or not.
14. In the end, the application dated November 30, 2022 fails in its entirety for want of merit and the same is hereby dismissed. The applicant shall bear the costs of this application.
15. This Court so orders.

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

.....



**S.M.GITHINJI**

**JUDGE**

**In the Presence of; -**

Mr Ombaro for the Respondent

Mr Nyambero for the Applicant (absent)

