



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ayienda v Nyasani (Civil Appeal E012 of 2023)
[2023] KEHC 23605 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E012 OF 2023
WA OKWANY, J
OCTOBER 5, 2023**

BETWEEN

AMINGA STEPHEN AYIENDA APPELLANT

AND

NANCY KERUBO NYASANI RESPONDENT

RULING

1. This ruling is in respect to the application dated 10th May 2023 wherein the Applicant seeks the following orders: -
 - a. The instant application be certified urgent and same be heard ex-parte in the first instance.
 - b. Pending the hearing and determination of the instant application, the honourable court be pleased to grant interim orders of stay of execution of the judgment and/or decree issued on 5th day of April 2023 together with all consequential orders arising therefrom and/or attendant thereto.
 - c. The honourable court be pleased to grant an order of stay of execution and/or enforcement of the judgement and decree issued on 5th day of April 2023 together with consequential orders arising therefrom and/or attendant thereto pending the hearing and determination of the appeal in terms of the memorandum of appeal dated 28th day of April 2023.
 - d. Costs of this application do abide the appeal.
 - e. Such other and/or further orders this honourable court may deem just and expedient to be granted.
2. The application is supported by the Applicant's affidavit and is premised on the following grounds: -



- a. The Appellant/Applicant herein filed and/or commenced the instant suit seeking various prayers and/or reliefs against the respondent.
 - b. Upon being served the respondent duly entered appearance and filled (sic) statement of defence.
 - c. Subsequently, the instant suit was listed for hearing and indeed same was heard culminating to judgment being rendered on 5th day of April 2023.
 - d. Pursuant to the said judgment under reference the said suit was disallowed.
 - e. The Appellant/Applicant is/was dissatisfied with the said judgement and he has preferred an appeal and therefore an order of stay of execution is necessary.
 - f. In the premises the Appellant/Applicant herein has a filled (sic) an appeal with over whelming chances of success as against the judgement and decree of the Honourable Court.
 - g. In the circumstances there exists sufficient cause and/or basis in terms of an arguable appeal.
 - h. Be that as it may, the Appellant/Applicant is desirous to be heard and/or afforded an opportunity to be heard on the appeal.
 - i. In a nutshell, the execution and/or implementation of the Decree shall be irredeemably and/or incapable of redemption in the event that the appeal succeeds which is most likely.
 - j. In any event the instant Application has been made without unreasonable delay.
 - k. The respondent would not suffer any prejudice if the orders sought herein are granted.
 - l. Notwithstanding the foregoing this Honourable court should afford the Appellant/Applicant reasonable opportunity to pursue the Appeal.
 - m. It is in the interest of justice that the Application herein be heard and allowed.
 - n. It is in the interest of justice that the Application herein be heard and allowed.
3. The Respondent opposed the application through his Replying Affidavit sworn on 25th May 2023 wherein he states that the application does not meet the threshold set for the granting of orders for stay of execution.
 4. The Respondent stated that the welfare of the minors in whose favour the orders sought to be stayed were issued, continues to be in jeopardy due to lack of basic daily needs.
 5. The application was canvassed by way of written submissions which I have considered.
 6. The main issue for determination is whether the Applicant has made out a case for granting of orders of stay of execution pending appeal. Stay pending appeal is anchored under Order 42 Rule 6 of the [Civil Procedure Rules](#) which stipulates as follows: -
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such 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, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) No order for stay of execution shall be made under subrule (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

7. In the present case, I find that the requirement that an application for stay of execution be filed without unreasonable delay was fulfilled/met as the application herein was filed on 10th May 2023 while the judgment appealed against was rendered on 5th April 2023.
8. Turning to the requirement that the Applicant demonstrates that he will suffer substantial loss unless stay is granted, I note that the appeal is against a negative order dismissing the Appellant's suit before the Lower Court where he sought orders for custody and access of the subject minors and costs.
9. This court is therefore at a loss as to the decree that the Appellant seeks to stay as there was no order made to be executed by the Respondent herein save for the costs of the Lower Court suit. I note that the Applicant does not even state if the said costs have been assessed and how the settlement of such costs would cause her to suffer loss let alone substantial loss.
10. On security for costs, I note that the Applicant has not stated that he is ready, able and willing to furnish any security for the due performance of the decree.
11. For the reasons stated in this ruling, I find that the application 10th May 2023 is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the appeal.
12. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 5TH DAY OF OCTOBER 2023.



W. A. OKWANY
JUDGE

