



REPUBLIC OF KENYA



KENYA LAW
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**Imonje & 2 others v Salim (Civil Appeal E19 of 2022)
[2023] KEHC 24246 (KLR) (9 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E19 OF 2022
GMA DULU, J
OCTOBER 9, 2023**

BETWEEN

PRAXIDESE KHATEMBI IMONJE 1ST APPELLANT

JOSHUA NYASYA NYAMAI 2ND APPELLANT

PRAXIGON TRANSPORTERS LIMITED 3RD APPELLANT

AND

SALIM SAID SALIM RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated April 22, 2022 filed under section 1A, 1B and 3A of the *Civil Procedure Act* (cap.21), and Order 21 Rule 1B, Order 22 rule 22, Order 40 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules*, and article 159(2)(a) and (d) of the *Constitution* of Kenya 2010.
2. The application was filed by the appellants through Counsel Kimondo Gachoka & Company Advocates and seeks the following orders:-
 1. (Spent).
 2. (Spent).
 3. That this court be pleased to order stay of execution of judgment delivered by the trial court on March 10, 2022 in Kilungu PMCC No. E061 of 2020 between the parties herein pending the hearing and determination of the appeal herein.
 4. That the court allow the applicant to furnish the court with security in the form of a bank guarantee from a reputable bank.
 5. That the auctioneers be ordered to tax their costs to scale.



6. That the costs of this application abide the outcome of the appeal.
3. The application has grounds on the face of the Notice of Motion that judgment was entered for general damages of Kshs. 1,000,000/= loss of diminished earning capacity Kshs. 600,000/=, costs and interest, that the appellant's had appealed the decision, that auctioneers had now proclaimed assets for auction, that the respondent is a person whose means is unknown and that the applicants are apprehensive that they might not recover the decretal amount if it is paid and the appeal succeeds.
4. The application was filed with a supporting affidavit sworn by Praxidese Khatembi Imonje a director of Praxigon Transporters Ltd the 1st applicant on April 22, 2022, which amplifies the grounds of the application.
5. The application is opposed through a replying affidavit sworn by Munyoki Muthangya Advocate for the respondent in which it was deponed that the application was defective, and not merited and was only intended to defeat the execution proceedings already commenced.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka & Company Advocates for the applicants, as well as the submissions filed by the Munyoki Junior Advocate for the respondent.
7. This being primarily an application for stay of execution of judgment or decree pending appeal, it is governed by the provisions of Order 42 Rule 6 of the Civil Procedure Rules. In particular Rule 6(2) provides:-

“6 (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.
 - b. Such security as the court orders for the performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
8. Was the application filed without unreasonable delay? The judgment was delivered on March 10, 2022. The application was filed on April 22, 2022. There was granted a stay of execution for 30 days from the date of judgment. In my view, from the facts and circumstances of this matter, this application was filed without unreasonable delay.
9. I now go to the next issue, whether the applicant is likely to suffer substantial loss if the stay orders sought are not granted. I note that this is a money decree; and the appeal is primarily on the quantum of damages awarded.
10. In my view, the appellants are likely to suffer substantial loss if the entire amount is paid, and is not recovered. However, as this is an appeal on quantum of damages, in my view stay of execution can only be justified if the appellants pay part of the decretal amount. I will thus grant stay of execution, but order that the appellants pay the respondent part of the decretal amount Kshs. 500,000/=
11. I now go to the last requirement, that is provision of security by the applicants. I note that the applicants have offered to provide a bank guarantee as security. In my view however, in the circumstances of this case, the part payment of the decretal amount is sufficient security.
12. I note also that the respondent's counsel has put up arguments in submissions on who had authority to litigate on behalf of a company. In my view that objection, if at all, should have been raised at the trial as a preliminary issue, not in this application or even on appeal. I dismiss that contention.



13. With regard to the prayers sought that the court orders taxation of the auctioneers fees and charges, I am of the view that the said prayers be raised in the matter where the auctioneers were appointed, not in this application.

14. I thus allow the application under the following orders:-

i. I grant stay of execution of judgment or decree in Kilungu PMCC No. E061 of 2020 between the parties herein pending the hearing and determination of the appeal herein.

ii. The stay orders granted in (i) above are subject to the applicants/appellants paying the respondent through counsel part of the decretal amount Kshs. 500,000/= within 45 days from today.

iii. In default of (ii) above, the stay orders herein will automatically lapse and be of no effect.

iv. The costs of the application will abide the determination of the appeal.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF OCTOBER 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Ms. Kemunto – for appellants/applicants

No appearance for respondent

