



REPUBLIC OF KENYA



KENYA LAW
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**Kan Travellers & another v Nguto (Civil Appeal E159 of 2023)
[2023] KEHC 23649 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E159 OF 2023
RN NYAKUNDI, J
OCTOBER 17, 2023**

BETWEEN

KAN TRAVELLERS 1ST APPELLANT

JOSEPH NYIGE KANGETHE 2ND APPELLANT

AND

JACOB NYANGA NGUTO RESPONDENT

RULING

1. I have before me an application dated 31st August 2023 express to be brought under Article 50 and 159 of *Constitution* of Kenya, 2010, Sections 1A 1B 3 &3A and all other enabling provisions of the law. The application here in place by the following orders:
 1. That: There be a stay of execution of the Ruling delivered by the Honourable T. Mbugua (Adjudicator R/M) in Eldoret SPMCC no E 136 of 2023 *Jacob Ng'ang'a Nguyu v Kan Travelers & Joseph Ngige Kang'ethe*) dated 4th August, 2023 and all subsequent proceedings therefrom pending the hearing and determination of this application
 2. That There be a stay of execution of the Ruling delivered by the Honourable T.Mbugua (Adjudicator/RM) in Eldoret SPMCC no E136 of 2023 *Jacob Nga'ng'a Nguyo v Kan Travellers & Joseph Ngige Kangethe* dated 4th Augsut, 2023 and all subsequent proceedings therefrom pending the hearing and determination of Eldoret HCCA no E159/2023.
 3. That the costs of this application be provided for.
2. In support of the application is an affidavit dated the same day which purposes briefly as follows:
 1. That: On 4/8/2023 the Honourable T. Mbugua (Adjudicator /RM) delivered a ruling in Eldoret SPMCC no E136 of 2023 *Jacob Ng'ngan Nguya v Kan Travellers & Joseph Ngige Kangethe*) in relation to the Appellants/Applicants Application dated 9th May 2023 seeking



to set aside the *ex parte* judgement delivered on 28/4/2023. (Annexed and marked AA-1 is a copy of the ruling delivered on 4/8/23

2. That The court allowed the application by the Appellants/Applicants and ordered That they make payment of Throw Away Costs of ksh 20,000 within 5 days of delivery of the said Ruling
 3. That the said timeframe was so unreasonable bearing in mind a copy of the Ruling was only availed on the 5th day That is on 9th August, 2023, (Annexed and marked as AA-2 is a copy of the letter to court requesting for the supply of the Ruling dated 4/8/2023
 4. That as such the Appellants/Applicants were unable to comply with the aid stringent condition resulting in the court on 17/8/2023, reverting the *ex parte* judgement previously entered
 5. That the Appellant/Applicants being aggrieved by the conditions ordered by the court of making payment of Throw Away Costs of ksh 20,000 within 5 dyas have preferred an appeal against part of the said ruling on the particular aspect
 6. That the Appellants/Applicants are apprehensive That since the *ex parte* judgement was reverted on 17/8/2023 for failure to comply with the condition of the court, the Respondent will proceed to execute against the Appellants for the *ex parte* judgement (Annexed and marked as AA-3 IS A copy of the decree taken out by the Respondent)
 7. That the trial court ordered That the terms of the Ruling of making payment of ksh 20,000 as throw away costs within 5 days were not complied with yet a copy of the Ruling was only but availed on the 6th day after delivery That is 9/8/2023
3. The respondent vehemently responded to the application in the affidavit dated 22nd September, 2023. He briefly deposed as follows:
1. That the Appellants application is only meant to derail this matter and particularly to deny me my rights to enjoy the fruits of valid judgement on record. (Attached herein and marked JNN1 is a copy of the said ruling)
 2. That my advocate on record informs me, which information I verily believe to be true That the Applicant is an indolent party having failed to honour the conditional stay orders issued by the Hon. T Mbugua (Adjudicator) by failing to pay me throw away costs of ksh 20,000 as directed by the court, and thus is undeserving of the orders sought herein (Attached here with and marked JNN2 is a copy of the said ruling)
 3. That I know of my own knowledge and a further advised by my advocate on record That the Appellant/Applicant is has not paid the said thrown away costs to date and is therefore coming to this court with unclean hands
 4. That the applicant herein has not offered cogent reasons and/or justifiable grounds as to why the orders sought herein should be granted noting the hearing and determination of the appeal against the ruling delivered by the Honorable trail court especially hearing in mind That the judgement on record has already reverted after default by the applicant herein to fulfill the conditions of the court.



Determination

4. I have considered the notice of motion, annexed affidavits for and against exercise of discretion for grant of stay of execution pending an appeal to be canvassed at a future date. The submissions also as filed and argued by counsels is also of significance in this matter.
5. The central issues being considered are based on the following case law principles in *RWW v EKW* (2019) eKLR addressed itself on this as hereunder:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in disputed so tht the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgement. The court is also called upon to ensure That no party suffers prejudice That cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary, The court when granting the stay however, must balance the interest of the Appellant with those of the Respondent.”

6. Similarly the court of Appeal in *Absalom Dova v Tarbo Transporters* (2013) eKLR had this to say on the interpretation of Order 42 Rule 6(1) of the *CPR* on stay of execution pending an appeal to a superior court:

“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 tht the case deserves. This is in recognition That both parties have rights. The Appellant to his appeal which include the prospects That the appeal will not be rendered nugatory, and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two compelling rights focuses on their reconciliation.”

7. In my opinion therefore having considered the application and the connecting principles the remedies sought in the notice of motion should succeed on this issue of stay of execution pending the hearing and determination of the intended appeal. In view of the conclusion the Applicant to file and serve the record of Appeal upon the respondent within 30 days from today’s date. In the present case as envisaged in Order 42 rule 6(1) of the *CPR* a bank guarantee from the reputable financial institution licensed by the Central Bank of Kenya be secured by the Appellant detailing the terms of the quantum in the impugned judgement to be deposited as security within the same thirty (30) days period in clause 2 of this ruling. The appeal’s registry to open the substantive Appeal’s file which will form the basis of the proceedings in the next stage of the Appeal. The costs of this application to abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF OCTOBER, 2023.

In the presence of

Mr. Amihanda Advocate

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R. NYAKUNDI

JUDGE

