



**Kanini v Mutungwa & 2 others (Civil Appeal 93, 94 & 95 of 2023
(Consolidated)) [2023] KEHC 23843 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23843 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 93, 94 & 95 OF 2023 (CONSOLIDATED)**

MW MUIGAI, J

OCTOBER 12, 2023

BETWEEN

SEKE KANINI APPLICANT

AND

FAITH MUTUMO MUTUNGWA 1ST RESPONDENT

CAROLINE NZILANI NDIWIWA 2ND RESPONDENT

NICKSON MBUVA KIIO 3RD RESPONDENT

*(Being an Appeal from the judgment of the Hon. M.
Thibaru (RM) delivered on 5th April, 2023 in Machakos)*

RULING

Background

1. By Notice of Motion dated and filed in Court on 3rd May, 2023 brought under Sections 1A,1B,3A, 63 (e),79G and 95 of the *Civil Procedure Act* Cap 21; Order 40 Rules 2 Order 42 Rule 6 (1), Order 50 Rule 5 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010.
2. The Applicant sought the following Orders that:
 - a. Spent
 - b. Spent
 - c. There be an order of stay execution pending the hearing and determination of Applicant's intended appeal preferred therefrom.



- d. There be a stay of any further proceedings pursuant to the judgment delivered on 5th April,2023 pending the hearing and determination of intended appeal and or such other terms as the court may deem just.
- e. The Honorable Court be pleased to grant any such orders as it may deem fit and just to grant.
- f. The costs of this application to abide the outcome of the intended appeal herein.

Supporting Affidavit

3. Vide supporting affidavit dated and filed in court on 3rd May,2023 sworn by Paul Maundu Advocate for the Applicant which affidavit has the same contents touching the 1st to 3rd Respondent.
4. It is deposed by the Counsel that he has full knowledge of the facts of this matter and that on 5th April,2023 judgment was delivered against the Applicant; deposing that amount of damages and costs (when taxed) is paid to the intended Appeal will be rendered nugatory and the Applicant herein will suffer irreparable loss and damage; it is lamented that the Applicant has since filed a Memorandum of Appeal before this Honourable Court with high chances of success and that unless the application for stay of execution is heard urgently, on priority basis, the Respondents threatens to levy execution against the Applicant which will render the appeal nugatory.

Replying Affidavit of the 1st to 3rd Respondents.

5. By a Replying affidavits dated 24th May, 2023 and filed in Court on 12th June, 2023, the said replying affidavits have the same contents as sworn by 1st to 3rd Respondents.
6. In reply to the Application by the Applicant, Respondents in there sworn Affidavits deposed that they sued in their respective suits in the lower court and sought general and special damages as well as costs and interests of the suit arising out of a road traffic accident which occurred on 22/10/2022 along Wote Makindu Road.
7. It is in their respective replying affidavits that the matters went to hearing and the court gave its judgment delivered on 5/4/2023 where the court found that they had proved their case and entered judgment on their favor, in each of their respective suits consolidated herein.
8. It is their case that the intended Appeal does not raise triable grounds and thus chances of success are very minimal and that the Applicant comes to this court with unclean hands since she was found liable having been declared so by a court of competent jurisdiction.
9. It is Respondents case that judgment having been issued by a competent court and for the stay of execution pending appeal to issue the conditions set out in Order 42 Rule 6 of the [Civil Procedure Rules,2010](#) ought to be met and that the Applicant has not satisfied the above mentioned conditions to warrant grant of the orders sought.
10. It is deposed further by Respondents that they are advised by their advocate on record that provision of security is one of the necessary conditions for grant of stay pending appeal and the Applicant has not provided any.
11. The deponents lament they are advised by their advocate on record that the Applicant has not demonstrated what loss she stands to suffer, if any, if orders sought are not granted and further, the right of appeal ought to be balanced with their rights to enjoy the fruits of their judgment.
12. They opined that should the Honorable court be inclined to grant the orders sought, they prayed that the Applicant be ordered to deposit the entire decretal sum in a joint interest earning account.



13. The matter was canvassed by written submissions.

Submissions.

Applicant's Written Submissions

14. Applicant in her written submissions dated 31st May,2023 and filed in court on 2nd June,2023, Mr. Maundu counsel for the Applicant submits that: it is trite law that in exercising its discretion to make an order for provision of security pending appeal a court will consider the circumstances of each case; and in particular whether it is fair, equitable and just to both the parties to require the furnishing of security pending appeal. Reliance is placed on the case of *Mohamed Ali Osman Wa Hanan Petroleum v Juanco Group Limited*, to buttress his point.
15. Counsel submitted that the Applicant herein is not able to meet the security of costs as awarded by the trial court at the moment due to the harsh economic times and also due to the fact she is currently unemployed and has no viable source of income that would enable her to furnish the same before this Honorable court. Counsel places reliance on the cases of *Jayesh Hasmukh Sha v Narin Haira & another* (2015) eKLR and in *Noornamohammed Abdullah v Ranchbodhbai J. Patel* (1962) 1 EA 447, to support his point.
16. Counsel further submits that security for costs pending appeal is discretionary in nature and this Honorable Court has a duty to regard each particular circumstances of the case and considerations of equity and fairness to both parties. Counsel contends that the Applicant herein is apprehensive that the Respondent's proportion of 50% security pending appeal would ultimately deny her a chance to be heard and as result of the same deny her a chance to access justice.

Respondents Submissions

17. Respondents filed the same Submissions separately, the said submissions bear the same contents with the same advocate on record.
18. Vide the submissions dated and filed in court on 12th June,2023, Mr. Wambua counsel for the Respondents in their respective submissions raised an issue whether the court should grant the orders sought.
19. Counsel places reliance on Order 42 Rule 6 (2) of the *Civil Procedure Rules* which provides:
- (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; 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.
20. Counsel submits that the Court must be persuaded that substantial amount of loss will be suffered by the Applicant should the orders of stay of execution fail to issue and that the Applicant has furnished enough and sufficient security for the due performance of the decree and judgement Appealed against. Reliance placed on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR, to buttress his point of substantial loss.



21. Counsel contends that the Applicant has not demonstrated what loss she will suffer, if any if she was to pay the decretal amount, urging that she has not proved Respondent will not be in a position to refund should the award be disturbed.
22. As to security, counsel avers that the Applicant is required to offer Security for the due performance of the decree and the court is entitled to take into account the fact that no such security has been offered in deciding the application before court. counsel relies on the cases *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR, *Ena Investment Limited v Benard Ochau Mose & 2 others* (2022) eKLR and *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, to support his argument on security.
23. Counsel finally averred that the Applicant cannot therefore fail to abide by the conditions set out Order 42 on the provision of security should stay pending appeal be granted and urged that this court to order the Appellant to deposit the entire decretal amount in a joint interest earning account in the names of counsel for the Appellant and the Respondent.

Determination/Analysis

24. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the Replying affidavit and submissions together with case law cited by both counsel for their respective clients.
25. The main issue that commends itself for determination is whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited.
26. The guiding principles for 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:

“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.”
27. In furtherance to the above stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that 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 now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
28. 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.”
29. It is worth noting here that for a party to qualify for the stay of execution pending appeal, the parameters 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.
 - 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.
30. 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.”
31. In the instant case the applicant vide the supporting affidavit sworn by her Advocate deposed that if the amount of damages and costs (when taxed) is paid over to the claimant, the intended appeal will be rendered nugatory and the Applicant herein will suffer irreparable loss and damage. On the other hand the Respondent contended that the Applicant did not sufficiently demonstrate what loss she will suffer, if any, if she was to pay the decretal amount and further that she has not proved that the Respondent will not be in a position to refund should the award be disturbed on appeal.
32. I am guided by case of *RWW v EKW* [2019] eKLR, where the purpose of the stay of execution was well enunciated as follows:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that 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 judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
9. 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 interests of the Appellant with those of the Respondent.”
33. In my considered view, indeed the Applicant has not offered a demonstration which loss she is likely to suffer should she pay the decretal sum. Respondent on the other hand has not given any material as to his ability to repay the decretal sum in case the appeal succeeds. In my view I find that the substantial loss not been proved.
34. I am also convinced that there has been no inordinate delay in bringing the instant appeal as the judgment being appealed against was delivered on 5th April, 2023 and the Memorandum of Appeal filed approximately less than 30 days later on 3rd May, 2023.
35. As to security Counsel for the Applicant submitted that security for costs pending appeal is discretionary in nature and this Honorable Court has a duty to regard each particular circumstances of



the case and considerations of equity and fairness to both parties and further that the Applicant herein is apprehensive that the Respondent's proportion of 50% security pending appeal would ultimately deny her a chance to be heard and as result of the same deny her a chance to access justice.

36. On the other side the Respondent opined that the Applicant is required to offer security for the due performance of the decree and the court is entitled to take into account the fact that no such security has been offered in deciding the application before Court.
37. In the case *Gianfranco Manenthi & another v. Africa Merchant Assurance Company Ltd* [2019] eKLR, where the Court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the Court to determine.”

38. In *Mwaura Karuga t/a Limit Enterprises v. Kenya Bus Services Ltd & 4 others* [2015] eKLR, it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under 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-which is seldom. The security to be given is measured on that yardstick.”

39. In the upshot of the above cited authorities an in the need to balance the scale of justice, it is evident from this case that the Applicant did not provide any security that he was will, ready and able to pay. Hence failure to do so will in my view be prejudicial to Respondent in whose the judgment was entered by the Trial Court.



Disposition

40. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful Plaintiff, I grant a stay of execution of the decree herein on the following conditions:
- a. That the Applicant pay to the Respondent half of the decretal sum and deposit the other half in a joint earning account of both Advocates.
 - b. The said payment and deposit in (a) above to be met within 90 days from the date of this Ruling and in default the application shall be deemed to have been dismissed with costs and the Respondents will be at liberty to execute.
 - c. Parties/Counsel to file Records of Appeal and serve. Lower Court Files be availed through Deputy Registrar Machakos High Court.
 - d. The costs of the application are awarded to the Respondent in any event.

READ, SIGNED AND DELIVERED AT MACHAKOS THIS 12TH DAY OF OCTOBER, 2023(PHYSICAL/VIRTUAL CONFERENCE.

M. W. MUIGAI

JUDGE

Delivered in the presence of:

No appearance - for the Applicants

No appearance - for the Respondents

Geoffrey/Patrick - Court Assistant(s)

