



Makau v PM (Minor Suing through the father and next friend FMM) (Civil Appeal E040 of 2023) [2023] KEHC 23859 (KLR) (23 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E040 OF 2023
TM MATHEKA, J
OCTOBER 23, 2023**

BETWEEN

RAPHAEL MUSILA MAKAU APPELLANT

AND

**PM (MINOR SUING THROUGH THE FATHER AND NEXT FRIEND
FMM) RESPONDENT**

RULING

1. This application is made in relation to the appeal from the judgment of Hon Mutegi PM in Tawa MCCC 32 of 2022 delivered on the 6th April 2023
2. The application is brought vide Notice of Motion dated 20th May 2023 brought under sections 3A, 79G, and 95 of the *Civil Procedure Act* and Orders 22 rule 22, 42 rule 6 and 50 rule 6m 52 rule 1&3 of the *Civil Procedure Code* 2010.
3. The applicant seeks stay of execution of the judgment pending the hearing and determination of his appeal, seeks that this court allows him to furnish the court with a security in the form of a bank guarantee from a reputable bank pending the hearing of the appeal
4. The grounds for the application are on the face of the application and the supporting affidavit of the applicant sworn on the 20th May 2023. He depones that he is the owner of m/v registration no. KCY 732K which was involved in an accident at a time by was insured by Directline Insurance Company. That in the suit related to the accident, the court found him 100% liable and awarded the sum of Ksh 250,000 as general damages. That he was aggrieved by the awards and filed this appeal, supported by the annexed memorandum of appeal.
5. Annexed to the affidavit is also the Decree which indicates that the judgment was against three defendants: Sleek Trading Limited, Alphajiri Limited and the applicant. It is noted that the Judgment against which the appeal is brought is not annexed.



6. The application is opposed vide the replying affidavit of Benard M Kitindio on the grounds that the application does not satisfy the conditions laid down in Order 42 rule 6(2) of the [CPR](#) (2010) and s. 79G of the [CPA](#). That the appeal has no chances of success because the award is Ksh 250,000 for multiple soft tissue injuries which he lists as blunt head injury, left temporal region, blunt chest and back injury bruises on left elbow, minor cut on right knee joint, bruises on left tibia and chin
7. That the applicant does not contest liability and the appeal is only against quantum and that the learned trial court took into consideration all the laid down principles in arriving at the quantum of damages. The respondents position is that the prayers sought are undeserved however should the court find in their favour the applicant be ordered to pay the respondent half the decretal sum and to deposit security in the event that the appeal is unsuccessful
8. The parties agreed to proceed by way of written submissions.
9. I did not find any submissions by the applicant.
10. It is submitted for the respondent that she was a lawful passenger in the applicant's m/vehicle at the time the accident happened.
11. That the only considerations for this court is whether the applicant has complied with the provisions of order 42 rule 6(2). That the applicant has not demonstrated that he will suffer substantial loss if the order is not granted see [Antoine Ndiaye v African Virtual University](#) [2015] eKLR quoting from Tropical Commodity Suppliers Limited on the definition of substantial loss; that it is not calculated from a mathematical formula but it is a qualitative concept; it is about loss that is of real worth or value whether great or small. That it is upon the applicant to demonstrate that the execution will create an irreparable state of affairs that will render the appeal nugatory. See [James Wangalwa & Another v Agnes Naliaka Cheseto](#) Bungoma HC Misc. Application no. 42 of 2011. It is argued that the applicant has not demonstrated what loss he stands to suffer, no evidence of the state of affairs that will be rendered irreparable, resulting in the appeal becoming nugatory. This is because 'substantial loss is the cornerstone of both jurisdictions for granting stay' [Kenya Shell limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga](#) (1982 -1988) KLR. See also [Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another](#) [2014] eKLR, [Radio Africa Limited v Lingam Enterprises & 4 Others](#) [2011] eKLR
12. On the condition of undue delay in bringing the application it is conceded that there was no delay
13. On deposit of security the respondent submits that what the applicant has placed before court is an application for funds via the Family Bank which application indicates it was received by the said bank on the 23rd February 2022. That the lack of security means that should the appeal be unsuccessful the respondent will not be assured of her award. It is submitted that the security here would be that the applicant to pay the respondent the entire decretal sum pending the hearing and determination of the appeal.
14. I have carefully considered the application and the submissions by the respondent's counsel. None were filed by the applicant and if any were filed they were not in the court file.
15. Order 42 rule 6(2) sets out the parameters under which stay of execution pending an appeal will be granted. In the circumstances of this case
 - (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 (emphasis mine)

16. The application was brought in good time. However, the Judgment against which the appeal has been lodged is not attached.
17. Looking at the supporting affidavit I do not see anything in the affidavit to demonstrate that the substantial loss will be incurred by the applicant other than the claim that the respondent will not be able to refund the money should the appeal succeed. The claim that the award is substantive is not supported by any evidence. In addition, the supporting affidavit does not seem to support the same application as it states that the appeal is against 'liability which was excessive because the third party is the one liable for the accident'. This is clearly not true. The memorandum of appeal indicates that the appeal is about the quantum of damages. Liability is not an issue.
18. The respondent's proposed security is in a document that is incomplete and one that cannot be said to amount to the security.
19. In the circumstances other than the fact that the application was brought in time the applicant has not established the other conditions.
20. The application is not merited and the same is dismissed with costs.

DATED SIGNED AND DELIVERED THIS 23RD OCTOBER 2023

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MUMBUA T MATHEKA

JUDGE

N/A Ms. Kemunto for the applicant

Ms. Muia holding brief for Mr. Kitindio Musembi for the respondent

