



**Abogi & 2 others v Kamunyu & 3 others (Civil Appeal E005 of 2023)  
[2024] KEHC 14145 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14145 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CIVIL APPEAL E005 OF 2023  
AC MRIMA, J  
NOVEMBER 13, 2024**

**BETWEEN**

**ENOCK ABOGI & 2 OTHERS ..... APPLICANT**

**AND**

**NANCY WANJIKU KAMUNYU & 3 OTHERS ..... RESPONDENT**

**RULING**

1. This ruling is in respect of an application by way of a Notice of Motion dated 24<sup>th</sup> October, 2023. It was filed by the Appellants herein.
2. The application sought the following reliefs: -

1. That the application be certified urgent and be heard *ex parte* in the first instance.
2. That this Honourable Court be pleased to grant an interim order for stay of execution of the judgment delivered on 19<sup>th</sup> September, 2023 in Kapenguria SPMCC E31 of 2019 (*Nancy Wanjiku Kamunyu (Suing as the Legal Admin & Rep of the Estate of Julius Mbugua Njoroge –Dcd v Enock Abogi & 4 Others)*) pending the hearing and determination of this application inter-parties.

That this Honourable Court be pleased to grant an order for stay of execution of the judgment delivered on 19<sup>th</sup> September, 2023 in Kapenguria SPMCC E31 of 2019 (*Nancy Wanjiku Kamunyu (Suing as the Legal Admin & Rep of the Estate of Julius Mbugua Njoroge –Dcd v Enock Abogi & 4 Others)*) pending the hearing and determination of the appeal, Kapenguria HCCA NO.E005 of 2023.

3. That this Honourable Court allows the applicant to furnish the court with security in the form of a Bank Guarantee from Equity Bank, Family Bank or any other Bank of good repute for



the sum of Kshs.3,000,000- as per section 5(b) of the Insurance (Motor Vehicle Third Party Risk) Act.

4. That the costs of this application be provided for.
3. The application was supported by the grounds on its face and further by the duly sworn Affidavit of the 1<sup>st</sup> Appellant herein.
4. The gist of the application was that by the judgment of the trial Court delivered on 19<sup>th</sup> September 2023, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein succeeded in their claim on damages arising out of a road traffic accident in Kapenguria Senior Principal Magistrates Civil Suit No. E031 of 2019 (hereinafter referred to as 'the suit').
5. In the said judgment, the trial Court apportioned liability between the then Defendants jointly and severally liable for the accident and assessed damages as follows: -
  1. Pain and suffering – Kshs. 100,000=.
  2. Loss of expectation of life – Kshs. 80,000=.
  3. Loss of Dependency – Kshs. 11,253,78360
  4. Special damages at Kshs. 259,250=.
6. On learning of the outcome of the suit, the Appellants were wholly dissatisfied with the judgment and preferred an appeal. They also filed the instant Notice of Motion.
7. The Appellants posited that they were apprehensive that there was imminent threat of execution by the Respondents such that if the stay orders were not granted, they will suffer substantial loss, hence, prejudiced. In the main, the Appellants contended that they had a holding appeal which raised serious issues of law and fact.
8. The Appellants filed submissions in support of the application. They also referred to several decisions. They pleaded that the application be allowed.
9. The application was opposed by the Respondents through the Replying Affidavit of the 1<sup>st</sup> Respondent. On their part, the Respondents contended that the Appellants proposal on a Bank Guarantee as security was not tenable.
10. The Respondents also filed written submission in urging this Court to dismiss the application.
11. Order 42, Rule 6 of the *Civil Procedure Rules* provides that an Applicant must satisfy the following conjunctive requirements for the grant of stay of execution pending appeal; that is to say: -
  - i. The application has been made without unreasonable delay;
  - ii. Substantial loss may result to the Applicant unless the order is made; and
  - iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.
12. It is not lost that the purpose of stay pending appeal as held in the case of *RWW v EKW* [2019] eKLR, is 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 hisher judgment. 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 interests of the Appellant with those of the Respondent.

13. The application shall, hence, be determined under the three parameters captioned above.

**Whether the application has been filed timeously:**

14. This can be determined from the transpirations in the matter.
15. Judgment at trial was entered on 19<sup>th</sup> September 2023. The instant application was filed on 26<sup>th</sup> October, 2023. That was a round a month post the judgment.
16. This Court, therefore, finds and hold that the period taken to file the application was not inordinate considering the fact that the Appellants had to liaise with Counsel and accordingly give instructions.

**Whether the Applicant will suffer substantial loss:**

17. The aspect of substantial loss was discussed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR as follows: -

... 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.

18. The principal contention by the Appellants in the application is that the decretal sum awarded in the judgment, of over Kshs. 11 Million, is collosum and that the appeal raises serious issues of law and fact worth settlement by this appellate Court. They offered security by way of a Bank Guarantee by Family Bank Limited in favour of Directline Assurance Co. Limited, the insurers of the offending motor vehicle. The proposed guarantee was for Kshs. 3 Million.
19. The Appellants argued that satisfying the decree would be unfair and they stood to lose irreparably since the financial status of the Respondents were unknown.
20. This Court would restrain itself from expressing its position on the merits of the appeal since that is the subject of the main appeal. However, in the event the Appellants succeed in the appeal, then they would either not be liable to satisfy the decree or be otherwise ordered. Conversely, if the appeal fails, the Appellants would have further delayed the Respondents' realization of the fruits of the judgment. In such a case, a balance ought to be struck.
21. The Court, however, asserts that when a party contends that the receiving party is not able to make good any payments made, then the burden of proving that the receiving party is in a position to make good the payment rests with that party. In this case, it was incumbent upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to demonstrate that ability.



22. In a bid to prove ability to refund the sum decreed, the 1<sup>st</sup> Respondent annexed copies of a title deed for PioneerNgeria Block 1 (Eatec)12083 and two motor vehicle registration [log] books.
23. To say the least, neither an official search for the parcel of land nor official searches for the vehicles were availed. As such, the averments by the 1<sup>st</sup> Respondent were not proved. In other words, the Respondents did not discharge the burden that they are able to make good any sums paid on the basis of the impugned judgment.
24. Having said as much, this Court also has reservations over the proposed guarantee. I say so because the guarantee is not in respect of this particular matter, but it is rather a general one issued to Directline Assurance Co. Ltd over Court cases or claims pending before Courts. Given the nature of the undertakings the company is involved in, there is no evidence that the general guarantee sums of Kshs. 200 Million issued in the guarantee in July 2023 is still current and would take care of this matter. This Court, therefore, finds the proposal untenable.
25. The Court would then fashion a suitable security.

**Furnishing of security:**

26. In stay of execution applications, the Court has discretion to order parties to furnish security in appropriate instances.
27. On a consideration of the above conditions, and for equity sake, it is this Court's position that a conditional stay of execution order be granted in the unique circumstances of this matter.
28. Having so said, the application is determined in the following manner: -
  - a. There be a stay of execution of the judgment and decree in Kapenguria SPMCC No. E031 of 2019 on condition that the sum of Kshs. 2,000,000= (Kenya Shillings Two Million Only) be deposited in Court within 30 days of this ruling pending the hearing and determination of the appeal.
  - b. Alternatively, there be a stay of execution of the judgment and decree in Kapenguria SPMCC No. E031 of 2019 on condition that the Appellants do provide a Bank Guarantee specific to this case in the sum of Kshs. 3,000,000= (Three Million Only) by a reputable Bank within 30 days of this ruling.
  - c. In the event of default on the part of the Appellants, the order of stay of execution of the judgment and decree will automatically lapse and the Respondents shall be at liberty to execute for the entire decretal sum.
29. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. C. MRIMA**

**JUDGE**

Ruling No.1 virtually delivered in the presence of:

No appearance for Mr. Amihanda, Learned Counsel for the Appellants Applicants.

No appearance for Mr. Wafula, Learned Counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.

ChemosopDuke – Court Assistants.

