



Birir & 2 others v Koech & another (Suing as the administrator of the Estate of the Late Koech Paul) (Civil Appeal E099 of 2023) [2024] KEHC 13772 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E099 OF 2023
HM NYAGA, J
NOVEMBER 6, 2024**

BETWEEN

**JUDY BIRIR 1ST APPELLANT
JULIUS BIRIR 2ND APPELLANT
PRINCE KIMUTAI BIRIR 3RD APPELLANT**

AND

**AARON KIPKURUI KOECH 1ST RESPONDENT
WINNY CHEPKEMOI KOECH 2ND RESPONDENT
SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE KOECH
PAUL**

RULING

1. The Applicants vide their Notice of Motion dated 22nd February, 2024 expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Orders 42 Rule 6(2) & 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law seek the following orders:-
 1. Spent
 2. Spent
 3. That pending the hearing and determination of this Appeal, this Honourable Court be pleased to grant stay of execution of the judgement, decree and/or all consequential proceedings and the subsequent auctioneers' notices in Molo CMCC No. E002 of 2021 between Winny Chepkemoi Koech & Another Vs. Judy Birir & 2 Others.
 4. Costs of this Application be provided for.



5. Any further orders this Honourable Court may deem fit and just to grant.
2. The Application is premised on the grounds on the face of the Application, annexures and supporting affidavit of the 1st Applicant, Judy Birir, sworn on 22nd February, 2024. The Applicants' case is inter alia; that being aggrieved by the judgement on quantum delivered by the trial court on 25th April, 2023, they have preferred an appeal on the same and have also sought to be supplied with the typed and certified copy of the judgement and proceedings to enable them prepare a Record of Appeal; that on 20th February, 2024 the 1st Applicant was served with auctioneers proclamation notices from Crater View Auctioneers notifying her of the initiated execution process against her to recover the decretal sum and auctioneers costs of Ksh.159,187/=; that pursuant to the warrants of attachment and sale issued by Crater Auctioneers, the Respondents/decreed holders have initiated execution against the 1st Applicant which if carried out to fruition will render the appeal if successful a mere academic exercise and waste of the precious judicial time; that execution against the 1st applicant is detrimental to her as the said auctioneer has proceeded to proclaim the suit motor vehicle without ascertaining its ownership; that once the decretal sum is paid to the respondents and the appeal succeeds, the respondents will be unable to refund the same since their means of income are unknown; that the appeal raises triable issues with high chances of success and if execution proceeds they will suffer irreparable loss as the appeal will be rendered nugatory and mere academic exercise; that they are ready and willing to deposit half of the decretal sum in court or in a joint account of both advocates as security for stay of execution pending appeal; and that the respondents shall suffer no prejudice if stay of execution is granted.
3. In response to the Application, the Respondents filed a Replying Affidavit sworn by the 1st Respondent Winnie Chepkemai Rotich on 8th March, 2024 who averred inter alia; that the application lacks substance and it has been filed with unreasonable delay; that the Applicants filed a similar application dated 12th June, 2023 in Molo CMCC No. E002 of 2021 between Winny Chepkemai & Anor Vs. Judy Birir & 2 others seeking stay of execution pending appeal; that the said application was dismissed on 14th November, 2023 and its until 22nd February, 2024 that the applicants filed the instant application without any explanation for delay; that the right to appeal ought to be balanced with the right of the decree holder to enjoy the fruits of the judgement; that the Applicants have not demonstrated the evidence of the substantial loss they would suffer if execution is levied; that the warrants of attachment herein were legally issued and the same ought not to be disturbed as she is entitled to enjoy the fruits of a successful litigation; that the applicants have not proved that she is a person of straw and would not be in a position to refund the decretal amount in the event their appeal succeeds; that appeal has no chances of success and does not raise triable issues; that execution is a lawful process and this application is a ploy to delay her from enjoying the fruits of the judgement; and that the applicants have abused the principle that he who comes to equity must come with clean hands and must be vigilant. She thus prayed that the application be dismissed and applicants be ordered to pay the auctioneers costs.
4. The Application was canvassed by way of written submissions. Both parties duly filed their respective submissions.
5. On whether the Applicants will suffer substantial loss in the absence of stay order, the Applicants submitted in the affirmative for reasons that their averment that the respondents will be unable to refund the decretal sum as their means are unknown are unrefuted since the respondents did not adduce concrete evidence of their financial capabilities. In buttressing their submissions reliance was placed on the case of *Mutuku v Mohamed (Civil Appeal E039 of 2022)* [2022] KEHC 15451 (KLR) (18 October 2022) (Ruling)
6. In regard to whether the Application has been filed without unreasonable delay, the Applicants submitted that they filed the instant application three months after their similar application before the



trial court was denied on 14th November, 2023. They posited that the delay of three months is not excessive to qualify as being unreasonable. In support of their submissions, the applicants referred this court to the case of John Gateri Kimani & another v Nderitu Thathua [2017] eKLR where the court found that the delay of less than three months was not excessive.

7. With regard to the issue of security for due performance of the Decree, the Applicants argued that they have already complied on this limb as they have paid Ksh. 522,500/= being half the decretal amount as ordered by this court. Citing the case of Japheth Akoth Oyach & another v Francis Omollo Otieno [2022] eKLR the applicants posited that the said amount is sufficient security.
8. In sum, the Applicants submitted that this application meets the legal threshold for grant of stay of execution pending appeal and prayed that the same be allowed with costs to be borne by the Respondent.
9. The Respondents on their part submitted that the application lacks merit and should be dismissed.
10. On whether the Applicants will suffer any loss if application is disallowed, the Respondents submitted in the negative for reason that the Applicants have not specified the exact loss they will suffer. To support their submissions, the respondents relied on the cases of *Owade & another v Njoroge (Civil Appeal E005 of 2022)* [2022] KEHC 10715 (KLR) (9 June 2022) (Ruling) & Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR where the Applicants' applications for stay of execution pending appeal were denied for failure to prove substantial loss.
11. Citing the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another (supra) the respondents argued that the release of the entire sum to them will not render the appeal nugatory as the same is a money decree and can be reimbursed.
12. On whether this application has been filed without unreasonable delay, the Respondents submitted that the Applicants have not adduced any tenable reason for filing this application 99 days after the aforesaid application before the lower court was dismissed. In the circumstances, they posited that the Applicants are indolent and intent on frustrating them from enjoying the fruits of their judgement. In buttressing their submissions the Respondents relied on the case of Rainbow Acres Limited V Nic Bank Limited [2015] cited in the case of London Distillers K Ltd v Philip Kipchirchir & 2 Others [2007] eKLR where the court opined that;-

“In my view delay is affront to the administration of justice, delay is something to be deplored, delay is repugnant to justice, delay spoils the image of the judiciary, delay forments public outcry against the judiciary, delay creates disharmony between the consumers of justice and the courts. Delay is a disguised disinterest in the disposal of the suit. Delay creates desolate and despair in the minds of the party affected by the delay. It is a despicable attempt to enslave a party to an endless contest. That contest must come to an end if the instigator is unwilling to end it. In this case the plaint of the plaintiff is like a despotic ruler hanging over the head of the defendants.”
13. With respect to the issue of security, the respondents submitted that the half decretal sum already paid is insufficient and prayed that the applicants be ordered to either pay the remaining half of the decretal sum plus costs to them or to deposit the same in a joint interest earning account in the names of the advocates.



Analysis and Determination

14. The sole issue for determination is whether the applicants have met the prerequisite for grant of stay of execution pending appeal.
15. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6 Civil Procedure Rules. The rule stipulates: -
 - “ 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 2. No order of stay 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 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”
16. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
17. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] eKLR the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
 1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 2. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
 3. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



4. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
18. As to what amounts to substantial loss, this has been the subject of consideration by courts. In *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR, the court stated;
- “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”
19. On whether the applicants will suffer substantial loss, they have argued that the respondent means are unknown and they may not be able to refund the decretal amount if their appeal succeed. Further, the applicants have stated that the respondents have initiated execution proceedings and if stay of execution is denied their appeal will be rendered nugatory and a mere academic exercise. The Respondents did not adduce any affidavit of means to controvert this position.
20. In the case of *National Industrial Credit Bank Ltd. v Aquinas Francis Wasike & Another* [2006] eKLR the Court of Appeal held as follows:
- “This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge. In my view, the respondent was unable to discharge his burden”.
21. Similarly, in the case of *Lawrence Musyoka Ndambuki & Another v Daniel Kato Ndambuki* [2018] eKLR the court held:
- “The decretal amount is substantial and the Respondent has no known source of income. Further, the Respondent has not demonstrated that he would be able to refund the said amount in the event the Applicants appeal is allowed.
48. There is no sworn affidavit of means that has been served upon and or on record.
49. The law as it is requires that where there is an allegation that the Respondent is not possessed of means, the burden of proof shifts to the Respondent to demonstrate, by way of affidavit of means evidence that they are possessed of such sufficient means that should the decretal sum be paid to them and the



appeal is successful they shall be in a position to reimburse/refund the decretal sum".

22. Further in *Equity Bank Ltd vs Taiga Adams Company Ltd* [2006] eKLR, the Court again stated that the only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent, that is; execution proceeds or is carried out, in the event the appeal succeeds, the respondent would not be in a position to pay or reimburse because he has no means of doing so.
23. In view of the foregoing, the Applicants have successfully demonstrated the substantial loss they will suffer if stay is not granted.
24. On timeous filing of the application, it is undisputable that the lower court judgement was delivered on 25th April, 2023 while the instant application was filed on 22nd February, 2024. Prior to filing of this application, the Appellants had filed a similar application dated 12th June, 2023 before the lower court and the same was dismissed on 14th November, 2023. It is patent therefore that the instant application was filed 3 months and 8 days after their said application was denied. The Applicants averred that delay of 3 months in filing this application is not inordinate.
25. In the case of *Almas Hauliers Ltd v Abdulnasir Abukar Hassan* [2017] eKLR a delay of four months was found not to be inordinate. I therefore find that the delay by the applicants is not so inordinate as to make this court deny them the opportunity to challenge the judgment by the trial court.
26. However, it is noted that the applicants only moved this court after the respondents had commenced execution of the said lower court judgement. For this they have to bear the costs so incurred in the execution process.
27. Regarding the issue of Security of costs, the Appellants have already paid half of the decretal sum to the respondents as ordered by this court on 26th February, 2024.
28. The Applicants have therefore satisfied all the conditions necessary for the grant of orders of stay of execution pending Appeal.
29. Having considered the matter, I am inclined to allow the application dated 22nd February, 2024 on the following terms:-
 - I. A stay of execution of the judgment of the lower court delivered on 25th April, 2023 is hereby granted pending hearing and determination of the appeal.
 - II. The applicants to file and serve the record of appeal within the next 30 days.
 - III. For reasons given hereinabove, the applicants shall bear the auctioneer's costs, if any, to be agreed or taxed.
 - IV. Costs of this application, shall be borne by the applicant in any event.

DATED AND DELIVERED VIRTUALLY AT MERU THIS DAY OF 6TH DAY OF NOV 2024.

H. M. NYAGA,

JUDGE

