



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kana v Sudoi & 2 others (Civil Appeal 48 of 2023)  
[2024] KEHC 13559 (KLR) (4 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13559 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 48 OF 2023  
JRA WANANDA, J  
NOVEMBER 4, 2024**

**BETWEEN**

**ARIF ABDUL GAFUR KANA ..... APPELLANT**

**AND**

**ALLAN KIPNGETICH SUDOI ..... 1<sup>ST</sup> RESPONDENT**

**KARIMA KARIM HASSANALI JAMAL ..... 2<sup>ND</sup> RESPONDENT**

**PETER KIMUNYA NJUGUNA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This Appeal arises from the Judgement delivered in Eldoret Chief Magistrates' Court Case No. 615 of 2013. Aggrieved with the Judgement, the Appellant filed this Appeal.
  1. The Application now before Court for determination is the Appellant's Notice of Motion dated 11/05/2023 filed through Messrs Bulbul-Koitui & Co. Advocates, seeking the following orders;
    - i. [.....] spent
    - ii. [.....] spent
    - iii. There be a stay of execution of judgment and orders of Hon. C. Menya in Eldoret Chief Magistrates' Court Case No. 615 of 2013, delivered on 28<sup>th</sup> February 2023 pending the hearing and determination of the appeal.
    - iv. The costs of this application be provided for.
3. The Application is premised on the grounds cited on the face thereof and is supported by the Affidavit sworn by the Appellant. In the Affidavit, the Appellant deponed that on 28/02/2023, the trial Magistrate entered Judgment against him for Kshs 750,000/-, being a refund to the 2<sup>nd</sup> Respondent in



relation to a motor vehicle transaction and that the trial Magistrate made the order despite finding the Appellant to have been an innocent purchaser. He set out the contents of his grounds of Appeal and deponed that the 2<sup>nd</sup> Respondent has obtained warrants of attachment of the Appellant's property in execution of the Decree, has already issued a notice of attachment and that unless the orders sought are issued, the 2<sup>nd</sup> Respondent is likely to proceed with execution at any time. He averred that he has no knowledge of the 2<sup>nd</sup> Respondents' ability to refund any sums that may be paid out and therefore, he is likely to suffer irreparable loss unless stay of execution is granted. He deponed that he is willing to abide with any order in respect to security that the Court may impose for due performance of the Decree.

### **1<sup>st</sup> Respondents' Replying Affidavit**

4. In opposing the Application, the 1<sup>st</sup> Respondent swore the Replying Affidavit filed on 23/05/2023 through Messrs Keter, Nyolei & Co. Advocates. He deponed that he successfully sued the Appellant and the co-Respondents in Eldoret CMCC No. 615 of 2023 in respect to his motor vehicle registration number KBT 890S, that by the Judgment delivered on 28/02/2023, the trial Court ruled in his favour, cancelled the registration of the 2<sup>nd</sup> Respondent as owner of the motor vehicle, reverted ownership thereof to him ( 1<sup>st</sup> Respondent) and ordered the Appellant to refund to the 2<sup>nd</sup> Respondent the sum of Kshs 750,000/- that the 1<sup>st</sup> Respondent received as purchase price.
5. He stated that despite knowing of the Judgment and having filed this Appeal, the Appellant did not seek for stay of the Judgment until the execution process commenced, that the current application coming 3 months after the Judgment, is an afterthought and that the delay is inordinate and inexcusable. He added that the Judgment, being a money decree, no prejudice will be suffered by the Appellant as the 2<sup>nd</sup> Respondent is a banker and therefore capable of refunding the same. He deponed that he is the owner and in possession of the motor vehicle whose value is known and if the appellate Court makes a different decision, he is capable of making good such a decree and therefore, the appeal would not be rendered nugatory and that he is employed as a Researcher at KEMRI.

### **2<sup>nd</sup> Respondents' Replying Affidavit**

6. The 2<sup>nd</sup> Respondent, too, opposed the Application which she did vide the Replying Affidavit filed on 23/06/2023 through Messrs M.C. Ruto & Co. Advocates, and sworn by his Counsel, Mercy C Ruto. Counsel deponed that the Application is an afterthought as the Appellant knew that he was required to pay the decretal amount, but which he ignored or refused to comply with until he was followed up by Auctioneers and that this Court should therefore not entertain him. Counsel deponed further that the Application does not meet the conditions established for grant of stay orders as the Appeal has no chances of success, and that the same has been brought after an unreasonable delay of 3 months. According to her, the Appellant will not face any substantial loss as he already knew that the money paid for the motor vehicle was owed by him to the 2<sup>nd</sup> Respondent anyway, as the vehicle was a stolen one. She urged that it is not fair for the Appellant to prevent the 2<sup>nd</sup> Respondent from enjoying the fruits of her Judgment.

### **Hearing of the Application**

7. The Application was canvassed by way of written submissions. Strangely however, there are two sets of Submissions filed by or for the Appellant. The 1<sup>st</sup> is the Submissions dated 24/10/2023 and filed through Messrs Bulbul-Koitui & Co Advocates and the 2<sup>nd</sup> is the Submissions dated 13/12/2023 filed through Messrs Kipkosgei & Co. Advocates. Since I have not come across any Notice of Change on record, I will only consider the Submissions filed by Messrs Bulbul-Koitui & Co Advocates which is the law firm that has hitherto been representing the Appellant herein. In any case, no leave was



sought or obtained to file Supplementary Submissions. For these reasons, I expunge from the record, the Submissions filed through Messrs Kipkosgei & Co. Advocates.

8. In respect to the 1<sup>st</sup> Respondent, I have not seen any Submissions filed by or on his behalf. On the part of the 2<sup>nd</sup> Respondent, his Submissions was filed on 14/12/2023.

### **Appellants' Submissions**

9. Regarding the principles applicable in determining Applications for stay of execution pending Appeal, Counsel for the Appellant cited Order 42 Rule 6(2) of the Civil Procedure Rules. He submitted that the stay sought by the Appellant is an equitable remedy granted at the discretion of the Court and that for an Applicant to benefit from the equitable remedy he must comply with the principles of equity, prove that substantial loss may result unless the order is made and that the Application has been made without unreasonable delay. He submitted that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties, considering the circumstances of the case. He cited the case of RWW vs. EKW (2019) eKLR, and the case of Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.
10. Counsel submitted that the first requirement is that the intended appeal must be arguable, that a cursory look at the Memorandum of Appeal shows that the grounds raised are triable, that the 2<sup>nd</sup> Respondent has obtained warrants of attachment of property in execution of the Decree, has carried out proclamation thereof and issued a notice of attachment. He submitted that without the Court granting the stay, the 2<sup>nd</sup> Respondent will go ahead and dispose of the subject matter, and that the essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate Court overturn that of the trial Court. He submitted further that the second aspect is to consider whether the Application has been filed without undue delay, that the order granting warrants of attachment is dated 6/04/2023, the present Application is dated 11/05/2023, and the Memorandum of Appeal is dated 27/03/2023. According to him therefore, there is no undue delay.
11. Counsel submitted that denial by this Court of the order for stay of execution will place the Appellant at a more prejudicial position than the Respondents, that while it is unfortunate that the Respondents have had to wait for long to enjoy the fruits of their judgment, the Appellant has adequately demonstrated that the Appellant is likely to suffer loss should his properties be attached and sold off. He contended that the Appellant has stated that he is apprehensive that the Respondents may not be able to repay him should the Appeal go in his favour, that the fear is not far-fetched as the Respondents have neither rebutted nor demonstrated that they have the means and capacity to refund the Appellant. He submitted further that the 1<sup>st</sup> Respondent has not produced any payment voucher or bank slip to demonstrate how much his earnings are and his ability to repay, and that the contract alleged by the 1<sup>st</sup> Respondent and KEMRI should be corroborated by a payment voucher or documentary evidence. He reiterated that the Appellant has sworn that he is ready to abide by any order in respect to providing of security for due performance of the decree.
12. Counsel submitted further that the Appellant has established a prima facie case with high probability of success, that the subject matter is one of peculiar circumstances in which a contractual obligation was satisfied, that for any contract to be valid, elements of offer, acceptance, consideration, intention to create legal relations, authority and capacity must be met, and that it is undisputed that the Appellant was an innocent purchaser of the motor vehicle in a transaction in which all the essentials of a contract were met and that the 2<sup>nd</sup> Respondent also entered into another contract with the 1<sup>st</sup> Respondent for sale of the motor vehicle and in which the ingredients of a contract were also satisfied. He cited the case of Lawrence P. Mukiri vs Attorney General & 4 Others (2013) eKLR. He added that the trial



Court agreed that denying the Appellant the prayers sought would pose great inconvenience, that it also agreed that one Oscar Kanjira was not availed to testify and that he should have been enjoined in the proceedings as a third party, which could have tilted the scales of the case. According to Counsel, these undisputed facts tilt the balance of convenience towards allowing the Application.

## **2<sup>nd</sup> Respondents' Submissions**

13. Counsel for the 2<sup>nd</sup> Respondent similarly cited Order 42 of the Civil Procedure Rules. In respect to “substantial loss”, she urged that the Appellant is not likely to suffer any loss because he has admitted to having been paid the money for the motor vehicle and as it was realized to be stolen, he knew that he is obliged to return the money to the 2<sup>nd</sup> Respondent. She cited the case of *Ena Investment Limited v Bernard Ochau Mose & 2 others* [2022] eKLR. As regards “unreasonable delay”, Counsel submitted that the present application has been brought approximately 3 months after the Judgement sought to be stayed, that the Appellant waited until the Judgement has been executed before bringing the Application and that the same ought to be made as soon as the appeal was made. On security for due performance of such decree, Counsel submitted that the Appellant has not satisfied this condition and therefore, the Application must fail or alternatively, he must be compelled to provide security by depositing the decretal amount. She cited the case of *Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR. On costs of the Application, she submitted that the Appellant ought to pay the same because the Application is an afterthought and has prejudiced the 2<sup>nd</sup> Respondent greatly and led her to suffer irreparably.

## **Determination**

14. The issue that arises for determination herein is “whether this Court should grant an order of stay of execution pending Appeal”.
15. The Court’s power to grant stay of execution pending Appeal is provided under Order 42 Rule 6(2) of the Civil Procedure Rules as follows:
  - “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.
16. Therefore, an Applicant for stay of execution of a decree or order pending Appeal is required to satisfy the conditions set out above. The first one is whether the Application has been made without unreasonable delay, the second is to demonstrate that “substantial loss” may result to the Applicant unless the order is granted, and the third is the Applicant’s willingness or its readiness to deposit security for due performance of the decree or order.
17. The first condition that I need to consider is therefore whether the Application has been made “without unreasonable delay”. It has been said that although there is no exact measure as to what amounts to unreasonable delay, it must be such delay that goes beyond acceptable limits given the nature of the act to be performed. In this case, the impugned Judgment was delivered on 28/02/2023 and the present Application was filed on 11/05/2023. This is after a period of about 3 months. The Appellant has not bothered to explain this delay and which means that the Court has no material before



it to interrogate the Appellant's statement that the Application was made "without unreasonable delay".

18. The second condition is whether the Appellant would suffer "substantial loss" should the order not be granted. As to what constitutes "substantial loss", F. Gikonyo J in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated as follows:

“

- “ 11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“... 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.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.”

19. Further, Platt, Ag. JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR, expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

20. On his part, Gachuhi, Ag. JA (as he then was) in the same case, stated as follows:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”



21. The Judgment sum herein is for the sum of Kshs 750,000,000/-. It cannot therefore be disputed that the amount is substantial, particularly, for an individual. According to the Appellant, there is doubt over the 2<sup>nd</sup> Respondent's ability to refund the money should it be paid to her and then subsequently, the Judgment is overturned on Appeal. On the issue of a decree-holder's ability to refund the decretal sum, the Court of Appeal in the said case of National Industrial Credit Bank Ltd v Aquinas Francis Wasike (*supra*) guided 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 the lack of them. Once an applicant expresses a reasonable fear that 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 — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.

The 1<sup>st</sup> respondent swore the replying affidavit in this matter and in Paragraph 1 thereof, he swore that he is the Chief Executive Officer of and the principal shareholder in the second respondent. He did not disclose the value of his share-holding in the 2<sup>nd</sup> respondent; nor did he say if he earns a salary and if so how much. In Paragraph 11 of the replying affidavit, the 1<sup>st</sup> respondent set out the contracts in which the 2<sup>nd</sup> respondent was engaged in but the values of those contracts were not disclosed. .... On the material before us, the means or resources of the 1<sup>st</sup> respondent remain wholly unknown and in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1<sup>st</sup> or even to the 2<sup>nd</sup> respondents, the two might not be able to repay it back and in that case, if the applicant's intended appeal were to succeed, that success would be rendered nugatory.”

22. Applying the above principles to this case, I find that the 2<sup>nd</sup> Respondent has not provided evidence to demonstrate her ability to refund the decretal sum should the Appeal succeed. I agree with the Appellant that execution of the decree for such a substantial sum has the potential to disrupt and paralyse his livelihood, and that he will be adversely affected if execution proceeds before his Appeal is heard and determined. The description I have given no doubt amounts to “substantial loss” as contemplated under Order 42(6)(2)(a) of the Civil Procedure Rules. “Substantial loss” is however not the only consideration herein.
23. On the merits of the Appeal, from what I have gathered from the copy of the Judgment exhibited, it is not disputed that the motor vehicle, at all material times, belonged to the 1<sup>st</sup> Respondent from whom a fraudster took possession after purporting to purchase it by issuing a false banker's cheque to the 1<sup>st</sup> Respondent. Although the 1<sup>st</sup> Respondent reported the fraud to the police and a caveat was then lodged at the Motor Vehicles Records Registry prohibiting transfer of the motor vehicle, the same was sold to 3 successive purchasers. The 2<sup>nd</sup> last purchaser, the Appellant, sold the motor vehicle to the last purchaser, the 2<sup>nd</sup> Respondent, who somehow, despite the existence of the caveat, managed to get herself registered as owner. The trial Magistrate, in her Judgment, restored ownership of the vehicle to the 1<sup>st</sup> Respondent, ordered for cancellation of the 2<sup>nd</sup> Respondent's name as owner and ordered the Appellant to refund to the 2<sup>nd</sup> Respondent the purchase price paid. She also declared that the Appellant should follow-up his refund from the person who sold him the motor vehicle, Oscar Khanjira.
24. Since it is not disputed that the initial acquisition of the motor vehicle from the 1<sup>st</sup> Respondent was unlawfully secured by a fraudster and a result of a criminal act, *prima facie*, I have my reservations



on how the Appellant will succeed in faulting the trial Magistrate for ordering for restoration of the motor vehicle back to the rightful owner, the 1<sup>st</sup> Respondent, and for the Appellant to refund the 2<sup>nd</sup> Respondent. Further, the Appellant, having failed to join the alleged Oscar Khanjira, from whom he claimed to have purchased the vehicle, in the suit, I wonder how he can then fault the trial Magistrate. Although the existence of an arguable appeal and chances of success thereof is not strictly one of the considerations under Order 42 Rule 6 of the Civil Procedure Rules, in my view, such considerations must still be taken into account since at the end of the day, the Court must strike a balance between the interests of both sides. In this case, my view is that the Appellant has not demonstrated that he has a strong Appeal and this, I will take as a factor in determining whether I should grant the order of stay.

25. In the end, I find that although the Appellant has demonstrated that he may suffer substantial financial inconvenience should he pay the Judgment, he has however failed to demonstrate that he filed the instant Application without unreasonable delay and he has also not persuaded or convinced this Court, at this stage, that he has adequately demonstrated the existence of a prima facie strong Appeal. I also consider that this matter has been in Court since 2013 (more than 10 years) and also that the 2<sup>nd</sup> Respondent parted with money in purchase of the motor vehicle but which vehicle was later dispossessed of. Granting the stay, will only unfairly perpetuate that situation against the 2<sup>nd</sup> Respondent which I find to be unjustly punitive to her. For these reasons, I am not inclined to stay execution of the Decree.
26. I must however clarify that the fact that this Court is of the opinion that a strong appeal has not prima facie been demonstrated at this stage, does not at all mean that the Court has already prejudged the Appeal or that this Appeal shall fail. Nothing can be further from the truth. Of course, at the hearing of the substantive Appeal, the Appellant will have adequate opportunity to demonstrate the strength of his Appeal and he may as well do so and succeed in overturning the Judgment of the trial Court. That stage has not been reached. The findings I have made above should therefore be understood from that point of view

### **Final Orders**

27. The upshot of the foregoing is that I order as follows:
- i. The Appellant's Notice of Motion dated 11/05/2023 is dismissed.
  - ii. Costs shall be in the Cause.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 4<sup>TH</sup> DAY OF NOVEMBER 2024**

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

Kemei for 1<sup>st</sup> Respondent

N/A for all other parties

Court Assistant: Brian Kimathi

Eldoret High Court Civil Appeal No. E048 of 2023

