



REPUBLIC OF KENYA



**Muchiri v Ambane & another (suing as the Administrators of Kennedy Ambane Kidake)
(Civil Appeal E250 of 2024) [2024] KEHC 14749 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E250 OF 2024
FN MUCHEMI, J
NOVEMBER 21, 2024**

BETWEEN

KENNEDY MUKUHA MUCHIRI APPELLANT

AND

MATAYO KIDAKE AMBANE 1ST RESPONDENT

WYCLIFFE MALWA KIDAKE 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF KENNEDY AMBANE KIDAKE

RULING

Brief Facts

1. The application dated 23rd September 2024 seeks for orders of stay of execution in respect of the judgment in Thika CMCC No. E140 of 2023 delivered on 28th August 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 30th September 2024.

Appellant's/Applicant's Case

3. The applicant states that judgment in Thika CMCC No. E140 of 2023 was delivered on 28th August 2024 whereby the trial court found the appellant 100% liable and awarded the respondent general damages for pain and suffering at Kshs. 50,000/-, loss of expectation of life at Kshs. 100,000/-, loss of dependency at Kshs. 1,300,000/- and special damages of Kshs. 145,740/-.
4. Being aggrieved with the decision of the trial court, the applicant lodged an appeal by filing his Memorandum of Appeal on 21st September 2024. The applicant argues that his appeal has high chances of success and if stay is not granted, the appeal would be rendered nugatory and he shall suffer



substantial loss. The applicant further states that the respondents' ability to refund the decretal sum is unknown. The respondent argues that the respondents shall not suffer any prejudice if the application is allowed.

5. The applicant states that he is willing and able to furnish security in the form of a bank guarantee from Diamond Trust Bank.

The Respondents' Case

6. The respondents state that the application offends the mandatory provisions of order 42 Rule 6 of the Civil Procedure Rules as the applicant has not demonstrated what substantial loss he stands to suffer. Further, the respondents state that security in form of a bank guarantee will not ensure due performance of the decree. Thus the respondents state that in the event the court grants the orders of stay, the applicant ought to pay them half the decretal sum and deposit the other half in a joint interest earning account as security for the performance of the decree.
7. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

8. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of *Owour vs Catholic University of Eastern Africa* [2023] KEELRC 2807 and submits that he stands to suffer substantial loss as the decretal sum is substantial being a sum of Kshs. 1,737,440/- and the respondents are of unknown means, therefore there is no telling if they are able to refund the said sum if the appeal succeeds. The applicant further relies on the cases of *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another* (2006) eKLR; *ABNAMRO Bank vs Lemond Foods Limited* Civil Application No. 15 of 2002 and *Sentrim Contracts Ltd vs Joseph Mutinda Menya* [2016] KEHC 4980 (KLR) and submits that the financial probity of the respondents is a matter within their personal knowledge and therefore they bear the legal burden to demonstrate that they are able to refund the decretal sum in the event the appeal succeeds. The applicant argues that the respondents failed to depose to an affidavit of means or any affidavit merely stating that they are able to refund the decretal sum.
9. The applicant argues that although the respondents have alleged that a stranger to the suit will pay the decretal sum, they have not availed any evidence that the judgment sum shall be paid by the insurance company. The applicant submits that the insurer is only legally mandated to settle the claim after a declaratory suit premised on the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405, has been filed and determined. Thus there being a decree against the applicant, the respondents can execute against him and deprive him his property.
10. Relying on the cases of *Owour vs Catholic University of Eastern Africa* [2023] KEELRC 2807 (KLR) and *James Wangalwa & Another vs Agnes Naliaka Cheseto* (Miscellaneous Application 42 of 2011) [2012] KEHC 1094 (KLR) (24 October 2012) and submits that he has a right to a fair hearing including the right to pursue an appeal and thus in the event the orders sought are not granted, the appeal shall be rendered nugatory.
11. On the issue of security, the applicant relies on the case of *Kenya National Authority vs Zenith Steel Fabricators Limited & SBI International Holdings Ag (Kenya) Ltd* [2017] KEHC 7385 (KLR); *Nyamwaya vs Ondera* [2022] KEHC 619 (KLR); *Peter Osoro Omagwa & Kefa Okware vs Bathseba Mwangi Maikini* [2021] KEHC 3472 (KLR); *Kiprop & Another vs Wafula & Another* [2023] KEHC 1177 (KLR); *Nduhiu Gitahi vs Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 and *Galgalo Jarso Jillo vs Agricultural Finance Corporation (Cause 13 of 2019)* [2022] KEELRC 480 (KLR) (17 March 2022) (Ruling) and submits that purpose of providing security is to ensure that



at the end of the dispute, the decretal sum is easily accessible to the winning party which the bank guarantee offers.

12. The applicant submits that the instant application was filed within 30 days after judgment was entered as judgment in the trial court was delivered on 28th August 2024 and the instant application was filed on 23rd September 2024.
13. The applicant submits that the appeal raises arguable and reasonable grounds of appeal which have appreciable chances of success. Relying on the case of Kenya Power & Lighting Company Ltd vs Eunice Nkirote Ringera [2020] eKLR, the applicant submits that he is challenging both liability and quantum which raise serious questions of law and facts.

The Respondents' Submissions

14. The respondents submit that the applicant has not demonstrated substantial loss or damage that will be occasioned to him but he has only stated in his application that he stands to suffer irreparable loss and damage if execution is levied. The respondents argue that the decretal sum is to be paid by the insurance company, Sanlam Insurance Company and therefore the applicant will not suffer any substantial loss.
15. The respondents submit that orders of stay of execution are discretionary in nature and it is upon the court to assess the facts of the case and make an order. The respondents argue that in the event the court allows the application, the court ought to balance the rights of both parties and direct that the applicant pay half the decretal sum and deposit the other half in a joint interest earning account in the names of both advocates within thirty (30) days.
16. The respondents submit that the applicant's financial ability is unknown and he has not demonstrated the same by way of an affidavit of means. The respondents argue that they have a judgment in their favour and the honourable court should allow them to enjoy the fruits of their judgment.
17. The respondents submit that the decree is a money decree and therefore a bank guarantee will not ensure the due performance of the decree. Further, the respondents argue that there is no evidence of the purported bank guarantee that is to be issued by Diamond Trust Bank Limited.
18. The main issue for determination is whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

19. It is trite law that an appeal does not operate as an automatic stay of execution. 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(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules 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 to 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 orders set aside.



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 1st 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. 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.
21. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“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.

22. The applicant contends that should the respondent proceed with execution and the appeal is successful, he may not recover the same from the respondents as their financial ability is not known to him.
23. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to its detriment therefore rendering the appeal nugatory.

In the instant case, the applicant has shown that he does not know the respondents’ financial capabilities and that he may not recover the said amount from the respondents in the event the appeal succeeds. The evidentiary burden at that point shifted to the respondents to show that they are persons of means and would be able to settle the decretal sum should the appeal succeed. The respondents in this case failed to do so. Thus, it is my considered view that the applicant has demonstrated that he stands to suffer substantial loss in the event that stay orders are not granted.

Has the application has been made without unreasonable delay.

24. Judgment was delivered on 28th August 2024 and the applicant filed the instant application on 23rd September 2024. It has taken the applicant about 3 weeks between the date of judgment delivered in the trial court and the time when he filed the instant application, thus the application was filed timeously.



Security of costs.

25. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

26. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has stated that he is ready and willing to furnish the court with a bank guarantee from Diamond Trust Bank as security. I have perused the record and the applicant has not availed a copy of the said bank guarantee from Diamond Trust Bank despite having sufficient time to do so. Therefore, one cannot ascertain the veracity of the said bank guarantee or the parties to the said bank guarantee. Furthermore, a bank guarantee is not proof of existence of funds.

27. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

28. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent her right of enjoying her judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they raise arguable points of law. Therefore, it is my considered view that the applicant has met the threshold of granting stay of execution pending appeal. In order to balance the interests of both parties, this court must give a condition to ensure that none of the parties will suffer pending hearing and determination of the appeal.

29. Accordingly, it is my considered view that the application dated 23rd September 2024 has merit and is hereby allowed.

30. The court grants orders for stay pending appeal and the applicant shall deposit the decretal amount in court within 30 days. In default, the stay orders shall stand vacated.

31. The respondent shall have the costs of this application which will abide in the appeal.

32. It is hereby so ordered.



**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21ST DAY OF
NOVEMBER 2024.**

F. MUCHEMI

JUDGE

