



REPUBLIC OF KENYA



KENYA LAW
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**Signon Group Limited & another v Vincent (Civil Appeal E002 of 2024)
[2024] KEHC 14549 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CIVIL APPEAL E002 OF 2024
RB NGETICH, J
NOVEMBER 14, 2024**

BETWEEN

SIGINON GROUP LIMITED 1ST APPELLANT

STEPHEN KIPROTICH 2ND APPELLANT

AND

KIPKIRUI K. VINCENT RESPONDENT

RULING

1. The Appellant/Applicant has moved this court vide an application dated 16th August, 2023 brought under the provisions of Section 1 A, 1B and 3A of the *Civil Procedure Act*, order 51 Rule 1, order 21 Rule 9A & order 42 rule 6 of the Civil Procedure Rules, 2010 seeking for the following orders: -
 - i. Spent.
 - ii. Spent.
 - iii. That this honourable court be pleased to cancel, set aside, recall and or lift the Warrants of Attachment and proclamation notice dated the 23rd April 2024 for having been issued irregularly.
 - iv. That this honorable court be pleased to issue orders for stay of execution of the judgment/decree issued by this Honourable court in Eldama Ravine CMCC NO 27 OF 2020 pending hearing and determination of the instant appeal on conditions already granted by court on 17th August, 2023 and complied with on 31st August, 2023.
 - v. That the Certificate of costs dated 13th July, 2023 be varied and or set aside and taxed afresh by the taxing master.
 - vi. That the auctioneer's cost be borne by the Respondent herein



- vii. That costs of this application be in the cause.
2. The application is premised on the grounds that on the 8th May,2023, in the absence of the Applicants and without their knowledge, judgment herein was entered in favour of the Plaintiff condemning the Applicant herein to settle the decretal sum of Kshs. 613,555.00 plus costs and interest.
 3. That the Applicants being aggrieved and dissatisfied with the said judgment delivered on 8th May,2023 preferred to appeal in the High Court but since the prescribed time of 30 days within which the memorandum of appeal should be lodged had lapsed, the Applicants filed an application dated 16/08/2023 seeking stay of execution and leave to file the Memorandum of Appeal out of time serialized as Eldama Ravine High Court Misc No E001/2023 Siginon Group Limited -vs- Stephen Kiprotich Vs Kipkurui Vincent.
 4. That on 17th August, 2023 upon hearing the application, the Appellants were directed by this court to deposit half the decretal sum in court within 21 days as a condition for stay of the judgment delivered on 8th May, 2023 which sums were deposited on 31st August,2023.
 5. That on 4th April, 2024 the court delivered its ruling in respect to the aforesaid application granting leave to the Defendant to file the instant Appeal out of time and despite the aforesaid, the Respondent herein has already moved prematurely and illegally and commenced execution process to the extent of serving the Applicants herein with warrant of attachment of moveable property, warrant of sale of movable property and proclamation notice.
 6. That in addition to the aforesaid, the costs of the suit herein have been taxed without the Applicant's participation contrary to the provisions of Order 21 Rule 9A of the Civil Procedure (Amendment) Rules 2020 and further contrary to principles of natural justice and if the said premature execution is allowed to proceed, the appeal will be rendered nugatory and the Applicant herein will incur substantial financial losses. Moreover, the Applicant herein will be condemned to meet auctioneer's fees for a procedure that was commenced illegally and prematurely.
 7. That the Applicant herein has already furnished such security as ordered by the High Court on 17th August,2023 and it is in the wider interest of justice that the orders sought herein are granted to avert miscarriage of justice of an illegally commenced court process.
 8. The application is further supported by the annexed affidavit of Esther Wanjiku Ndungu who avers that she is the Legal Officer of the Appellant's insurer herein and has its authority to swear this affidavit. She restated grounds of the application.
 9. She avers that judgment in Eldama Ravine Cmcc No 27 Of 2020 was delivered on 8th May,2023 in favour of the Plaintiff/Respondent in the absence of the Appellants and without their knowledge condemning the Appellants herein to settle the decretal sum of Kshs. 613,555.00 plus costs and interest and they only learnt of the judgment when the Plaintiff/Respondent served their advocates on record with the decree and certificate of costs on 10th August,2023.
 10. That upon filing application to appeal out of time and for stay of execution on 17th August, 2023 the court ordered the Appellants to deposit half the decretal sum in court within 21 days as a condition for stay of the judgment delivered on 8th May,2023 and on 31st August,2023, the Appellants deposited the sum of Kshs 296,404.00 in court in due performance of the court order and a further Kshs 1,500.00 being collection fees.
 11. And upon hearing of the application, by ruling delivered on 4th April,2024 the Applicants were granted leave to file the instant appeal and state that the Respondent has moved prematurely, illegally



and commenced execution process to the extent of serving the Appellants herein with warrant of attachment of moveable property, warrant of sale of movable property and proclamation notice.

12. Further, that the costs of the suit herein have been taxed without the Appellants participation contrary to the provisions of Order 21 Rule 9b of the Civil Procedure (Amendment) Rules 2020 and principles of natural justice and if the said premature execution is allowed to proceed, this appeal will be rendered nugatory and the Appellants herein will incur substantial financial losses. Moreover, the Defendant/Applicant herein will be condemned to meet auctioneer's fees for a procedure that was commenced illegally and prematurely.
13. She avers that the Defendant/Applicant herein has already furnished such security as ordered by this court on 17th August, 2023 and is ready and willing to abide by any further orders that this court may deem fit in the circumstances. She further avers that in the unlikely event that this court finds that the execution process commenced by the Plaintiff/Respondent is regular, they implore this court to direct that the same be agreed upon between parties and or taxed and urged this court to stay of execution of the judgment and decree dated 13th July, 2023 together with the warrants and proclamation notice pending hearing and determination of this appeal.

Response

14. In response, the Respondent filed a replying affidavit sworn by Kipkirui K. Vincent the Respondent herein. He avers that the Applicants' Application dated 26th April, 2024 is bad in law, made in bad faith, inept, lacks merit, an after-thought, and otherwise amount to an abuse of the court process.
15. He further avers that he instituted a case against the Applicants seeking compensation for injuries he sustained as a result of a road traffic accident which occurred on 15th December, 2019 and the matter came up in court on several occasions and on 8th May, 2023 the trial court delivered judgment in his favour and the Applicants were granted 30 days stay of execution but failed to satisfy the judgment and instead filed an application seeking stay of execution and leave to file the memorandum of appeal out of time. That the Applicants were notified of the judgment through the letter dated 8th May, 2023 and certificate of costs was sent to the Applicants and another letter dated 25th July, 2023 tabulating the costs of the suit and the total amount owing to him for them to make payments; that the Applicants confirmed receipt of their previous communications and sought 30 days to enable them settle the matter.
16. Further that a reminder was sent to the Applicants to settle the matter but instead filed the application dated 16th August, 2023 seeking to appeal the court's decision. This court granted stay of execution as prayed for in the application dated 16th August, 2023 on condition that the Applicant deposits half the decretal sum in court within 21 days from 17th August, 2023 and the application dated 16th August, 2023 was also allowed and the Applicant was allowed to file the appeal out of time.
17. He avers that the Applicant did not inform them of the deposit made in court and they could not tell whether they had complied with the court's order or not and since the order was to deposit half the decretal sum, they lawfully moved to execute for the other half of the decretal sum as there was no stay of execution for the same.
18. He further avers that the auctioneers were properly instructed and the Applicant having failed to satisfy half of the decretal sum, he ought to be compelled to pay the auctioneer's fees. Further that he will be grossly prejudiced if this application is allowed as it is as the Applicants have not met the conditions for granting such an application.



Applicant's Submissions

19. The applicants submit that stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 and the power of a court to grant stay of execution is discretionary and this discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision. They rely on the case of Civil Application No Nai. 6 Of 1979 Butt -vs- Rent Restriction Tribunal and submit that the applicant is required to satisfy the court that substantial loss would occur if the order of stay is not granted and further relied on the case of Good News Church of Africa Vs Board of Management Eldoret Secondary School [202] eKLR in support of their argument.
20. The Applicants submit that they will suffer substantial loss should stay orders be declined consequently giving way to the Plaintiff to execute the judgement/decree delivered on 8th May,2023 and the appeal may be rendered nugatory and they may not be able to recover the decretal sum as the Plaintiff/ Respondent's financial status is not known as no evidence has been tendered to show that the Plaintiff/ Respondent is capable of refunding the decretal sum whereas on the other hand ,the Applicants are more than capable of paying the decretal sum in full in the unlikely event that the appeal fails as they are people of means insured by one of the top Insurance companies in Kenya, Fidelity Shield Insurance Company Ltd;that the onus is on the Plaintiff to demonstrate to this court his financial muscle to refund the decretal sum and relied on the case of Bonface Kariuki Wahome v Peter Nziki Nyamai & another (2019) eKLR in support of their argument.
21. The Applicants further submit that as much as the Respondent is entitled to the fruits of the judgment, this court should also ensure that the interests of the Applicants are secured. Further that the Respondent has not indicated the loss he will incur should the court grant stay orders pending appeal and urged this court to preserve the subject matter pending the outcome of the appeal.
22. On requirement to file application without unreasonable delay, the applicants submit that, judgment was delivered on 8th May,2023 in the absence of the Applicants and without their knowledge and learnt of the judgment when their Advocate was served with the decree and certificate of costs on 10th August,2023 and they made application dated 16th August,2023 seeking stay of execution of the judgment and leave to file the Memorandum of Appeal out of time. That on 17th August,2023 upon hearing of the application exparte, this court ordered that the Appellants deposit half the decretal sum in court within 21 days as a condition for stay of the judgment delivered on 8th May,2023.
23. That on 31st August,2023, the Appellants deposited the sum of Kshs 296,404.00 in court in due performance of the court order and a further Kshs 1,500.00 being collection fees and proof of the same is as seen in the supporting affidavit. Upon hearing of the application aforesaid, the court on 4th April,2024 delivered its ruling in respect to the application aforesaid granting leave to the Appellants to file the instant appeal.
24. That it is therefore the Applicants submission that this application has been filed in court in good time and the fact that the Appellants have already deposited money in court as ordered by the honourable court amounts to compliance with the second and third threshold required for grant of stay of execution pending appeal.
25. In respect to the Certificate of costs, the Applicants submit that the Certificate of Costs issued should be set aside on ground that the Applicant was not served and relied on the provisions of order 21 Rule 9A of the Civil Procedure Rules and the case of Vincent Kibiwott Rono v Abraham Kiprotich Chebet



& another J20221 eKLR where the court set aside costs and directed taxation to be done afresh for failure to prove service and urged this court to set aside Certificate of Cost and direct fresh taxation arguing that from the replying affidavit filed by the Respondent, they have not disputed and or tried to substantiate that they served the applicants with their bill of costs prior to taxation neither have they filed any documents in support of their costs and further, some of the costs which included witnesses' attendances were not awarded by the court in its judgment and or pleaded but the same were awarded as seen in the certificate of costs.

26. In respect to warrants of attachment and proclamation notice dated the 23rd April, 2024, the applicants submit that from the Respondent's own admission as seen in the Replying Affidavit, he was aware that the Appellants had deposited the money in court and that is why he deposes that he was executing against the other half of the decretal sum. It is important to note that the Respondent was notified via email that half the decretal sum had been deposited in court.
27. That it is interesting for the Respondent to state that they were executing against the other half yet the court had not issued orders directing the Respondent to recover the other half thus the process of execution and obtaining warrants had no basis and the warrants of attachment were irregular as the Appellants had fully complied with the orders of the court issued on 31st August, 2023 directing the Appellant to deposit half the decretal sum in court; and the Respondent should incur the auctioneer's costs and prayed for orders for stay of execution pending appeal do issue.

Respondent's Submissions

28. The Respondents submits that the Applicants were granted stay of execution on condition that they deposit half the decretal sum in court within 21 days but failed to comply with the said conditions and the Respondent proceeded to execute the judgment; and it is through the Applicants application that the Respondent got to know that they had complied with the court orders.
29. They submit that the court is therefore functus officio on the issue of stay of execution and thus the Applicants cannot be granted the order for stay and even if the court was to consider whether the Applicants have met the requirements for granting stay of execution, the Applicants have not complied with all the conditions and the Applicants are therefore still not entitled to an order for stay of execution.
30. The Respondent in submitting on whether the Applicant will suffer any loss if the Application herein is not allowed, they submit that the applicants have not established that they will suffer loss as they have not provided any proof to the effect that the Respondent will not be able to refund money paid in the event the appeal is successful and relied on the case of Equity Bank Limited Vs Taiga Adams Company Limited Civil Appeal No. 722 of 2000 as cited in the case of Luxus Woods (K) Limited v Patrick Amugune Kamadi [2016] eKLR.
31. On whether the Defendant/Applicants have given any security, they submit that according to the Application filed by the Applicants, they have not provided any security for the half of the decretal sum or shown willingness to provide the same; and submit that this Application herein is unmerited as the same does not satisfy the requirements of Order 42 rule 6. They therefore pray that this application be dismissed with costs to the Respondent.
32. On whether the certificate of costs should be set aside, they submit that the Applicants were served with the tabulated costs through a letter dated 8th May, 2023 and were equally served with the letter dated 25th July, 2023 enclosing the certificate of costs and the same are attached to Respondent's replying affidavit. Further that the applicants acknowledged receipt of all their correspondences and sought 30



days to enable them settle the claim and their acknowledgment is annexed in Respondent's replying affidavit.

33. That it is disingenuous for the Applicants to state that they were not aware of costs and that the certificate of costs was issued without their participation yet at the time they were served with the same, they did not oppose or raise any concerns but rather were willing to settle.
34. Further that the Applicants have not stated which items on costs they are opposed to or were not taxed properly to justify any variation on the certificate of costs. It is therefore the Respondent's submission that the certificate of costs was properly issued and the same ought not to be varied, set aside or taxed afresh.
35. On whether the warrants of attachment and proclamation should be set aside and whether the Respondent should pay the auctioneer's costs, the Respondents submit that the Appellants/Applicants were directed to deposit half the decretal sum in court within 21 days from 17th August, 2023. That the Applicants did not notify the Respondent that they had deposited the half decretal sum as directed by court and therefore the Respondent was not in a position to know the same and thus it was the Respondent's position that the court orders were not complied with thus proceeded to execution.
36. That the instructions of auctioneers, taking out warrants and the proclamation notice were purely on the notion that the Applicants had not complied having failed to notify the Respondent that they have complied. The Respondents cannot therefore be penalized for the omissions of the Appellants. It is therefore the Respondents submissions that the warrants and the proclamation notice ought not to be set aside, cancelled, recalled or lifted. The Respondents submits that the auctioneer's costs be borne by the Applicants; that this application is not merited and urge this court to dismisses with costs to the Respondent.

Determination

37. This application is brought under Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. In the case of *Butt v Rent Restriction Tribunal* {1982} KLR 417 Madan JA stated as follows: -

“It is the discretion of the Court to grant or refuse a stay, but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general rule ought to exercise its best discretion in a way so as to prevent the appeal if successful being nugatory. It follows also in *Hassan Guyo Wakalo v Straman East Africa Ltd* Civil Appeal No. 160 (201) {2013} eKLR the Court held: “In addition, the applicant must prove that if the orders sought are not granted and his appeal, eventually succeeds, then the same shall have been rendered nugatory.”

38. These twin principles go hand in hand and failure to prove one dislodges the other. What the court ought to consider while exercising discretion is whether the appeal will be rendered nugatory upon succeeding and if yes, are there any exceptional circumstances to necessitate the suspension of the decision complained of.
39. Further in the case of *RWW v EKW* {2019} eKLR the court stated 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 his/her 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.”

40. And the Court of Appeal in case of Kenya Tea Growers Association & another v Kenya Plantation and Agricultural Workers Union [2012] eKLR addressed what is considered to be an arguable appeal as hereunder-

“The power of the Court under rule 5(2)(b) of the Court of Appeal Rules is discretionary. Two principles guide the court in exercising that discretion. First, for an applicant to succeed in such application he must show that his appeal or intended appeal is arguable, or put another way that it is not a frivolous one. He need not show that such appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision. It is also trite that the applicant need not show several issues. As stated earlier at least one issue suffices for purposes of an application under rule 5 (2) (b). Second, the applicant must in addition, show that, unless he is granted either a stay or injunction as the case may be, the success of his appeal or intended appeal will be rendered nugatory”

41. The applicant herein seeks to cancel, set aside, recall and or lift the Warrants of Attachment and proclamation notice dated the 23rd April 2024 for having been issued irregularly. The Applicants argue that upon learning that judgment was delivered on 8th May 2023, they filed application for stay and for leave to file appeal out of time and on 17th August 2023, this court granted stay orders on condition that half the decretal amount was deposited in court within 21 days. Half the decretal amount was deposited on 31st August 2023 the applicants therefore complied with the court condition for stay orders.
42. The Respondent proceeded with execution and their argument is that the Applicant failed to notify him that they had deposited half the decretal amount and they learnt of the deposit from the application herein. He further argues that there was no security for the remaining half in justifying execution process.
43. It is not disputed that the applicants deposited half the decretal amount as directed by court and therefore complied with the court’s condition for grant of stay of execution. It is not however confirmed that the Respondent was notified of the deposit of the half decretal amount. In respect to the remaining half of the decretal amount, the Respondent misinterpreted the court’s order to suit their action. It is clear from court’s direction that what was expected from the Applicant was to deposit in court half the decretal amount as a condition as a condition for grant of stay orders and there were no directions for payment of the remaining half to the Respondent.
44. Whereas the Respondent’s Advocate may not have been notified of the deposit, I am of the view that it would have been prudent for the Respondent’s Advocate to confirm whether deposit had been made to court as directed before instructing Auctioneers. In view of the above, I am inclined set aside the warrants of attachment and proclamation notice dated 23rd April 2024 and direct that Auctioneer fee to be shared equally between the Respondent and the applicant; each party to pay half of auctioneer costs.
45. In respect to prayer to have Certificate of costs dated 13th July, 2023 be varied and or set aside and taxed afresh by the taxing master, the proper procedure for challenging assessment of cost to be followed.



46. Final Orders

1. warrants of attachment and proclamation notice dated 23rd April 2024 are hereby set aside.
2. Auctioneers' fee to be paid equally by Respondent and Applicants.
3. In the event parties herein are not able to agree on Auctioneers' fee, the same to be assessed by court.
4. Stay of execution to remain in force pending hearing and determination of this appeal.
5. Each party to bear own costs of this application.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 14TH DAY OF NOVEMBER 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of

Elvis, Court Assistant.

Oteyo holding brief for Ms. Mwangi for Appellant.

Ms. Onyango for Respondent.

