

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. E138 OF 2024

ELIUD KOGO.....1ST APPLICANT

JOSEPH TANUI.....2ND APPLICANT

VERSUS

ENOCK KIPLAGAT.....RESPONDENT

RULING

1. By way of Notice of Motion dated 26th June 2024, the Applicant seeks the following orders;

1) Spent

2) Spent

3) Spent

4) That pending the hearing and determination of this Appeal, this Honourable Court be pleased to stay the execution of the judgment, decree and/or any consequential orders/ processes thereto by the Respondent either by themselves, their servants, agents, employees and/or any other person authorized by him.

5) That cost of this application be in cause.

2. The Application is expressed to be brought under **Article 159(2) (d) of the Constitution of Kenya 2010, sections 1A, 1B, 3A and 79G of the Civil**

Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010, and all other enabling provisions. The application is premised on the grounds on the face of it and the averments in the supporting affidavit sworn by the 2nd Applicant.

3. The deponent averred that judgment was delivered by the trial court on 31/05/2024 in favour of the Respondent wherein a limited stay for 30 days was granted by the trial Court which stay lapses on 31/06/2024. He annexed a copy of judgement marked as JT1. He urged that they were aggrieved by the said finding and have preferred an appeal against the same. However, in the absence of a stay of execution order pending the hearing and determination of the appeal, they are at the risk of facing execution from the Respondent and his agents.
4. He stated that it shall be unconscionable and inequitable for the Respondent to be allowed to execute the final judgment and decree without himself his co-applicant being given the opportunity to be heard in the matter as the same shall be prejudicial. Further, that they have a good, solid, arguable and meritorious Appeal and the matter ought to be heard on merit as evidenced in the Memo of Appeal.
5. On the issue of security, he stated that the subject matter of the small claims court was the construction on a house which is already at the roof level as evidenced by the photos which he annexed and marked as JT2. Further, that they entered into a contract for the construction of a house and the respondent herein deposited with us Kshs. 1,000,000/- for the said works which amount was substantially used in the construction of the said house. He annexed and marked the receipts as JT3. He stated that the house already exists on the respondent's premises and there were no orders as to

demolition and/ or any structural defects to the building. Without any finding as to what happens to the already existing building and/or the structural issues in the same, it remains that the respondent herein still has a sound house standing in his land and thus asking the them to furnish any further securities will be greatly prejudicial against the applicants.

6. He stated that unless the Application is heard, the Applicants will suffer untold injustice, irreparable loss and damage. Further, that the application has been brought without undue delay and it will not prejudice the Respondents in anyway. He prayed the court allow the same.

Respondents' Replying Affidavit

7. The respondent filed a replying affidavit dated 16th September 2024 in response to the application. He deponed that the application has not met the threshold of granting of orders of orders of stay of execution pending appeal. Further, that the appeal is a non-starter and a waste of court's time as the subject matter is an incomplete house that continues to depreciate and the respondent herein should not be held at ransom any longer due to a pending appeal. He urged that the applicant has not in any way established sufficient cause for seeking the orders neither has he established that he stands to suffer loss if stay orders are not granted. On the contrary, it is the respondent who is suffering substantially due to the continued delay of this matter. He stated that the applicant has not demonstrated any intention of providing security for the due performance of the decree as is required by law.
8. In response to paragraph 7 of the affidavit, he stated that the contract in question was very specific as to what was expected of the applicants and breach of the same followed a claim for a refund for the monies paid and the remedy given by court was merely giving effect to what parties enter into

voluntarily. In response to paragraph 8 and 9, he stated that the applicant is being unreasonable in that the honorable courts mandate was limited to establishing breach of contract and award damages and not issue orders not sought for. In response to paragraph 5 of the affidavit, he stated that the appeal in question raises no triable issues as the issues in questions speaks to a contract as the primacy legal obligation which contract the applicant's breached and which breach cannot be cured by an appeal. He urged the court to dismiss the application with costs.

Applicants' Submissions

9. Learned counsel for the applicant submitted that the Application is anchored on Order 42 Rule 6 of the Civil Procedure Rules and further, placed reliance on the interpretation of the above provisions by the court in **Kinyunjuri Muguta v Wotuku Muguta [2018] eKLR**.
10. Counsel urged that there would be a substantial loss occasioned on their part in the event the respondent executes the orders resulting from the impugned judgement and in support of this reiterated the facts deposed in the Applicants Affidavit as summarized in paragraph 5 above. He additionally stated that the respondent has also not demonstrated that he would be at a capacity to refund the money in case the appeal succeeds and the appellant submits that such a fact cannot be assumed by the court nor can it be left to inference.
11. Counsel urged that the factors all compounded obviously show that that in the event that this application is not granted and the respondent herein proceeds to execute, the applicants will suffer serious prejudice. Counsel placed reliance on the cases of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another (2018) eKLR** and **G.N. Muema P/A (Sic)**

Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another [2018] eKLR in this regard.

12. Counsel urged that the application was brought expeditiously before this Court as the Court delivered its judgement on 31st May, 2024 and the appellants filed a notice of appeal on 26th June, 2024 following receipt of the judgement and the application for stay of execution orders was filed on the same day. He urged that the application was instituted without unreasonable delay.

13. On security, counsel submitted that the applicants are ready to abide by any condition by this Court for due performance of the decree should the appeal fail. He submitted that the court should however consider the documents annexed to his application while giving any orders as to security. He reiterated that the judgment amount of Kshs. 1,000,000/- which was the end amount given to the applicants for the construction of the said suit house which is already constructed to the roof and that the applicants also utilized an amount totaling to Kshs. 685,250/- which figure they submit is less the labor fees for the construction workers and some raw materials. He urged therefore that the court in giving any orders for security, should consider that was actual money was used by the applicants in the construction of the house.

Respondents' submissions

14. Learned counsel for the respondent submitted that the instant application is a delaying tactic made in bad faith lacks merit and is an abuse of court process and ought to be dismissed with costs.

15. Counsel urged that the guiding principles in granting a stay of execution pending appeal are provided for under **Order 42 rule 6 (2) the Civil**

Procedure Rules. On substantial loss, counsel cited the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR**. He stated that in the instant case the applicant was bound by a contract and the respondent met his part of the bargain by paying the entire amount of construction. The applicant has not demonstrated goodwill by remitting a security to court to justify that they are able and willing to comply with the condition on security for the due performance of the decree appealed from which is yet to be extracted.

16. Counsel cited the case of **RWW vs EKW (2019) eKLR** and submitted that should the court grant the orders sought, the respondent will be greatly prejudiced as he has to wait to enjoy the fruit of his judgement. He additionally cited the case of **Arun Sharma vs Ashonee Raikundalia T/A Rairundulia & Co Advocates (2014) eKLR** where the court clearly dealt with the issue of security. Further, he urged that in Civil Proceedings, a security is given as security for due performance of such a decree or orders as may be ultimately be binding on the applicant. He urged the court to dismiss the suit and stated that if it is to allow the same the applicant should be compelled to tender a bank guarantee or the entire decretal sum be deposited in a joint interest earning account in the names of both advocates.

Analysis & Determination

17. The court, in **RWW v EKW [2019] eKLR**, considered the purpose of a stay of execution order pending appeal, in the following words:

“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.”

18. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under **Order 42 rule 6(2) of the Civil Procedure Rules** which provides:

“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 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.

19. What amounts to substantial loss was considered in the case of **G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR**, where the court stated as follows: -

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

20.Further in the case of **Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63**, it was held as follows;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”

21.The purpose of security was clearly enunciated in **Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR**, where 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 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.”

22. In the instant case, having considered the pleadings, the submissions and the annexed Memorandum of Appeal, I am satisfied that this Application for stay was filed within the allowable time frame and having considered the facts deposed in support of the Application, I am also satisfied that the applicant has sufficiently demonstrated that he has an arguable appeal. Further, in noting that the deposition by the Applicant that the house the subject matter of the decretal amount is still standing upon the Respondent's land has not been rebutted, then the deposition that some money must have been expended in putting it up to the stage it has reached, whatever condition it may be in notwithstanding, has substance and this cannot be ignored by the court.

23. In this regard, I am satisfied that the Applicant has sufficiently demonstrated the substantial loss that he stands to suffer if the orders of stay are not granted. Finally, on security, notwithstanding the Applicant's submissions on the same as already herein captured, the court does echo and reiterates the finding of the court in the case of **Arun. C. Sharma** herein above cited on why the provision of security on application's for stay of execution is deemed necessary and that is so as 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....

24. Being satisfied that the Applicant has met the conditions for stay of execution as set out in **Order 42 Rule (6)(2) of the Civil Procedure Rules**, I find that his Application has merit and the same is now hereby allowed as follows;

- a) That pending the hearing and determination of this Appeal, a stay of execution of the judgment, decree and/or any consequential orders/ processes by the Respondent either by themselves, their servants, agents, employees and/or any other person authorized by him in ELDORET SCCC NO. E472 of 2023 be and is now hereby issued.
- b) That the Applicant is to deposit half the decretal sum of Ks. 1,000,000/- with the court within the next 45 days from the date of this Ruling failure to which the stay orders herein issued shall be deemed to have lapsed and the Respondent is at liberty to proceed with execution for the entire decretal sum
- c) The Applicant is to bear the costs of the Application

Read Dated and Signed at ELDORET on 16th October 2025

E. OMINDE

JUDGE