



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Gikonyo & another v Wambui (Civil Application E019 of 2022)  
[2022] KECA 1033 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1033 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION E019 OF 2022  
W KARANJA, F SICHALE & KI LAIBUTA, JJA  
SEPTEMBER 23, 2022**

**BETWEEN**

**CHARLES MWANGI GIKONYO ..... 1<sup>ST</sup> APPLICANT**

**KENYA HORTICULTURAL EXPORTERS (1977) LTD ..... 2<sup>ND</sup> APPLICANT**

**AND**

**LAWRENCE MUKUMBU WAMBUI ..... RESPONDENT**

*(Being an Application seeking orders of Stay of Execution from the Judgment and Decree of the High Court of Kenya at Nanyuki (H. P. G. Waweru, J.) delivered on 3rd February 2022 in Civil Appeal No. 3 of 2020)*

**RULING**

1. This application arises from a second appeal in which the applicants challenge the High Court's decision dismissing their first appeal from the decree of the trial court in a running down matter. In the suit before the trial court, the applicants (who were the defendants) were held liable for the accident with the court apportioning culpability at 90%:10% in favour of the respondent herein.
2. The trial court assessed general damages for pain and suffering at Kshs 1,100,000.00, further medical expenses at Kshs 250,000.00 and awarded special damages of Kshs 117,440.00 (a grand total of Kshs 1,467,440.00), less the 10% contribution, leaving a sum of Kshs 1,320,696/00 (90% of the grand total).
3. The High Court noted that the accident occurred apparently in the course of the 1<sup>st</sup> appellant's duty with the 2<sup>nd</sup> appellant; that he was driving the 2<sup>nd</sup> appellant's bus, which was apparently ferrying its workers to or from work and that the 2<sup>nd</sup> appellant was vicariously liable for the tort committed by the 1<sup>st</sup> appellant in the course of his employment. The court found that the respondent (plaintiff) thus proved his case on a balance of probabilities, and that there was no merit in the appeal on liability.



4. Regarding quantum, the court noted that the appellants appeared to challenge the award on general damages; that the injuries suffered by the respondent were serious and were fully confirmed by the medical evidence adduced. The court noted that, in their written submissions, the appellants had not demonstrated what error the trial court had committed in assessing general damages. The court did not find on the record any error. The court opined that, in fact, the general damages awarded appeared a bit on the lower side, considering the injuries suffered by the respondent. Ultimately, the High Court did not find any merit in the appeal and dismissed it in its entirety.
5. Being aggrieved, the applicants filed the appeal before this Court and contemporaneously filed the instant application under Rule 5(2) (b) of the *Court of Appeal Rules* seeking an order of stay of execution of the decision of the High Court in Civil Case No. 3 of 2020 pending the hearing and determination of the substantive appeal.
6. It is the applicants' position that the respondent has been issued with the decree in the subordinate court and is capable of execution; that unless a stay order is issued the intended appeal may be rendered nugatory if successful; that the respondent will not be prejudiced in any way if the order sought is granted, and that the respondent may not be in a position to refund the amount decreed if execution takes place and the intended appeal succeeds.
7. The respondent has filed a replying affidavit in which he deposes that the application is frivolous and fatally defective; that the applicant's appeal on the issue of liability does not raise any serious issue for consideration by the court since the decision of the trial court, which was upheld by the High Court, was well reasoned as the driver of the subject accident failed to testify at the trial court, and that the decision of the award of the trial court which was upheld by the High Court was within the range applied by most courts, and hence the appeal is a waste of time; that execution has not yet commenced hence the orders sought herein are unwarranted.
8. He deposes further that the decree is a money decree and therefore the question of the appeal being rendered nugatory if successful does not arise as the applicants have not shown that the Respondent is impecunious such that he cannot refund the decretal sum awarded if the same is paid.
9. Both parties filed written submissions in support of their rival positions.

There was no appearance by either party at the virtual hearing of the application, and so the Court directed that the application will be determined on the basis of the affidavits and submissions as filed and the law. In our view, this is a very straight forward matter, and the applicants have run into headwinds for two reasons.

10. First, the decision appealed against is a dismissal. It is therefore a negative order. This Court has innumerable times pronounced itself on stay of negative orders. In *Western College of Arts and Applied Sciences v EP Oranga & 3 Others* [1976] eKLR, the learned Judges stated thus:-

“What is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”



Similarly, in *Raymond M. Omboga v. Austine Pyan Maranga*, Kisii HCCA No 15 of 2010, Makhandia, J (as he then was) stated thus:-

“The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and, therefore, the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”

11. Second, we note that the appellants’ appeal basically raises matters of fact and, this being a second appeal whose jurisdiction is confined to points of law only, we harbor some doubt as to whether the appeal is arguable or not. The first hurdle on the requirement that the applicant must demonstrate that they have an arguable appeal has not been surmounted. Having so found, we need not get into the second aspect on the nugatory aspect.
12. For the foregoing reasons, we find the application devoid of merit and dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

