



REPUBLIC OF KENYA



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

**Kibiwott & another v Kingdom Bank Limited (Cause E003 & E004 of 2020 (Consolidated)) [2022] KEELRC 3986 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3986 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO**  
**CAUSE E003 & E004 OF 2020 (CONSOLIDATED)**  
**ON MAKAU, J**  
**SEPTEMBER 22, 2022**

**BETWEEN**

**MOSES KOECH KIBIWOTT ..... 1<sup>ST</sup> CLAIMANT**

**PHILIP KIMOSOP TUITOEK ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**KINGDOM BANK LIMITED ..... RESPONDENT**

**RULING**

1. The Respondent (herein after called the Applicant) brought the Notice of Motion dated 17<sup>th</sup> May, 2022 under Section 3A and 3B of the *Civil Procedure Act*, Order 42 Rule 6 (2) and Order 22 Rule 22 of the *Civil Procedure Rules* 2010, Article 159 (2) of *the Constitution* of Kenya and the other enabling provision of law. The application seeks the following the orders:
  1. That this application be certified urgent and be heard expeditiously and ex parte in the first instance.
  2. That pending hearing and determination of this Application, the Honourable court do issue stay of execution of the judgment.
  3. That pending the hearing and determination of the intended Appeal the Honourable Court further do issue stay of execution of the judgment.
  4. That the cost of this Application be provided for.
2. The application is supported by the Affidavit of Mr. Jackson Kimathi sworn on 17<sup>th</sup> May, 2022 and is premised on the grounds set out on the body of the motion. In brief, the applicant contends that it was dissatisfied with the judgments rendered by the court in the two suits herein on 28<sup>th</sup> April 2022 and has since filed a Notice of Appeal to challenge the same; that the appeal has high chances of success; that it is apprehensive that if stay order is denied, it will stand to suffer substantial loss because the claimants will



not be able to refund the decretal sum should the appeal succeed; that the amount involved is colossal being Kshs .1,680,000 and Kshs. 1,200,000 respectively; that the application has been made without delay; and that it is willing to offer bank guarantee as security for the performance of the decree.

3. In response to the Application, the Claimant has filed Grounds of Opposition dated 26<sup>th</sup> June, 2022. In brief, the Claimants contends that the application is fatally and incurably defective as it is founded on the wrong provisions of the law; that the application and the prayers sought are incapable of being granted; that the Applicant has tendered no evidence to prove that substantial loss would result unless the orders of stay are granted as they remain at liberty to sell the land they have charged to the Applicant for the said loan; that the applicant has not demonstrated that it has an arguable appeal with a high probability of success; and that there being no decree extracted, there is no danger of execution.

### **Applicant's Submissions.**

4. The Applicant submitted from the onset that stay pending appeal is meant to preserve the subject matter in the dispute so that the rights of the appellant in the appeal are safeguarded. It further urged that the power to grant stay is discretionary and is only exercised under certain principles which have been developed by Courts.
5. The Applicant then submitted that it has met the threshold for granting stay of execution under Order 42, Rule 6 that is; substantial loss would result to it unless an order of stay is made; that the application has been filed without unreasonable delay; and that the applicant is willing to deposit security for due performance of the decree.
6. On the first issue, it was argued that the amount in question is a colossal one that if paid to the claimants it will not be able to recover if the Appeal succeeds. It was argued that the claimants have not demonstrated their capacity to refund should the Appeal succeed. For emphasis, it relied on the case of *Century Oil Trading Company Limited v Kenya Shell Limited* [2008] eKLR where the court held that in a money decree, the court would still grant stay if it appears that there is possibility of inability to refund the decretal sum should the appeal succeed.
7. As regards the second requirement, it was argued that the Judgement was delivered on 28<sup>th</sup> April, 2022, and this Application was made on 17<sup>th</sup> May, 2022, less than a month thereafter. Therefore, it was submitted that the same was filed without undue delay.
8. On security for cost, the Applicant reiterated that it is willing to offer security in the form of bank guarantee from a reputable bank.
9. In conclusion the Applicant urged this Court to allow the Application as prayed since it has demonstrated to the court sufficient grounds for the same.

### **Respondent's Submissions**

10. The Claimants submit that the application is defective because it has not cited the Employment and Labour Relations Court Act(ELRCA) and the Rules thereto. In the claimants' view, the court has not been properly moved.
11. They further submit that the application is premature because the decree has not yet been extracted and therefore there is no danger of execution. For emphasis, they relied on the case of *Thomas M Nguti & 196 others v Kenya Railway Corporation* [2022] eKLR where the court declined to grant stay because the parties had not agreed on the decretal sum payable.



12. With respect to merits, the Claimants submit that Order 42 Rule 6 of the Civil Procedure Rules gives the conditions to be satisfied before an Order for stay of execution is granted. They argue that the Applicant has failed to demonstrate that substantial loss may result if stay is denied since there is no decree ready for execution. Besides, the applicant has not discharged its evidentiary burden of proof of the degree of loss that would result if stay is withheld. For emphasis they relied on *Wisley Patrick Simasi & 8 others v Lamanthe Hygiene Food* [2015] eKLR, where this court guided by the Court of Appeal decision in *Caneland Ltd v Delphis Bank Ltd* [2000] eKLR held that the applicant has the burden of proving that the decree holder's inability to repay the decretal sum should the appeal succeed.
13. They further contend that the applicant is the charge of their respective properties which are sufficient to offset the decretal sum should the appeal succeed.
14. On security, it was argued that the Applicant has not furnished this Court with sufficient security as a condition for stay Orders sought. They urged that should the court be persuaded to grant stay, their preferred security is a deposit of the decretal sum in in interest earning bank account opened in the joint names of the Advocates for the Parties to the suit.

### **Analysis and Determination.**

15. I have considered the material presented by the parties herein. The main issue for determination is whether the Respondent has fulfilled the requirements for the grant of an order of stay pending appeal.
16. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, which Rules states that;

“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.”
17. In *Butt vs. Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court also observed that the power of the court to grant or refuse an application for a stay of execution is discretionary, and it should be exercised in such a way as not to prevent an appeal or render it nugatory.
  18. The foregoing has a direct bearing to the Conditions prerequisite to granting of stay Orders as set out by order 42 rule 6 of the Civil Procedure Rules which I now address myself hereunder.

### **Undue delay.**

19. On the first condition on undue delay, it is not in doubt that the Application herein was filed timeously because the Judgement was delivered on 28<sup>th</sup> April, 2022 and the Application was filed on 17<sup>th</sup> May, 2022, three weeks. A delay of three weeks in the circumstances of this case cannot be described as unreasonable delay.

### **Substantial loss.**

20. The Applicant argued that it would suffer substantial loss should the application be denied. It maintained that the sum in issue is a colossal one and the Claimants are men of straw who have already



defaulted in their loan to the bank. In its view the claimants are not in a position to refund the decretal sum if the appeal succeeds and that will occasion substantial loss to it. The Claimant have however maintained that the applicant has failed to demonstrate by evidence that it would suffer substantial loss if stay is denied noting that the decree has not yet been extracted.

21. In the case of Wisley *Patrick Simasi & 8 others v Lamanthe Hygiene Food* [2015] eKLR, this court guided by the Court of decision in *Caneland Ltd v Delphis Bank Ltd* [2000] eKLR held that the applicant has the burden of proving that the decree holder's inability to repay the decretal sum should the appeal succeed.
22. In the said case of *Caneland Ltd v Delphis Bank Ltd* [2000] eKLR the Court of Appeal held that: -

“We now turn to apply these principles to facts of the present case. Let us say at once that it was nowhere alleged by the applicants that the respondent will be unable to refund to the defendants any sums of money paid in satisfaction of the decree. The onus of proof was on the applicants to satisfy the court on this issue. Upon careful consideration of all the material available to us we are unfortunately not satisfied that this onus has been discharged. There is nothing to show that the appeal will be nugatory if a stay is not granted.”
23. Decisions of the Court of Appeal made after the foregoing decision have clarified that both parties in an application pending appeal have a burden of proof. In the case of *National Industrial Credit Bank Ltd V Aquinas Francis Wasike and Another* (2006) eKLR the Court of Appeal stated that:-

“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 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”.
24. The above principle was further stated in *ABN Amro Bank vs Lemond Foods Limited* Civil Application No.15 of 2002 where the Court of Appeal held that:-

“The legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in bank and so on.”
25. Guided by the above binding precedents, it is my firm position that the Applicant has a legal burden of proving that the claimant herein is a man of straw. The said burden is discharged by alleging that the claimant has no known means of repaying the decretal sum should the appeal succeed. In this case, the applicant has alleged as much and even gone further to say that the claimants have defaulted on the loan it had advanced to them while in employment.
26. In view of the foregoing, the evidential burden of proof has shifted to the claimant to prove that they have the means of refunding the decretal sum if the intended appeal succeeds after execution of the impugned decree.



27. The claimants have denied being men of straws and contended that they own parcel of land that is charged to the applicant bank for the loans alluded to above. In their view, value of the said land parcel is sufficient to offset the decretal sum if the appeal succeeds after execution.
28. I have carefully considered the material availed to the court and I find that the claimants are not men of straw. They have land parcels which they have charged to the applicant as security for loans. However, since they have not paid back the loan to the bank, and they are in fact not able to service the loans, they cannot be said to have demonstrated their capacity to repay the decretal sum should the appeal succeed after the decree is executed.
29. Consequently, I am satisfied the applicant has demonstrated that it stands to suffer substantial loss if the stay order sought is denied.

### **Security.**

30. The Applicant has offered security for the due performance of the decree in form of Bank Guarantee from a reputable bank. The Claimant on the other hand opposed security in the form of a Bank Guarantee and indicated their preferred security to be a cash deposit in an interest earning bank account to be opened in the joint names of the advocates for the parties herein.
31. Gikonyo J in the case of *Arun C Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* (2014) eKLR held that: -

“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.”
32. In the case of *Gianfranco Mantbi and another v Africa Merchants Assurance Company Limited* [2019] eKLR where the Court held that; -

“Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.”
33. I agree with the above decisions and wish to add that the security to be given depending on the circumstances of each case must be one which protects the right of the decree-holder to enjoy the fruit of his judgment forthwith should the appeal preferred fail. Consequently, in order to balance the applicant’s right of being heard on its intended appeal and the need to secure claimants right to immediately access his decretal sum if the appeal fails, I direct the applicant to deposit cash in an interest earning account to be opened in the joint names of the parties herein.



## **Conclusion.**

34. For the reasons that the Applicant has demonstrated that it stands to suffer substantial loss if stay is withheld, that the application was made without unreasonable delay and that the applicant is willing to deposit security for the payment of the decree if ordered to do so, I grant stay of execution of the impugned judgment on condition that the Applicant deposits the decretal sum in an interest earning bank account to be opened in the joint names of the advocates on record for the claimants and the applicant. The said conditions shall be met within 30 days from the date of this ruling and if the parties cannot agree on the bank, the applicant will be at liberty to deposit the money in Court before the said time lapses. Should the applicant default to meet the above conditions, the stay order shall stand lifted automatically after the lapse of the period of 30 days.
35. The costs of the application shall abide the outcome of the intended appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022.**

**ONESMUS N MAKAU**

**JUDGE**

### **ORDER**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the *ELRC Procedure Rules* which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

