



REPUBLIC OF KENYA



KENYA LAW
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**Waweru v Chege (Civil Case 21 of 2020)
[2025] KEHC 887 (KLR) (Civ) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 21 OF 2020

TW OUYA, J

JANUARY 30, 2025

BETWEEN

LILIAN MUDUDA WAWERU PLAINTIFF

AND

ISMAIL CHEGE DEFENDANT

RULING

1. This notice of motion application emanates from the judgement in Milimani HCCC No. 21 of 2020 delivered on 22nd March 2020 where Lillian Mududa Waweru the respondent herein was the plaintiff and Ismail Chege the Applicant herein was the defendant.
2. The Respondent had initiated a libel suit by way of plaint dated 28th January 2020 against the Applicant. The matter went for trial and the trial court found in favor of the respondent thereby awarding kshs. 2,000,000 in general damages and kshs. 500,000 in lieu of an apology.
3. The applicant being dissatisfied with the above finding, intends to file an appeal at the court of appeal. The Applicant has therefore moved this court under certificate of urgency through sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions for orders inter alia that there be a stay of execution of the decree in Milimani HCCC No. 21 of 2020 pending the hearing and determination of this application and pending hearing and determination of the intended appeal.
4. The Application is based on grounds that:
 1. The Defendant is aggrieved by the judgement granted on 22nd March, 2024 in Milimani HCCC No. 21 of 2020 and has lodged an appeal against the said judgement.
 2. The Defendant stands to suffer substantial loss if the stay sought herein is not granted.



3. This application has been made without unreasonable delay.
4. It is in the interest of justice and fairness that this application be granted unconditionally or on reasonable and not punitive terms.
5. The Application is supported by an affidavit sworn by Ismail Chege, the Applicant on 7th June 2024 attaching a copy of the notice of appeal. The Applicant depones that the award to the Respondent is substantial and likely to paralyze his operations and occasion him substantial loss unless the stay is granted pending appeal. He also avers that he is apprehensive that should the respondent execute the decree herein then his constitutional right to access to justice will be undermined and compromised. The Applicant believes as advised by his counsel that it is in the best interest of justice that the orders prayed for should be granted in order to expedite his intended appeal.
6. The Appellant prays for orders that:
 1. The appeal be allowed.
 2. This application be heard ex-parte at the first instance and be certified urgent.
 3. There be a stay of execution of the decree in Milimani HCCC No. 21 of 2020 pending the hearing and determination of this application inter parties.
 4. There be a stay of execution of the decree in Milimani HCCC No. 21 of 2020 pending the hearing and determination of the intended appeal.
 5. The costs of this application do abide the outcome of the intended appeal.
7. This appeal was canvassed by way of written submissions from the rival parties through their counsel. The court will therefore rely on the submissions together with the authorities cited.
8. The Applicant submits that his application stay of execution meets the threshold provided under order 42 Rule 6. That the decretal sum of kshs. 2,000,000 and kshs. 500,000 in lieu of an apology is substantial and that the respondent may not be able to pay back in the event that the Appeal succeeds. He cites the authority of Rhoda Mukuma v John Abuga (1988) eklr which underscored the need for preserving the status quo to prevent the appeal from being rendered nugatory.
9. On the issue of delay, the Applicant submits that he was excluded from the procedural course of the court's proceedings by his former counsel who failed to implement the Applicant's express instructions to file a notice of appeal and an application for stay of execution. That counsel's negligence led to the inordinate delay in this matter. He cites the authority Belinda Murai and 9 Others v Amos Wainaina (1978) eklr quoting Shah H Bharmal & Brothers v Kumari (1961) E A 679 holding that that mistakes of a legal advisor may amount to sufficient cause but not inordinate delay on his client's part.
10. With respect to security for the due performance of the decree, the Applicant submits that he is fully committed to abiding by this honorable court's orders.
11. The Applicant submits further that this court has an overriding obligation to administer justice under articles 48 and 50(1) of *the Constitution* on the principle of access to justice by all persons. He also urges the court to hold that costs be payable to him in the principle that costs follow the event as was held in Jasbir Singh Rai & Others v Tarlochan Rai & Others (2014) eklr.
12. The Respondent through her Counsel submits that this application has been made after inordinate delay since the judgement was entered on 22nd March 2024 and the application for stay of execution



made on 7th June 2024 contrary to the provisions of order 42 rule 6 of the civil procedure rules. The respondent states that there is no existing appeal filed by the applicant to date to justify granting of stay of execution.

13. It is the Respondent's contention that this application does not meet the threshold for grant of stay of execution pending Appeal. He cites the case of Joseph Juma Onditi v Jane Kisaka Mung'au (2018) eKLR where the Environment and Land Court while dismissing an application for stay made 4 months after the judgement was delivered on the basis that the delay in bringing the matter was not explained. She also cites the case of John Odhiambo v Sospeter Otieno (2010) eKLR where the court held that 8 months' delay in bringing a stay application was inordinate and consequently dismissed it. Further, the Respondent cites the case of Kiraita Abuta v Richard Nyandika (2019) eKLR where the Environment and Land Court held that in considering an application for stay of execution pending appeal, a court must be satisfied that all the conditions set in order 42 rule 6 of the Civil Procedure Rules have been met.
14. Finally, the Respondent urges the court to adhere to the principle that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage as was held in Machira T/A Machira Advocates v East African Standard (No 2) (2002) KLR 63. The respondent urges the court to find that the instant application constitute an abuse of the court process, is bad in law and should not be allowed.
15. Having considered the submissions by the parties and the authorities cited, this court is of the view that the main issue for determination is whether the instant application meets the required threshold under the law. The conditions for granting stay of execution pending appeal are clearly set out under order 42 rule 6 and are para-phrased to include:
 - a. It is discretionary and can be ordered by the court as may seem just.
 - b. the court must be satisfied that substantial loss may result to the applicant if the order is not granted.
 - c. the application has been made without unreasonable delay.
 - d. such security as the court orders for due performance of such decree or orders as may be binding on him has been given by the applicant.
 - e. An appeal to the court of appeal shall be deemed to have been filed when under the rules of that court, notice of appeal has been given.
16. The above principles were restated in the case of Hamisi Juma Mbaya v Amakecho Mbaya [2018] eKLR where it was held: -

“The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.



17. In *Pauline Yebei & Another v Estate of Kiprotich Leting* [2017] eKLR the Court of Appeal affirmed its decision in *Ishmael Kagunyi Thande Vs. Housing Finance Kenya Ltd.* Civil Application No. Nairobi 157 Of 2006 (Unreported) where the court held as follows on the principles for stay of execution:-

“The jurisdiction of the Court under rule 5(2) (b) is not only original but also discretionary. Two principles guide the court in exercise of that jurisdiction. These principles are well settled. For an applicant to succeed he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay ZQA as the case may be, the success of that appeal will be rendered nugatory.”

18. Based on the foregoing, an application for stay will succeed if: -

- a. It is brought without unreasonable delay
- b. Substantial loss will occur if the orders are not given
- c. The applicant gives security for performance of the decree sought to be stayed.

19. The Applicant has pleaded in his grounds and in the affidavit that the decretal sum is substantial and that the Respondent may not be able to refund if the Appeal is successful. From the judgement, the decretal amount is Ksh. 2,000,000 plus kshs. 500,000 in lieu of an apology which the Applicant failed to make to the Respondent within 30 days of the judgement. As was stipulated. The court takes note that the decree is of a monetary nature involving a substantial amount and should be taken into account as a factor in considering the instant application. This goes to satisfy the condition that there is possibility of substantial loss if the stay of execution pending appeal is not granted and therefore the need to preserve the status quo.

20. Concerning delay in making the instant application the Applicant submitted that he was let down by his previous counsel who did not act on his express instructions to make the application as soon as the judgement was delivered in March 2024. He was therefore forced to instruct a different advocate and that took some time. Although this was not demonstrated in his affidavit, it is evident from the record that the instant application was filed by *Wesonga Masinde and Company Advocates* after filing a notice of change of advocates replacing *Makallah and Associates* who had represented him in the main suit. Whereas there is obvious delay in bringing this matter from 22nd March 2024 when the judgement was delivered to the filing of the application on 7th June 2024, the delay of four months is sufficiently explained. It is trite law that the faults of a counsel cannot be visited upon his client as was espoused by the Court of Appeal in the case of *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR, that in determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis-a-viz the prejudice to be visited on the opposing party. In a case where the appellant is to be locked out of the seat of justice and possibly penalized in damages for a claim it maintains has a good defence to, the court ought to take into account whether the other party stands to suffer any prejudice. The Court observed that:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”



21. In exercise of its discretion, Justice Hoffman stated in films Rover International Ltd v Cannon Film Sales Ltd (1986) e All ER 772 at page 780 – 781, cited in Lochab Bros. case above,

“ A fundamental principle is That the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to be wrong.”

In view of the above this court finds that it is in the interest of justice not to penalize the applicant for the delay which was occasioned by his counsel.

22. Having dealt with the two conditions above, I will now address the issue of security for due performance. Order 42 rule 6 vests discretionary power in the court to grant:

“...Such security as the court orders for specific performance of such decree or order as may ultimately be binding on him has been given by the applicant “.

23. It is now common practice by the courts to order judgement debtors who apply for stay of execution pending appeal to deposit the entire decretal sum in the courts or in an interest earning account in the names of advocates for both parties in order to satisfy the requirement for security for due performance. This principle was underscored in Vivo Energy Kenya (formally Kenya Shell V Francis M Mulatya T/ a Ganjoni Agip Petrol where the court stated that:

“.....The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute.....”

In the same case, the court quoted RRW v EKW (2019) eKLR where the court of Appeal addressed itself on this issue as hereunder: -

“.....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 is 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 judgement. 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.....”

24. Taking into account the above principles, I have interrogated whether the Applicant has met the tests above. The Defendant has sufficiently explained that the delay was occasioned by his previous counsel. It is also not in dispute that the award in issue is a colossal sum in the tune of kshs. 2,500,000 and the need to preserve the status quo cannot be overstated.

25. Having determined the above, this court shall address itself to the issue of security. The purpose of security was enunciated in Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia M 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 G 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...’

26. The Applicant has expressed his willingness to provide security for due performance at the terms issued by the court if stay is granted. I am therefore convinced that the interests of both the appellant and the respondent will be balanced and none will be prejudiced if the stay that is sought for is granted.
27. On the issue of costs, the same is provided for under section 27 of the *Civil Procedure Act* and the award of costs is discretionary. The costs should follow the outcome of the appeal.

Determination

28. Based on the above findings this court orders that:
- i. application for stay of execution pending appeal is hereby granted on the following terms:
 - ii. The Applicant to deposit the entire decretal sum kshs.2,500,000 in a joint interest earning account in the names of advocates for both parties within 30 days from the date hereof
 - iii. Applicant to file the intended appeal within 30 days from the date hereof.
 - iv. The stay of execution orders shall automatically lapse at the expiry of 30 days upon default of orders ii. and iii above.
 - v. Each party to bear their costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JANUARY, 2025

R.O. A

HON. T. W. Ouya

JUDGE

For Applicant Andayi H/B for Makala

For Respondent Miss Kariuki H/B for Oduor

Court Assistant Martin

