



REPUBLIC OF KENYA



Ayongah v Osimbo & another (Suing as the Legal Representatives of the Estate of Rebecca Osimbo Nganyi) (Civil Appeal E017 of 2023) [2025] KEHC 240 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E017 OF 2023
S MBUNGI, J
JANUARY 23, 2025**

BETWEEN

JAMES OPEYWAH AYONGAH APPELLANT

AND

LEAH ANYOSO OSIMBO 1ST RESPONDENT

STANLEY SAMBOYI OSIMBO 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF REBECCA OSIMBO NGANYI

RULING

1. On 21.08.2021, The applicant's driver while driving Motor Vehicle Reg. No. KBZ 265A lost control of the vehicle, knocked down Motor Vehicle Reg. No. KBS 190Q, thereby causing a road accident and occasioning fatal injuries to the deceased who was on board Motor Vehicle Reg. No. KBS 190Q. Judgment was delivered on 10.01.2023 where the court found the applicant 100% liable and awarded Kshs. 1,431,168/- to the respondents herein as quantum.
2. The appellant/applicant filed a motion dated 13.02.2023 brought under Order 42 Rules 6 and 7, Order 51 Rule 1 of the *Civil Procedure Rules 2010* and Section 1A and 1B of the *Civil Procedure Act* Cap 21 of the Laws of Kenya seeking the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That execution of the decree in Butali CMCC No. 72 of 2022 between *Leah Anyoso Osimbo & Stanley Sambayi Osimbo (Suing as Admin of the Estate of Rebecca Osimbo Nganyi – (Deceased) – vs – James Opeywah* be stayed pending the hearing and determination of the appeal herein.



- iv. That cost of this application be provided for.
3. The application was supported by the affidavit of one Edinah Kerubo Masanya who stated that she was the legal associate at Britam General Insurance Company, the insurers of the suit motor vehicle owned by the applicant.
 4. She stated that the awarded sum was big and if paid to the respondents, may be impossible to recover in the event that the appeal succeeds. She stated that as the insurers of the applicant, they had insurable interest in the matter and that the application for stay of execution had been brought in good faith and without delay.
 5. She further stated that that a Bank Guarantee can be availed by the insurer upon reasonable notice, to guarantee the due performance of the decree.
 6. The respondent, Leah Anyoso Osimbo, filed a replying affidavit where she averred that there was no evidence brought forth by the applicant to show what substantial loss they stood to suffer, should stay not be granted.
 7. She also contended that there was no proof by the applicant that the respondents herein are impecunious and would fail to pay back the money in the event that the appeal succeeds, therefore occasioning the applicant irreparable loss and prayed that the application be dismissed with costs.
 8. She stated that since the appeal herein is merely on quantum, the applicant ought to be ordered to pay at least three quarters of the decretal sum and deposit quarter thereof in a joint interest earning account as a substantial sum is not contested.
 9. The court directed that the application be canvassed by way of written submissions.

Applicant's Submissions.

10. In his submissions, the applicant reiterated the contents of the supporting affidavit on reasons why the court should grant stay of execution.
11. On whether the applicant stood to suffer substantial loss if stay was not granted, the applicant's counsel submitted positively and averred that the respondent herein had not demonstrated that he is able to refund the sum if the appeal succeeds. He cited the case of *G.N Muema P/A (SIC) Mt View Maternity & Nursing Home v Miriam Bishar & Another* [2018] eKLR.
12. The applicant submitted that the application was launched without delay and that further, the applicant had made a provision of a Bank Guarantee to be deposited by Britam Insurance for security as per the provisions of Order 42 Rule 6 and 7 of the *Civil Procedure Rules*. He referred the court to the case of *Justin Mutinga David v China Road & Bridge Corporation (K) Limited* [2019] eKLR.

Respondents' Submissions.

13. It was the respondents' submission that by dint of Order 42 Rule 6(2), stay may only be granted for sufficient cause. However, the court is not only limited to the provisions of Order 42 Rule (6) of the *Civil Procedure Rules*, but also sections 1A and 1B of the *Civil Procedure Act* which grants the court discretionary and inherent powers in the interpretation of any provisions of the law.
14. The respondents submitted that the applicant's averment that they stood to suffer financial loss, in the event that the appeal succeeds was not proven.



15. They submitted that it was untenable for them to be denied the fruits of judgment entered in their favor in view of Article 27 of the Constitution.
16. The respondents further submitted that the supporting affidavit by the applicant indicates that the appeal is only on quantum, not liability. As such, the respondents are entitled to part of the decretal sum. They prayed that the court balances the rights of the parties, by ordering that the applicant pays the respondents at least three quarters of the decretal sum, and the balance be deposited in a joint interest earning account. They referred the court to the case of Bungoma HCCA No. 31 of 2012 Tarbo Transporters Limited vs Absolom Dova Mumbasi and Kericho Misc. Application No. 34 of 2011 Eldoret Bus Services Limited vs William Kipkirui Korir.
17. On security, the respondents submitted that the Bank Guarantee promised by the applicant was offered by a third party who is not a party to this case and thus, it would be extremely difficult for the respondent to execute on the basis of such a guarantee if need be.

Analysis and Determination.

18. I have looked at the application, the submissions by both parties and the authorities which have been referenced.
19. The issue for determination is whether this court should issue stay of execution to the applicant pending the outcome of the appeal filed in this court.
20. The Court, in RWW vs. EKW [2019] eKLR, addressed its mind to 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.”

21. Order 42 rule 6 of the Civil Procedure Rules states as follows: -

Stay in case of appeal [Order 42, rule 6.]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (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.



- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule 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.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
22. The power of a court to grant stay of execution is discretionary. 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 appellate court overturn the trial court's decision. (see *Butt vs. Rent Restriction Tribunal* [1979]).
23. The three conditions to be fulfilled can be summarized as follows;
- i. That substantial loss may result to the applicant unless the order is made.
 - ii. Application has been made without unreasonable delay.
 - iii. Security as the court orders for the due performance.
24. The trial court entered judgment against the applicant on 10.01.2023. The applicant filed a memorandum of appeal on 24.01.2023, 14 days thereafter and before the lapse of the 30-day period for right of appeal. The present application seeking stay of execution was filed on 13.02.2023. I therefore find that there was no inordinate delay on the part of the applicant and therefore this ground succeeds.
25. Secondly, the applicant has stated that they stand to suffer loss if the orders sought are not granted since the appeal has high chances of success and they may experience financial loss if the decretal sum is paid to the respondent.
26. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as follows with regard to substantial loss:
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
27. The applicant avers that the respondents herein are unlikely to pay back the decretal sum since they are impecunious. The applicant never filed any documents in support of the allegation to prove the financial capabilities of the respondent or lack thereof. In rebuttal, the respondents submitted that it



is trite law that whoever alleges must prove, and the applicant did not demonstrate or file any evidence to support his averment.

28. In the case of *Mutbui v Kasivu* (Civil Appeal E268 of 2023) [2024] KEHC 9627 (KLR) (29 July 2024) (Ruling), the court held as follows:

“On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted as submitted by the Applicant, I beg to differ. The onus of proving the Respondent’s inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in *Stephen Wanjohi vs. Central Glass Industries Ltd.* Nairobi HCCC No. 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income.”

29. While the onus is upon the applicant to demonstrate that he is likely to suffer substantial loss, it is not likely that the applicant will know the particulars of the respondents’ financial status. The burden is therefore upon the respondents to prove their financial capability.

30. That was the position taken by the Court of Appeal in the case of *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike* Civil Application No. 238 of 2005 [2006] eKLR where it held;

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an 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.”

31. The applicant has expressed doubt as to the respondents’ financial capacity to refund the decretal sum if they are allowed to proceed with execution before the hearing and determination of the appeal. The respondents did not swear an affidavit to demonstrate that they are financially capable of refunding the decretal sum to the appellant. Consequently, this court has no feel of the financial liquidity of the respondents as no such evidence was filed. I therefore find that the applicant as shown that he is likely to suffer substantial loss if the intended execution is not stayed.

32. The respondents submitted that by granting a stay on the sole reason that they would not be able to pay the decretal amount back in case the appeal succeeds would be an act of discrimination contrary to Article 27 of the *Constitution* of Kenya which states

- “(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.



- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”
33. I will differ with the respondents’ submissions for Article 27 of the *Constitution* of Kenya offers protection to all parties including the applicant. It is the duty of the court to balance the rights of both parties to ensure justice is done to either.
34. On the issue of security, the applicant submitted that he is willing to provide a bank guarantee upon reasonable notice via his insurance providers, Britam General Insurance Company. The respondents expressed doubts regarding the providence, and execution of the Bank Guarantee if need be, since the applicant’s insurer is not party to these proceedings. I have perused the proceedings and judgment by the trial court. The court awarded a total of Kshs. 1,431,168/- as quantum (loss of dependency, pain and suffering and special damages), plus costs and interests of the suit to the plaintiff (respondent herein).
35. In the case of *Benard Kigada & another v Tom Ochieng Odeny* [2021] eKLR the court held;
- “... this court took the view that security in form of a bank guarantee was not suitable considering that there was a possibility of the bank not honouring the bank Guarantee as the bank that would issue the same would not be a party to the suit herein making it difficult for the Respondent to enforce any orders it would get regarding the said bank guarantee, if at all. This court therefore determined that the security to be furnished would be in form of money...”
36. However, courts have largely accepted bank guarantees as an acceptable mode of furnishing security. In the cases of *Justin Mutunga David vs China Road & Bridge Corporation (K) Limited* [2019] eKLR, *National Bank of Kenya Limited v Rachuonyo & Rachuonyo Advocates* [2021] eKLR, *Charles Wesonga Mbingi v Commissioner of Investigations and Enforcement* [2021] eKLR and *Mbukoni Services Limited & another v Mutinda Reuben Nzili & 2 others* [2021] eKLR the courts allowed the applicants to give bank guarantees to cover the whole or part of the decretal sum. I therefore find that a bank guarantee would also be sufficient security in this case.
37. The three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. From the above analysis, I find that the applicant has wholly satisfied the conditions to warrant the stay of execution.
38. In the upshot of the above, this Court in the exercise of its discretion and in the interests of justice, shall grant stay of execution of the decree in Butali CMCC No. 72 of 2022 between *Leah Anyoso Osimbo & Stanley Sambayi Osimbo (Suing as Admin of the Estate of Rebecca Osimbo Nganyi – (Deceased) – VS – James Opeywah* pending the hearing and determination of the appeal herein on the following conditions:
- I. That the Applicant shall pay to the Respondent Half (50%) the Decretal Amount in Judgment/Decree in Butali CMCC No. 72 of 2022, within the next thirty (30) days from the date hereof since the appeal is only on quantum. Liability is not disputed.



- II. That the Applicant shall deposit, half the decretal amount in a joint interest-earning bank account to be held in the names of the Counsel for the Applicant and Counsel for the Respondents within the next thirty (30) days from the date hereof.
- III. A default of Order (I) and/ or (II) above by the Applicants, shall automatically lapse the Order of Stay of Execution of Judgment/Decree granted.
- IV. Each party to bear its own costs of the application.
39. It is so ordered.
40. Right of appeal 30 days explained.
41. Mention on February 27, 2025 for further directions.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF JANUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of:

Ms. Nyagamo for the applicant present online

Ms. Kanana for the respondent present online

Applicant – absent

Respondent - absent

Court Assistant – Elizabeth Angong'a

