



REPUBLIC OF KENYA



KENYA LAW
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**Cheboi & 3 others v Kangogo (Civil Appeal E009 of 2024)
[2025] KEHC 1725 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E009 OF 2024
RB NGETICH, J
FEBRUARY 26, 2025**

BETWEEN

**MOHAMMED CHEBOI 1ST APPELLANT
JOSHUA TUITOEK RUTO 2ND APPELLANT
ELIJA KULEI 3RD APPELLANT
VINCENT YATOR 4TH APPELLANT**

AND

MICHAEL KANDIE KANGOGO RESPONDENT

RULING

1. The appellants/Applicants have moved this court vide an application dated 2nd September, 2024 seeking for the following orders: -
 - i. Spent.
 - ii. Spent.
 - iii. That this Honorable Court be pleased to grant an order for stay of execution of the judgement of the Honorable Magistrate Caroline Rose Tabuche Ateya delivered on 31st July 2024 and/or any consequential orders thereto upon terms as may be just and reasonable and facilitate of this Appeal.
 - iv. That the costs of this application be provided for.
2. The application is founded on grounds that the Appellants/ Applicants being aggrieved and dissatisfied with the judgement of the Honorable Magistrate Caroline Rose Tabuche Ateya delivered on the 31st July 2024 has preferred an Appeal before this High Court. That upon the delivery of judgment, the Appellants/Applicants were granted the automatic 30 days stay of execution which



lapsed on the 31st August 2024; and the Applicants have exercised their right of appeal and the appeal has high chances of Success; and the Applicants are likely to suffer substantial and irreparable loss unless the Respondent is in the meantime restrained from executing the judgement/ decree.

3. Further that the Applicants will require time to prepare a record of appeal which will include proceedings of the lower court and this will not be possible within a reasonable time and if the Respondent proceeds to execute the trial court judgement, and the Appeal lodged in this High Court will be rendered nugatory; that this Application has been filed without delay and it is in the interest of justice and fairness that the Applicants be granted orders sought to enable the High court determine the Appeal.
4. The application is supported by an affidavit sworn by Mohammed Cheboithe 1st Appellant/Defendant herein. He avers that the Appellants were held 100% liable for Malicious prosecution and Respondent awarded Kshs. 700,000/= plus costs and interest of the suit and being aggrieved with the said judgment, they have preferred to appeal the same and have already filed the memorandum of appeal.
5. The appellants restated grounds of application and added that their Advocate on record has since applied for the certified copies of the proceeding at the lower court with a view of preparing the record of appeal.
6. The appellants further aver that the Respondent is a person of unknown value and they doubt his ability to pay back the decretal sum if execution is allowed to proceed and that they are ready and willing to abide by any reasonable conditions to furnish the court with such security as the court may deem fit and/or facilitate this appeal.

Response

7. In response to the application, the Respondent filed a replying affidavit sworn by Sylvia Musanzu who avers that the application is fatally defective, non-starter, unmeritorious, incompetent, bad in law and an abuse of the court process and is only meant to delay the cause of justice; that it is frivolous, vexatious and an abuse of court process of this court and ought to be dismissed at the earliest opportunity.
8. She confirmed that by judgment delivered on 31st July, 2024 the trial found the appellants 100% liable and assessed General damages for malicious prosecution at Kshs. 700,000/= and the Appellant's Advocate on record was present in court when the judgment was delivered but failed to pray for an order of stay of execution.
9. Further that the Application for stay is premature as the Appellant has not demonstrated an eminent danger and/or threat of execution as the decree for execution is yet to be extracted; that the Respondent is entitled to enjoy the fruits of the judgment and the Appellants/ Applicants has not proved how it will suffer irreparable loss if the decretal sum is paid.
10. The respondent further stated that without prejudice to the foregoing, if the Court is inclined to allow the application, it directs the applicant to deposit security in terms of half of the decretal sum in part settlement and pay the other half to the Respondent herein.
11. The appeal was canvassed by way of written submissions.

Appellant's Submissions

12. The Appellants filed their submissions and submits that the trial court delivered its judgement against the appellant on the 31st July 2024 which gave a judgment on liability at 100% as against the Appellants and for a sum of up to a tune of Kshs. 700,000/= plus costs and interest of the suit.



13. They submit that the appellant herein then filed a Memorandum of Appeal dated 27th August 2024 and a Notice of Motion application under certificate of urgency dated 2nd September 2024, seeking stay of execution of the judgment delivered on 31st July 2024 pending hearing and determination of this application and the Appeal.
14. The appellant submits that this application was filed under certificate of urgency and was certified urgent on the 5th September 2024 where the court allowed the appellant/applicant's application for stay of execution on the condition that the Appellant deposits in court half of the decretal sum within 30 days and the Appellant complied by depositing half the decretal sum; the applicant now seeks stay of execution pending hearing and determination of the Appeal so as to allow the Appellant/Applicant exhaust their right of appeal.
15. The appellants submit that the requirements provided under Order 42 rule (6) of the Civil Procedure Rules are whether the application has been made without unreasonable delay, whether security for the performance of the decree has been given by the applicant and whether the applicant will suffer substantial loss if the orders sought are not granted; and further submit that granting of stay of execution orders is a discretionary power bestowed on the court and the discretion must be exercised judiciously in the interest of justice and rule of law; they relied on the case of Nation Media Group Limited vs Faith Muthoni Njiru [2021]eKLR quoting the decided case of; Loice Khachendi Onyango -vs- Mex Inyangu & another [2017] eKLR.
16. On whether the Application has been brought without any unreasonable delay the applicant submit that this Application was filed on the 3rd September 2024 under certificate of urgency, a clear demonstration that indeed the Application before court has been brought timely without any delay and urge this court to find that the Application was brought on time.
17. On whether such security as the court orders for the due performance of the decree has been given by the applicant, they submit that this court upon Considering the Appellants Application under certificate of urgency on 5th September 2024 stayed the execution of the judgment delivered on 31st July 2024 with the condition that the appellant pays half the Judgement/decretal sum to the court within 30 days from the date of the ruling and the Appellant has since complied with that order and has attached to its submissions a receipt for payment of the half decretal sum to confirm compliance. They place reliance in the ease of Gianfranco Manethi & Another vs Africa Merchant Assurance Company Ltd [2019] eKLR and in the case of Tamil Bora Bank Limited & another v Samuel Wambugra Ndirangu [2021] eKLR where the court of appeal cited the decision rendered in Arun C. Sharma vs Ashana Raikundalia a Rairundalia & Co. Advocates & 2 Others 2014 eKLR.
18. They submit that the appellant has satisfied this condition for security under Order 42 rule (6) and that they ask this court to allow the application as prayed.
19. On whether the applicant will suffer substantial loss if the orders sought are not granted, they submit that the applicant has demonstrated that they will suffer substantial loss if the prayers sought in his application are denied. The applicant states that they stand to suffer substantial loss as they do not know the financial position of the respondent and as such, they are apprehensive that he will not be in a position to refund the huge amount that has been awarded in the judgment if the appeal succeeds.
20. They submit that the Respondent has not demonstrated to this court that he is not a man of straw and capable of reimbursing the sum. That the court should therefore be averse to the fact that execution for the colossal sum by the Respondent who is of uncertain financial means exposes the Appellants to the risk of irreparable damage, substantial loss and will render the appeal nugatory. That the respondent has not clearly illustrated his net worth; they place reliance in the case of Kelvin Kinyua Macharia Vs



Aisha Motors Dealers Limited & 3 Others (2019) eKLR and the case of Antoine Ndiaye v African Virtual University {2015} eKLR and urge this court to be persuaded by the decisions above. They submit that the Appellant stands to suffer huge loss if the prayers sought for stay pending hearing and determination of appeal is not granted and urge this court to allow the application.

21. On whether the Appellant/applicant has an arguable appeal with high chances of success, the Memorandum of Appeal sets out the grounds upon which the appeal is based on and the grounds set out have expressly shown that the Applicant's appeal is based on facts that are true and demonstrates a high chance of success. They place reliance in the case of Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu [2021], where the court quoted the authority of Butt -Vs- Rent Restriction Tribunal (1982) KLR 7.
22. They submit that the court of appeal has time and again held that an arguable appeal is not one that will necessarily succeed but one which raises triable issues. That the appeal only ought to raise a legitimate point or points deserving judicial determination. They submit that this appeal raises triable issues, has high chances of success and this application meets all the conditions outlined in Order 42 Rule 6(2) and urge this court to grant the stay of execution pending appeal as prayed.

Respondent's Submissions

23. The Respondents raised the following as issues for determination:
 - a. Whether the Applicant has satisfied the conditions for stay pending appeal
 - b. Whether the Defendant/Applicant will suffer irreparable damages if the orders sought are not granted
 - c. To whose favor does the balance of probability tilt to
24. On whether the applicant has satisfied the conditions for stay pending appeal, they submit the applicant is obliged to satisfy the conditions set out in Order 42 Rule 6(2) that substantial loss may result to the applicant unless the order is made, that the application has been made without unreasonable delay, and security for due performance of such decree or order as may ultimately be binding on the applicant has been given and relied on the case of Antoine Ndiaye vs. African Virtual University [2015] eKLR.
25. The Respondent submits that the applicant has not availed security or demonstrated that they will deposit the full decretal sum in court or in a joint earning interest account, released the half of the decretal amount to the Respondent and the other half to the court for grant of orders for stay pending appeal and prayed that the orders should not be issued as the appellant's have not met the required conditions but in the event the orders should be granted, the same should be on condition that full decretal sum be deposited in court or in a joint interest account or half of the decretal sum be released to the plaintiff and the other half to be deposited in court; they relied on the case of Lagoon Development Limited v Prime Aluminium Casements Limited [2020] eKLR, Anthony Musyimi Mutisya v Penina Mwelu Ndetete (suing as the legal representative of the estate of Sharon Mwangi Maringa) [2017] eKLR and further in Richard Muthusi v Patrick Gituma Ngomo & another [2017] eKLR.
26. On whether the Defendant will suffer irreparable injury, they submit that Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352 sheds light on the second test as it reads: -

“...By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, even where the injury is capable of



compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

27. They further submit that this being a money decree, there is no way the appeal will be rendered nugatory as the amount is defined and can be recovered without any substantial loss to the Defendant/ Applicant if the application is not allowed but in fact, it will deny the plaintiff the right to enjoy the fruits of the judgment.
28. The Respondent submits that for the above reasons, the application dated 2nd September, 2024 be dismissed with costs.

Determination

29. I have considered grounds of the application herein, averments by the parties and submissions filed. The main issue for determination is whether the applicants have met the requirements for grant of orders of stay of execution as provided under order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:-

“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.
30. Further to the above, sections 1A and 1B of the *civil procedure Act* provide for overriding objective giving the courts discretion to grant stay for sufficient cause for just determination of proceedings before court. Section 1A (2) of the *Civil Procedure Act* provides that

“The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”

31. While under section 1B some of the aims of the said objectives are;

“The just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

32. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned namely
 - a. that substantial loss may result to the applicant unless the order is made,
 - b. that the application has been made without unreasonable delay, and
 - c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See Antoine Ndiaye v African Virtual University [2015] eKLR.



33. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR as follows: -

“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.”

34. In the instant case, the applicants argue that the applicant have not demonstrated financial ability to refund the decretal amount if the appeal succeeds and they therefore will suffer irreparable damage. They confirm that they have complied with requirement to deposit of security for due performance as they have already deposited half the decretal amount as ordered by the court on the 9th September, 2024.

35. In the case of *RWW v EKW* [2019] eKLR, the court stated as follows concerning stay of execution pending appeal: -

“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.”

36. On condition to file application without delay, I note that the judgment and decree being appealed against was delivered on the 31st July, 2024 and the Memorandum of Appeal filed on 27th August 2024 well within the time limits.

37. In respect to the respondent’s ability to refund the decretal amount, I have not seen affidavit of means confirming the respondent’s ability to refund the decretal amount in the event the appeal succeeds. The applicant has already deposited half the decretal amount in court as directed by this court. I will however direct that the entire decretal amount be deposited in court pending hearing and determination of the appeal herein.

38. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the applicants have fulfilled the requirements for grant of stay of execution pending appeal as provided under Order 42 Rule 6 of the Civil Procedure Rules. From the foregoing, I hereby allow the applicant/appellants’ application dated 2nd September, 2024 on condition that the entire decretal amount is deposited in court within 21 days from today’s date.



Final Orders: -

1. Stay of execution pending hearing and determination of appeal do issue on condition that the decretal amount is deposited is deposited in court within 21 days from today's date.
2. Costs of this application to abide by the outcome of this appeal.

RULING DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 26TH DAY OF FEBRUARY 2025.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kiptoon for Appellant.

Ms. Musanzu for Respondent.

Court Assistant - Elvis.

