



Kiambu Marafiki Sacco Limited v Ndegwa & 2 others (Civil Appeal E321 of 2024) [2025] KEHC 4127 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4127 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E321 OF 2024
FN MUCHEMI, J
MARCH 27, 2025**

BETWEEN

KIAMBU MARAFIKI SACCO LIMITED APPELLANT

AND

PETER MAINA NDEGWA 1ST RESPONDENT

VICTOR ITUKA 2ND RESPONDENT

MIDRED KEBONGO 3RD RESPONDENT

RULING

1. The application dated 22nd November 2024 seeks for orders of stay of execution in respect of the judgment in Ruiru Small Claims Court SCCC No. E209 of 2024 delivered on 29th May 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 15th January 2025.

Appellant's/Applicant's Case

3. The applicant states that on 28th May 2024, default judgment was entered against it in the sum of Kshs. 558,930/- plus costs and interest in a subrogation claim. The applicant states that it was never served with any suit papers and therefore were not aware of the suit in the Small Claims Court at Ruiru. The applicant avers that it only came to learn of the court proceedings on 20th September 2024 when its offices were visited by representatives of Icon Auctioneers who proclaimed its moveable assets in preparation of execution of the default judgment, the resultant decree and the warrants of attachment dated 17th September 2024.
4. The applicant avers that it attached its draft Statement of Response which raised triable issues for determination, but the learned magistrate dismissed its application for setting aside default judgment



on grounds that it lacked merit. The applicant further avers that the learned magistrate failed to consider the weight of the evidence considering the fact that the 2nd & 3rd respondents were the parties responsible for the accident which occurred on 4th May 2021.

5. The applicant states that it stands to suffer great substantial loss if stay is not granted as it has been condemned unheard to recompense the 1st respondent for an accident it did not cause. The applicant further avers that the appeal will be rendered nugatory and a great miscarriage of justice will occur in the event stay of execution is not granted.

The 1st Respondent's Case

6. The 1st respondent states that the suit in the Small Claims Court was filed by ICEA Lion General Insurance Company Ltd in his name in exercise of the insurer's subrogation rights seeking to recover the pleaded sum after having paid for the repairs for the 1st respondent's vehicle.
7. The 1st respondent states that judgment was entered in his favour over 7 months ago that is, on 29th May 2024. The 1st respondent states that since then, the applicant has failed to settle the decree and has delayed his realization of the fruits of the judgment through various applications in the lower court. The 1st respondent further argues that the instant application is an attempt to further frustrate his realization of the fruits of the judgment and to delay the realization of a valid judgment of the lower court.
8. The 1st respondent avers that ICEA Lion General Insurance Company Ltd is financially capable of refunding the judgment sum in the event of a successful appeal and the applicant will not suffer any prejudice even in the unlikely event of a successful appeal.
9. The 1st respondent states that the applicant was served with the pleadings in the lower court with the service of the first notice of mention and the Statement of Claim on 8th May 2024 at their offices at Mapa House 5th Floor Kiambu Town. Furthermore, the applicant has never disputed that that was its offices as contended by the process server.
10. The 1st respondent states that the applicant was then served with the 2nd mention notice shortly before the next mention on 20th May 2024. Despite the two occasions of service, the applicant did not file any papers in court leading to the entry of the default judgment.
11. The 1st respondent avers that even after judgment was entered on 29th May 2024, the applicant was served with a notice of entry of judgment and a ten days' notice on 1st August 2024 as per the supplementary affidavit of service filed on 16th August 2024. Instead, the applicant waited until the 1st respondent instructed auctioneers to execute for them to file various applications to frustrate the execution. The 1st respondent avers that from the foregoing, the application is a gimmick to buy time and drag the matter unnecessarily by frustrating a regular judgment of the lower court.
12. Parties disposed of the application by way of written submissions with the 1st respondent relying on his affidavit.

The Applicant's Submissions

13. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of Nicholas Stephen Okaka & Another v Alfred Waga Wesonga (Civil Appeal No. E033 of 2002) and submits that it has fulfilled the conditions to warrant it the orders of stay of execution. The applicant refers to the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR and submits that it stands to suffer substantial loss as it never caused the accident or owned the motor vehicle that led to the claim



before the lower court. The applicant submits that the 2nd and 3rd respondents were responsible for the accident as per the investigation report filed by the 1st respondent and the pleadings in the trial court state that the motor vehicle in question belonged to the 2nd and 3rd respondents. The applicant argues that it attempted to have the default judgment set aside by the trial court which dismissed the application in a ruling dated 8th November 2024 and it was denied its right to be heard and is at a great risk of having its property attached.

14. The applicant submits that it is apprehensive that the 1st respondent may not be in a position to repay it in the event the appeal succeeds. The 1st respondent has not rebutted or demonstrated that he has the means and capacity to refund the applicant. The applicant states that he is afraid that the appeal may be rendered nugatory if stay is not granted.
15. The applicant submits that the appeal was filed timeously as it was only fourteen (14) days after the ruling which was delivered on 8th November 2024.
16. The applicant relies on the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR and submits that it has complied with the court's orders dated 11th December 2024 and deposited the sum of Kenya Shillings Two Hundred and Forty Seven Thousand Four Hundred and Sixty Five (Kshs. 247,465/-) with the court being half the decretal sum.
17. The applicant further relies on the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR and submits that the right of appeal has to be weighed against the right to enjoy the fruits of the judgment.
18. The main issue for determination is whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

19. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
 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 orders set aside.
 2. 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 1st 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.



20. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
21. Substantial loss was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR:-
- “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.”
22. The applicant states that it stands to suffer substantial loss as it shall be condemned unheard to recompense the 1st respondent for an accident that it did not cause. On perusal of the proceedings, the 1st respondent served the applicant with the first mention notice as well as the Statement of Claim on 8th May 2024 at its offices at Mapa House, 5th Floor, Kiambu Town. The 1st respondent filed an Affidavit of Service dated 9th May 2024 whereby the applicant acknowledged service but refused to sign the copy of the documents. The applicant was then served with the 2nd mention notice for the mention scheduled for 20th May 2024. On 1st August 2024, the 1st respondent served the applicant with notice of entry of judgment with notice of ten days. A Supplementary Certificate of Service dated 16th August 2024 was on record together with the Notice of entry of judgment and notice of execution with an accompanying letter dated 20th June 2024. From the foregoing, it is evident that the applicant has not been condemned unheard. The applicant did not to enter appearance nor defend its claim despite being served. Notably, the applicant has not denied that it was served or that its offices are situated at the address given in the affidavits of service. Thus, it is my considered view that the applicant has not shown that it stands to suffer in the event that the orders sought are refused.
23. The applicant has stated that 1st respondent may not be in a position to refund the security in the event the appeal is successful. However, the applicant has brought up the issue in its submissions after the 1st respondent stated in his affidavit that ICEA Lion General Insurance Company Limited is financially capable of refunding the judgment sum in the event the appeal succeeds. Thus, it is my considered view that the applicant has not demonstrated substantial loss.

Has the application has been made without unreasonable delay

24. Judgment was delivered on 29th May 2024 and the applicant filed the instant application on 22nd November 2024 which is 9 months after judgment was rendered. Furthermore, the applicant has not given any reasons why it took 9 months to file the instant application. It is therefore my considered view that the delay is inordinate, unreasonable and unacceptable.



Security of costs

25. The purpose of security was explained in the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR 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 6 of the Civil Procedure Rules acts as security for the 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. It is trite that the issue of security is discretionary and it is upon the court to determine the same. The court on 11th December 2024 directed that the applicant deposits half the decretal sum in court. The applicant stated in its submissions that it complied with the orders of the court by depositing the sum of Kshs. 247,465/- in court as security but did not attach the deposit receipt or the banking slip.

27. In an application of this nature, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

28. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent its right of enjoying its judgment. The record shows that despite the applicant being served with the pleadings and notices in the trial court, it did not enter appearance or defend its claim. The applicant only took action after the 1st respondent instructed Icon Auctioneers to begin the execution process. It is therefore unjustifiable and unfair for the applicant to claim it has been condemned unheard when all along it was served with the pleadings. In my view, it is not in the interests of justice to deprive the 1st respondent from the fruits of his judgment.

29. I have further perused the grounds of appeal and without going into the merits of the appeal, it is noted that the grounds do not raise arguable points of law. It is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.

30. Accordingly, it is my considered view that the application dated 22nd November 2024 lacks merit and is hereby dismissed with costs.

31. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF MARCH 2025.



F. MUCHEMI
JUDGE

