Wanjiku v Oduor & another (Suing as legal representatives of the Estate of Elisha Ithamba Sammy - Deceased) (Civil Appeal E362 of 2024) [2025] KEHC 4087 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4087 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E362 OF 2024

FN MUCHEMI, J

MARCH 27, 2025

BETWEEN

JOHN KABATA WANJIKU ..... APPLICANT

AND

EUNICE ATIENO ODUOR ..... 1ST RESPONDENT

JOHN SAMMY NZAU ..... 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF ELISHA ITHAMBA SAMMY - DECEASED

RULING

1. The application dated 30th December 2024 seeks for orders of stay of execution in respect of the ruling in Thika CMCC No. E557 of 2021 delivered on 29th November 2024 pending hearing and determination of the appeal. The applicant further seeks for orders of setting aside of interlocutory judgment delivered on 19th July 2022 as well as the ex parte formal proof judgment, decree and proceedings in Thika CMCC No. E557 of 2021 and grant the applicant leave to file a Statement of Defence and defend the claim.

2. In opposition to the application, the respondents filed a Replying Affidavit dated 6th February 2025.

Appellant's/Applicant's Case

3. The applicant states that the ruling in Thika CMCC No. E557 of 2021 was delivered on 29th November 2024 whereas the magistrate dismissed his application dated 25th March 2024 seeking to set aside interlocutory judgment, ex parte and formal proof proceedings, and the resultant orders. Being aggrieved by the impugned ruling, the applicant states that he intends to file.

4. The applicant states that he has a good and arguable appeal with good prospects of success on the grounds that the trial court erred in law and in fact in finding that service of summons was proper and that the absence of a draft defence was fatal to the defendant. The applicant states that he was not served with any summons to enter appearance, plaint, mention notice or notice of entry of judgment nor was he aware of the existence of the primary suit. The applicant avers that the trial court failed to properly analyse the proof of service before it and failed to acknowledge that there was no proof at all that the mobile contact that the respondent allegedly used to contact him was not his as no screenshot was attached showing any call log, text message or Mpesa Hakikisha that would prove that the contact was his or was used to contact him. Owing to the erroneous false and improper service, the suit proceeded ex parte and interlocutory judgment was entered against him on 19th July 2022.

5. The applicant avers that he became aware of the existence of the suit on 20th March 2024 when his properties were proclaimed by auctioneers. The applicant further states that since he was not served with any pleadings, it was difficult for him to get a copy of the plaint and therefore difficult to draft a Statement of Defence.

6. The applicant argues that his application was dismissed on 29th November 2024 for the reason that a draft Statement of Defence was not attached as an exhibit. The applicant further argues that the issue of the draft Statement of Defence had not been raised by the respondent and neither had it been submitted by the parties and therefore was not an issue before the trial court.

7. The applicant states that to deny him the right to be heard and to a fair hearing on account of a missing annexture was draconian, capricious, malicious, whimsical and an abuse of the well laid and accepted constitutional rights. The applicant argues that it was never shown that he had knowledge of the existing ex parte proceedings nor was a notice of entry of judgment shown to have been served prior to the court upholding the irregular judgment that awarded the respondents Kshs. 2,500,000/- without according him an opportunity to refute the employment documents relied on.

8. The applicant avers that he shall suffer substantial loss unless the orders sought are granted. The applicant states that the respondent has commenced the execution process and has already applied for re-issue of warrants of attachment and sale of his property yet he has been condemned unheard. The applicant argues that if the orders sought are not granted, the respondents will proceed with execution and the appeal shall be rendered nugatory.

9. The applicant states that the respondents are persons of straw and there is no evidence that they would be in a position to refund the judgment sum if the appeal succeeds.

10. The applicant states that temporary stay of execution orders granted by the trial court lapsed on 29th November 2024 when his application was dismissed.

11. The applicant avers that he is ready, willing and able to abide by any terms or conditions that the court may deem fit to order including payment of throw away costs and filing the Statement of Defence within 14 days of the order.

The Respondents' Case

12. The respondents aver that the case was heard ex parte after the applicant failed to enter appearance and judgment entered in their favor and thus they undertook to execute the decree against him. The respondents state that the reasons given by the applicant for failure to attach a draft defence are not substantiated as his advocate could have reached out to the registry for perusal or even request their advocates to serve him with the pleadings and thus the magistrate's court could not have determined whether the defence raises triable issues. Furthermore, the respondents argue that before the lower

court they, raised the issue of the draft defence not having been attached in their replying affidavit and submissions.

13. The respondents state that the trial magistrate did not err in holding that the applicant acknowledged the fatal accident as he notified the insurance of the accident meaning that he confirms the accident happened but he did not follow up with his insurance company to compensate them for the loss. The respondents aver that they served the demand letter to the applicant's insurance company however both the applicant and his insurance did not follow up.

14. The respondents argue that the allegations by the applicant that he was not served with summons to enter appearance and plaint are blatant lies meant to mislead this honourable court as the same was served to him personally as evidenced by the affidavit of service dated 5th July 2022 and he did not dispute the number he was called through before the lower court but has raised the issue at the instant court, which is an afterthought.

15. The respondents contends that the applicant has no arguable appeal with high chances of success as the memorandum of appeal filed is frivolous. Further, the applicant did not serve a notice of appeal and without the notice of appeal validly filed and served, the intended appeal has no foundation.

16. The respondents argue that the applicant has not shown any sufficient cause to warrant stay of execution of the judgment or setting aside of the judgment of the trial court.

17. The respondents state that the applicant has not demonstrated that they are incapable of paying back the decretal sum to him in the event the appeal succeeds or that he is willing to deposit any security for the due performance of the decree.

18. The respondents state that in the event the court is inclined to grant stay, the applicant ought to be directed to deposit the decretal sum of Kshs. 2,020,200/- as security.

19. The respondents aver that the orders sought are prejudicial to them as they are meant to delay the cause of justice and they preclude their right of enjoying the fruits of their judgment.

20. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

21. The applicant submits that he reported the occurrence of the accident to the insurance company on the same day the accident occurred but he was not served with any of the pleadings by the respondents nor was he aware of the existence of the primary suit. The respondents' process server indicated that he had called him through his official mobile number +254792 507 182 but the appellant submits that, that is not his number. The said contact is registered to a 3rd party by the name of Esther Kyalo but his registered number is +254792 507 132. The process server swore that he had called the applicant through the wrong number and he allegedly directed to meet at Gituanyaga shopping centre. The applicant denies ever receiving any call as such or receiving any summons to enter appearance as alleged. The applicant argues that if the mobile number was wrong, the trial magistrate ought to have interrogated the issue of service properly. The process server misled the court to obtain interlocutory judgment and the same was improper and thus irregular. To support his contentions, the applicant relies on the case of Langer v Mutambu & Another [2023] eKLR.

22. The applicant argues that the trial magistrate erred in law and in fact by holding that he had not denied the contents sworn by the process server or even the phone number therein yet he did the same through his replying affidavit.

23. The applicant relies on the case of ABC Capital Ltd v Nzioka [2021] eKLR and submits that the respondents did not issue a notice of entry of judgment at least 14 days prior to execution pursuant to Order 22 Rule 6 of the Civil Procure Rules. Therefore neither the judgment nor execution was proper and the same ought to be set aside promptly.

24. The applicant reiterates that he did not attach a draft defence due to the fact that he did not have a copy of the plaint and the physical file could not be traced as the CTS had not been launched in Thika law courts.

25. The applicant refers to the cases of Omeriye Limited t/a Light International Schools v Hinesh Trading Limited (2022) eKLR; Murithi v Muketha & 2 Others ELCA E068 of 2022 [2024] eKLR and Lucy Bosire v Kehancha Div Land Dispute Tribunal & 2 Others [2013] eKLR and submits that a draft defence is not the only way a party can demonstrate triable issues. The applicant submits that while he did not deny the occurrence of the accident since he admitted he had reported it to the insurance company, he denied liability, the deceased's income amongst others, in the affidavits sworn.

26. The applicant submits that the respondents have not shown that they occasioned by any prejudice in their claim being heard on merit. Furthermore, such prejudice can be compensated by way of costs. The applicant further submits that he is willing to pay throw away costs of Kshs. 15,000/- subject to been granted leave to file a statement of defence within 21 days.

The Respondent's Submissions

27. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and submits that the applicant has failed to meet the threshold for grant of stay of execution. the respondents refer to the cases of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR and Chege v Gachora (Civil Appeal 265 of 2023) [2024] KEHC 1994 (KLR) (29 February 2024) (Ruling) and submits that the applicant has not furnished any evidence to show that substantial loss may result unless the orders are made as execution is a lawful process and not aground for granting stay of execution.

28. The respondents submit that the applicant has not mentioned that he is willing to furnish any security as the court may order and there is no proposal to show that he will deposit security with the court. Furthermore, the respondents argue that the applicant has not shown that they are incapable of paying back the decretal sum in the event the appeal succeeds.

29. The respondents refer to the case of Patrick Kiplangat Kirui v Roadtainers (Mbsa) Ltd [2019] eKLR and submit that the applicant did not file a notice of appeal as required by law and without the notice of appeal validly filed and served, the current application and the appeal has no foundation.

30. The respondents argue that the applicant was properly served physically and an affidavit of service filed to that effect dated 5th July 2022. The applicant did not dispute the phone number that was used to communicate with him during service at the trial court and he has only raised that issue in this application. The applicant further admitted that his motor vehicle caused the fatal accident. Thus the respondents urge the court to find that the applicant was properly served and was accorded a chance to be heard but he was indolent.

31. The respondents rely on the case of Kainamia & Another v Munyao & 4 Others (Environment & Land Case 245 of 2017) [2022] KEELC 3693 (KLR) (28 July 2022) (Ruling) and submit that the current application is an abuse of the court process as the applicant had filed a similar application at the lower court which was dismissed. Thus, litigation must come to an end.

32. The respondents submit that judgment was entered regularly all parties having been granted a chance to participate in the suit. The respondents argue that for a party to set aside a regular judgment and be granted leave to file a deefnce, one must demonstrate that he has a good defence which raises triable issues. The applicant failed to attach any defence at the trial court to demonstrate what kind of defence so had so that the trial court could ascertain whether the said defence raises any triable issues. To support their contentions, the respondents rely on the case of Moses Kimaiyo Kipsang v Geoffrey Kiprotich Kirui & 2 Others [2022] eKLR.

33. 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.

34. 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.

35. 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.

36. 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."

37. The applicant states that he stands to suffer substantial loss as the respondents shall proceed to execute the decree and they have already applied for the re-issuance of the warrants of attachment and sale which shall render the appeal nugatory.

38. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show that execution shall irreparably affect him or will alter the status quo to its detriment therefore rendering the appeal nugatory. In the instant case, the applicant has not shown that he stands to suffer substantial loss. The applicant has only mentioned that should the respondent proceed with the execution, the instant proceedings and the appeal shall be rendered nugatory.

39. It is noted that the lower court dismissed the applicant's application dated 25th March 2024 which resulted in a negative order. Notably, the court cannot grant stay of the impugned judgment as it dismissed the applicants' case which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR where the court held as follows:-

> " An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with."

40. Similarly in Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of Raymond M. Omboga v Austine Pyan Maranga (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent

kiuwhich is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the

situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

41. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order.

42. Accordingly, it is my considered view that the applicant has not demonstrated that he stands to suffer substantial loss.

Has the application has been made without unreasonable delay

43. The ruling was delivered on 29th November 2024 and the applicant filed the instant application on 30th December 2024. Thus, the application has been filed timeously.

Security of costs

44. 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."

45. It is trite that the issue of security is discretionary and it is upon the court to determine the same. The applicant has just stated that he is ready and willing to furnish reasonable security for the performance of the decree in terms of throw away costs of the sum of Kshs. 15,000/-.

46. 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."

47. 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 respondents their right of enjoying their judgment. I have further perused the grounds of appeal and without going into the merits, noted that they do not demonstrate an appeal with high chances of success. Therefore, it is my considered view that the applicants have not met the threshold of granting stay of execution pending appeal.

48. On further perusal of the grounds of appeal as set out in the memorandum of appeal, the court cannot at this juncture deal with the issues of the main appeal which challenges the interlocutory judgment

of 19th July 2022 and grant the applicant leave to file a Statement of Defence as that shall be ventilated upon at the hearing of the appeal.

49. Accordingly, it is my considered view that the application dated 30th December 2024 lacks merit and is hereby dismissed with costs.

50. It is hereby so ordered.

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

F. MUCHEMI

JUDGE