



**Izwe Loans Company Limited v Kanyora (Civil Appeal
130 of 2024) [2025] KEHC 5459 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 130 OF 2024
EM MURIITHI, J
APRIL 30, 2025**

BETWEEN

IZWE LOANS COMPANY LIMITED APPELLANT

AND

FESTUS MURIITHI KANYORA RESPONDENT

RULING

1. The applicant filed a Notice of Motion dated 17th January, 2025 seeking the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That the Honourable Court be pleased to issue an order staying execution of the Judgement delivered on 8th October, 2024 in Wanguru Civil Suit No. E197 of 2022 Between Festus Muriithi Kanyora vs Izwe Loans Limited pending hearing and determination of this Appeal.
 5. That the costs of the application be provided for.
2. The application is based on the grounds on the face of the application and the supporting affidavit of Mercy Kaima. The appellants aver that the primary suit proceeded for hearing and judgement was delivered on 8th October 2024. That being aggrieved with the Judgement of the trial court the Appellants have preferred the instant Appeal herein and which Appeal is competent and has appreciable chances of success. They are apprehensive that the Respondent will commence with execution of the said judgement if this Honourable Court does not issue orders for stay pending hearing and determination of this Application and the preferred appeal respectively.



3. Further, the Appellants are ready and willing to comply with the conditions of stay pending Appeal including but not limited to depositing half the decretal amount in a joint account in the names of counsels for the parties. That if execution of the judgment entered on 8th October, 2024 is not stayed, this Appeal will be rendered nugatory.
4. Lastly, the Appellants stand to suffer substantial loss as the Respondent may not be in a position to repay any funds paid out to them should the preferred appeal be successful.
5. The respondent opposed the application by a Replying Affidavit of 11th February, 2025. The respondent avers that the subject of this application emanates from a case he filed being Wanguru Civil Suit Number E197/2022 in which he was seeking both general and special damages in regard to an accident that occurred on the 28/10/2022 at Red Soil area along the Embu-Mwea road that involved motor vehicle registration number KCJ 343N and motor cycle registration number KMDX 938X whereby he sustained serious injuries. On the 8/10/2024 the learned magistrate went ahead to award General Damages and special damages as compensation for the injuries sustained. The appellants sought 30 days stay which they were granted and the same lapsed on the 8/11/2024.
6. He avers that the statutory period within which the appellant is required to file an appeal has already lapsed and so by law they are already time barred. That the grounds of stay by the appellant do not to provide the court with prima facie evidence to warrant the grant of the orders sought as they are meant to delay execution of the judgement and | would wait for long to enjoy the fruits of my judgement as awarded by the lower court.
7. Lastly, if the application is allowed the appellant should be made to pay half of the decretal amount to his advocates on record for onward transmission to the respondent.

Appellant submissions

Whether the Applicant has demonstrated that it will suffer irreparable loss

8. They submit that the Applicant has proven that it will suffer substantial loss. The deponent of the Supporting Affidavit averred that the Respondent may not be in a position to refund the decretal sum if the appeal were to succeed and thus if the decretal sum was paid to them, the Applicant would have difficulties recovering it. The Respondents has not responded to this issue. Notably, no affidavit of means has been filed by the Respondent. As it stands, the deposition is uncontroverted and the Respondent remain persons of unknown means. If the appeal succeeds, the Appellant shall not be able to recover the sums paid to the Respondent and the Respondent have no known properties that can be attached in fulfilment of the decree. The Appellant therefore stand to suffer irreparable loss.

Whether this Application has been filed without undue delay

9. They respectfully submit that this Application having been filed within 30 days from the date of Judgment, it was filed without unreasonable delay. This Honourable Court granted a stay of execution of 30 days. This application was lodged before that time lapsed.

Whether the Applicant has offered security

10. The Appellant herein has offered to deposit half the decretal sum in a joint interest account under the names of the Counsels for the parties. Order 42 Rule 6 requires that there be security for the decretal sum and there is no provision or requirement for payment of any portion of the decretal sum to the Judgment Creditor.



11. Whereas indeed the court ought to balance the right of the Applicant to appeal with the right of the Plaintiffs/Respondents to enjoy the fruits of their judgment, the balance can be achieved through depositing of the decretal sum in court which guarantees due performance of judgment or decree.

Whether the Appeal is arguable and not frivolous

12. They urge that under this issue, the court only ought to be satisfied that the appeal is not an abuse of the court process, frivolous or vexatious. The court is not called upon to consider whether the appeal is meritorious or not but simply whether it raises any triable issue. In the instant case, the appeal challenges the finding of the court on its choice of multiplier which the applicant finds unreasonable.

Respondent submissions

13. In the instant case, the judgment in this case was delivered on the 08/10/2024 which the application before court was filed on the 17/01/2025 to this end, the Applicants have not complied with the procedure for instituting an appeal before this court and thus the court has no jurisdiction to entertain the present application.
14. They submit that this Respondent suffered mangled (severely crushed) injuries on the right lower limb and other soft tissue injuries. The injuries he sustained left him with 50% incapacity and therefore making him unable to earn a living like he had previously done before he got involved in the accident. The applicant inordinately delayed in bring this application and has only done so Respondent has begun the execution process. It is the right of the respondent to enjoy the fruits of his judgment.
15. Execution is a lawful process aimed at allowing the decree holder to enjoy his judgment. The judgment in Wanguru Civil Suit E197 of 2022 is a valid judgement and its only in the interest of justice that the respondent is allowed to execute. In the case of Ndungu v Mutual (Civil Appeal £047 of 2024 (2024) KEHC 6276 (KLR). The court held:
16. "It is trite law that execution is a lawful process and It is not a ground for granting stay of execution. The application is required to show how execution shall irreparably affect him or will alter the status law to his detriment therefore rendering the appeal nugatory".
17. The applicant has annexed a Memorandum of appeal which do not raise triable issue and which further is time barred and therefore the court should not in a position to consider the same. The discretion of the court in granting a stay of execution pending who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice Shar v Mbogo & Another EA 116).

Issue

18. Whether stay of execution pending hearing of the appeal should be granted.

Analysis

19. The Trial Court delivered its judgment in the Wanguru CMCC NO E197 of 2022 Festus Muriithi Kanyora vs IZWE Loans Company Limited on 8th October 2022. Being aggrieved by the said judgment, the Defendant lodged an appeal. The appeal challenges various aspects of the judgment. The Appellant thus contends that the appeal has chances of success and is arguable.
20. Order 42 Rule 6 of the *Civil Procedure Act* provides for three elements to be proved by an Applicant seeking a stay of execution pending appeal. An Applicant should demonstrate that the application has been brought without delay; that they will suffer substantial loss unless the order sought is granted; and that security for the due performance of the decree has been given.



21. These elements were reiterated and considered in the case of *Sentrim Contracts Ltd v Joseph Mutinda Menya* (2016) eKLR where the Court (JK Serگون, J.) observed that:

“ 5. The principles to be considered when deciding an application for stay of execution pending appeal are well settled. First, an Applicant must show the substantial loss he would suffer if the order for stay of execution is not given. Secondly, the Applicant must show that the application was filed without undue delay. Thirdly, the court must take into account the provision of security for the due performance of the decree.”

Therefore, three questions emerge.

Whether the Applicants have demonstrated that they will suffer irreparable loss?

22. The appellants/applicants submit that the Respondent may not be in a position to refund the decretal sum if the appeal were to succeed and thus if the decretal sum was paid to them, the Applicant would have difficulties recovering it.
23. The Respondents has not responded to this issue. They submitted that execution is a lawful process aimed at allowing the decree holder to enjoy his judgment.
24. Thus, the appellant will suffer loss as the respondent has not committed to refund the decretal sum if the appeal were to succeed.

Whether this Application has been filed without undue delay

25. The primary suit proceeded for hearing and judgement was delivered on 8th October 2024. The memorandum of appeal was lodged on 15th October, 2024.
26. In *Vegpro Kenya Limited v Susan Wanja* (2017) eKLR, the Court in considering whether an application had been filed under undue delay stated that:
- “ The period of filing a Memorandum of Appeal is 30 days and it is within the said period that an application for stay of execution ought to be filed.”
27. The respondent avers that the statutory period within which the appellant is required to file an appeal has already lapsed and so by law they are already time barred.
28. However, the appellant submits that the application was filed within that time. This Honourable Court granted a stay of execution of 30 days. This application was lodged before that time lapsed. They urge that any delay is solely attributable to delay in receiving the judgment which was delivered after filing of the appeal and the instant application.

Whether the Applicant has offered security

29. The Appellant herein has offered to deposit half the decretal sum in a joint interest account under the names of the Counsels for the parties. Order 42 Rule 6 requires that there be security for the decretal sum and there is no provision or requirement for payment of any portion of the decretal sum to the Judgment Creditor.
30. Whereas indeed the court ought to balance the right of the Applicant to appeal with the right of the Plaintiffs/Respondents to enjoy the fruits of their judgment, the balance can be achieved through depositing of the decretal sum in court which guarantees due performance of judgment or decree.



31. In *Jamii Bora Bank Limited & Another v Samuel Wambueu Ndiraneu* 2022 eKLR the Court (Muchemi, J) considered the provision of the condition of furnishing a security, as follows:

“23] The applicant ought to satisfy the condition of security. In the persuasive decision of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd* [2019] eKLR the court observed:

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

It is the discretion of the court to determine the security for costs.

Whether the Appeal is arguable and not frivolous

32. The appellants submit that the appeal as filed raises triable and arguable issues and is not frivolous. The respondent submits that the applicant has annexed a Memorandum of Appeal which do not raise triable issue and which further is time barred and therefore the court should not in a position to consider the same. The Court, however, accepts the trite position that an arguable appeal is not one that will necessarily succeed but one which raises triable issues for consideration by the appellate court, and finds an arguable case on the question take by the appellant as to the trial court’s choice of multiplier. There is not application to strike out the Memorandum of Appeal for having been filed out of time, and the Court which hears the appeal will deal with the issue.
33. The applicant has an arguable case based on the ruling of the Court (LM Njuguna, J.) in *Vegpro Kenya Limited v Susan Wanja* [2017] KEHC 6118 (KLR) that “that an appeal which is filed out of time can be validated by an application for leave to validate that appeal.”

Orders

34. Accordingly, for the reasons set out above, the Court grants the application for stay of execution pending hearing and determination of the appeal on the following conditions:
35. The Appellant shall deposit the decretal sum into an interest earning joint account in the names of the Counsel for the parties within thirty (30) days.
36. The Record of Appeal shall be filed within sixty (60) days.
37. In default, the stay of execution order shall lapse and be of no effect.
38. The costs of the application shall abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mwaura for the Appellant.



Ms. Njuguna for the Respondent.

