



REPUBLIC OF KENYA



KENYA LAW
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**Ayongah v Nyambaka (Civil Appeal 15 of 2023)
[2025] KEHC 9181 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 9181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 15 OF 2023
SC CHIRCHIR, J
APRIL 29, 2025**

BETWEEN

JAMES OPEYWAH AYONGAH APPELLANT

AND

HELLEN OMENDA NYAMBAKA RESPONDENT

RULING

1. The Applicant's Notice of Motion dated 13/2/2023 seeks for stay of execution pending Appeal. The Application is supported by the Affidavit of Ednah Kerubo
2. It is stated that the sum involved is huge and the respondent may not be in a position to refund the decretal sum in the event that the Appeal succeeds; that the Appeal is likely to be rendered nugatory; that the Application has been brought without undue delay and that the Applicant's Insurer is ready to provide a performance guarantee.
3. The respondent opposes the Application. she deposes that the Applicant has not demonstrated that she is impecunious and hence underserving to be paid the decretal sum; that there is no evidence that the Applicant will suffer substantial loss and that the Applicant is relying on mere apprehension which cannot be a basic for granting of stay.
4. The Respondent further states that the Appeal is only against the award on damages and hence the Applicant should be ordered to pay $\frac{3}{4}$ of the award and deposit the rest.
5. The Parties has filed submissions which I have considered.

Determination

6. The principles governing the granting of stay of execution pending Appeal are well settled. Order 42 Rule 6 the Civil Procedural Rules requires the Applicant to show that substantial loss will occur unless the order is granted, that the application for stay has been made without unreasonable delay and that



the Applicant has given such security as may be sufficient to satisfy the due performance of the decree in the event that the Appeal fails.

7. The Applicant has stated that it stands to suffer substantial loss of Kshs. 1,643,318. The judgment is for Kshs. 1,137,812 hence I do not know where the Applicant has gotten the figure stated. Nevertheless, the respondent has stated that there has been no demonstration that substantial loss would be suffered. In addressing the respondent's contention that substantial loss has not been proved, the decision in *James Wamalwa & Anor Vs Agnes N. Cheseto (2012) eKLR* cited by the Applicant is relevant. The court held inter alia that "Substantial loss is what has to be presented by preserving the status quo because such loss would render the Appeal nugatory. Thus, the Applicant need not demonstrate anything else in an attempt to prove substantial loss.
8. On whether the Appeal will be rendered nugatory the respondent has argued that there has been no evidence to show that she is impecunious. However, that is not the duty of the Applicant. Once the Applicant expresses apprehension, the onus is on the respondent to show that the Applicant's misapprehension is unfounded. In other words, it is the respondent who knows her financial health, it was for her to demonstrate that she is capable of refunding the decretal sum. She has not done so. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] KECA 333 (KLR)* the court of Appeal had this to say about the burden of proof on a respondent's financial standing: "This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a 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 the respondent or lack of them. Once an applicant expresses 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."
9. On the filing of the Application, am satisfied that there was no inordinate delay.
10. On security, the Applicant has offered a Bank guarantee. However, I agree with the respondent that the applicant is not contesting the lower court's finding on liability. This implies that the Applicant accepts that the deceased died due to the negligent acts of the Appellants and consequently some loss was suffered by his estate and/or dependants.

In the circumstances, denying the respondent access to the entire award does not serve the ends of justice.
11. The Application is merited. It is hereby allowed on the following terms:
 - a. There shall be a stay of execution of the Judgment and decree of the trial court in Butali CMCC NO. 69/2022 pending the hearing and determination of the Appeal herein.
 - b. The stay is conditional upon the Applicant paying the Respondent half of the decretal sum, and depositing the other half in an Interest Earning Account to held in the joint names of the respective Advocates.
 - c. The payment in (b) above to be done within 45 days from the date of this Ruling.
 - d. In default of (b) and/or (c) above, the stay herein shall automatically lapse.

DATED, SIGNED AND DELIVERED VIRTUALLY, AT ISIOLO, THIS 29TH DAY OF APRIL, 2025.

S. CHIRCHIR



JUDGE.

In the presence of:

Godwin Luyundi- Court Assistant.

Mr. Oyugi for Mr. Amaya for the Applicant

Ms Karani for the Respondent.

