



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mashashi & another v Archdiocese of Kisumu & 3 others (Commercial Case 13 of 2018) [2024] KEHC 551 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 551 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE 13 OF 2018  
RE ABURILI, J  
JANUARY 30, 2024**

**BETWEEN**

**MARGARET ATIENO MASHASHI ..... 1<sup>ST</sup> PLAINTIFF**

**GEORGE MASHASHI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ARCHDIOCESE OF KISUMU ..... 1<sup>ST</sup> DEFENDANT**

**RIGHT REV. BISHOP ZACCHEAUS OKOTH ..... 2<sup>ND</sup> DEFENDANT**

**TUMSIFU AGENCY ..... 3<sup>RD</sup> DEFENDANT**

**ERASTUS IAN KHANDIRA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This Ruling determines the plaintiffs'/applicants' application dated November 15, 2023 seeking for stay of execution of this court's order dated 31<sup>st</sup> October 2023 requiring the Plaintiff to refund the Respondents Kshs.349,501 being an overpayment made to her by the 1<sup>st</sup> Defendant towards settlement of decree issued on August 19, 2015, pending hearing and determination of the plaintiff's intended appeal to the Court of Appeal.
2. The application is brought under the provisions of order 42 rule 6 of the *Civil Procedure Rules*. The grounds upon which the application is predicated are on the face of the application among them, is that the Applicant is aggrieved by the Ruling of this court rendered on 31<sup>st</sup> October 2023 and has preferred an appeal.
3. That her intended appeal is extremely strong that is going to set the record straight. The affidavit in support reiterates the grounds as hereinabove.



4. The application is opposed by the respondents who filed a Replying Affidavit deposing in contention that the application does not meet the conditions under order 42 rule 6 of the [Civil Procedure Rules](#), that the Plaintiff has not stated what substantial loss will be suffered if stay is not granted.
5. That the church has the financial ability to refund the Plaintiff's sum of Kshs.349,501 if the money is paid to them and the intended appeal is successful; that the appeal being from an order given in execution proceedings it is doubtful if the plaintiff have a right of appeal yet no leave was sought and obtained to appeal hence the chances of the appeal being successful are highly doubtful.
6. Parties filed written submissions which I have considered in line with the conditions that must be fulfilled for stay of execution pending appeal to be granted, as espoused in order 42 rule 6(2) of the [Civil Procedure Rules](#).

### **Determination**

7. The principles guiding the grant of a stay of execution pending appeal are well settled. Under order 42 rule 6(2) of the [Civil Procedure Rules](#):
  - “No order for stay of execution shall be made under subrule (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.”
8. Further, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.
9. 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” 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.”
10. 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.



11. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”

12. The court in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“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.

9. 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.”

13. In this case, the application was filed without inordinate delay. The amount of decretal sum that the Court found to have been paid in excess is only Kshs.349,501 out of the over ten million Kenya Shillings paid to the Plaintiff by the Defendant church, out of the principal sum of Kshs.3.6 million plus interest at commercial rates.

14. There is no evidence of any substantial loss that the Plaintiff will suffer that the appeal, if successful, will be rendered nugatory unless the stay sought is granted.

15. In addition, there is no evidence that if the amount of money ordered to be refunded is paid out, then the defendants will not be in a position to refund the Plaintiff who had already received over ten million Kenya Shillings from the 1<sup>st</sup> defendant.

16. As to whether the appeal is extremely strong is not for this court to determine.

17. Additionally, in this case, I do not find any need to ask the applicant to deposit any security for due performance of decree.

18. For the above reasons, I find and hold that the Applicant has not demonstrated that she is deserving of the orders of stay of execution of the order of October 31, 2023 pending the hearing and determination of the Intended appeal to the Court of Appeal.

19. I decline to grant the orders sought and dismiss it with an order that each party bear their own costs of the application.

20. I so order.



**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF JANUARY, 2024**

**R. E. ABURILI**

**JUDGE**

