



REPUBLIC OF KENYA



KENYA LAW
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**Ndogoh v Oswe (Civil Appeal E082 of 2023)
[2024] KEHC 268 (KLR) (Civ) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E082 OF 2023

JN MULWA, J

JANUARY 25, 2024

BETWEEN

TIMOTHY KIBERA NDOGOH APPELLANT

AND

DENNIS ODENY OSWE RESPONDENT

RULING

1. Before the court for determination is the appellant's Application dated 16/02/2023 brought under order 42 rule 6, of the *Civil Procedure Rules* and section 79G of the *Civil Procedure Act* among others. The appellant seeks stay of execution orders of the judgment from the small claims court case no E2711/2022 delivered on 19/01/2023 pending hearing and determination of the appeal. The grounds for the Application are stated at the Supporting Affidavit sworn by the Appellant on 16/03/2023.
2. The Application is opposed by a Replying Affidavit sworn by the respondent on 6/04/2023. Parties filed written submissions upon which they urged the court to make a determination. I have considered the parties' pleadings and submissions. The court notes that the appeal was filed within the statutory period as provided under section 79G of the *Civil Procedure Act*.
3. The only issue for determination is whether orders of stay of execution should be granted pending hearing of the appeal. The trial court found both parties liable and apportioned liability at 50:50 basis, and awarded material damages at Kshs. 209,837.50 to the Respondent, to be apportioned on equal basis. Being dissatisfied,



this appeal was lodged upon grounds stated at the Memorandum of Appeal dated 13/02/2023 seeking that the judgment of the trial court be set aside by allowing the appeal.

4. Stay of execution pending Appeal is governed by provisions of order 42 rule 6 of the [Civil Procedure Rules](#) providing the conditions to be met by an applicant that;
 - a. The court must be satisfied that substantial loss may result to the Applicant unless the order is granted;
 - b. The Application has been made without unreasonable delay; and
 - c. The Applicant has offered sufficient security for the due performance of the decree.
5. The decree herein is a money decree; and rarely would denial of a stay order render the appeal nugatory unless it is shown that the Respondent would be unable to repay back the decretal sum should the appeal not be successful.
6. In his submissions, the Appellant submits that the suit was brought by the insurer of the motor vehicle under subrogation doctrine and therefore a stay order shall not prejudice the Respondent, and that the appeal raises pertinent issues that are arguable, and if stay is not granted, he would suffer prejudice.
7. The Respondent on his part submits that the only reason for the appeal is that the Appellant's insurer has failed and neglected to intervene due to the Appellant's breach of the policy of insurance; and raises no arguable grounds with any chances of success and as such, the Appellant shall suffer no loss or prejudice by a denial of stay orders; and further that the Appellant has not offered any security.
8. In [National Industrial Credit Bank Ltd vs. Aquinos Francis Wasike & Another](#) [2006] eKLR the court held that it is the Applicant to prove that substantial loss either through difficulty in satisfying the decree or loss occasioned by the inability by the adverse party to refund, if the Appeal succeeds. See also [Tiny Bees Credit \(K\) Ltd vs. Patrick Macharia Nderity & Another](#) [2022] eKLR, [Zoa Taka Limited & Another vs. Dennis Kyalo](#) [2022] eKLR where the court expressed itself that stay of execution is not a right of a party but at courts discretion, which should be exercised judiciously, and within the confines of the law, and upon the court applying its mind to the circumstances of the case.
9. Further, it is trite that the purpose of stay pending appeal is to preserve the subject matter in dispute so that the Appellant's rights of appeal are safeguarded should the appeal be successful. – [Peter Nakupang Lowar vs. Nautu Lowar](#) [2022] eKLR, and [RWW Vs EKW](#) [2019] eKLW.
10. Upon analysis of the parties oral arguments and circumstances, and taking into account that both parties were held equally liable, on 50:50 basis; none would suffer any loss or prejudice that may not be compensated by an award of costs should the appeal, either succeed or fails.

For the above, I am not persuaded that an order of stay of execution as sought by the appellant would serve any purpose.
11. The application dated 16/02/2023 is therefore dismissed with costs to the respondent. The temporary stay orders granted on 16/02/2023 are hereby vacated.
12. On the matter of the Appeal, let the Appellant file the Record of Appeal within 60 days; and return for directions on 19/03/2024 before the Deputy Registrar.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

J. N. MULWA



JUDGE

