



Otundo v EIA (Minor suing through Next friend and Father IIA) (Civil Appeal E080 of 2022) [2024] KEHC 414 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEHC 414 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E080 OF 2022
PN GICHOHI, J
JANUARY 25, 2024**

BETWEEN

CALLEN NYABOKE OTUNDO APPLICANT

AND

EIA (MINOR SUING THROUGH NEXT FRIEND AND FATHER IIA) RESPONDENT

RULING

1. The subject of this ruling is a Notice of Motion dated 24/9/2022 filed through the firm Kimondo Gachoka & Co. Advocates and brought under Section 3, 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 50 Rule 5, 51 Rules 1 and 2 and Order 22 of the *Civil Procedure Rules* 2010. The Applicant seeks orders that:
 1. Spent
 2. This Court be pleased to grant a stay of execution of the judgment/decree in Kisii Civil Case No. 355 of 2020 delivered on 30th September 2022 pending the hearing and determination of this Applicant.
 3. This Court be pleased to grant a stay of execution of the judgment/decree in Kisii Civil Case No. 355 of 2020 delivered on 30th September 2022 pending the hearing and determination of this Appeal.
 4. Upon grant of prayer 3 above, this Court be pleased to order that the Applicant do provide sufficient security in the form of a suitable Bank Guarantee form a reputable financial institution to secure the Judgment herein for Kshs, 1,216,620/=.
 5. The costs of this application be in the cause.



2. The main grounds on the face of the Application which is supported by the Affidavit sworn by the Applicant herein on 24th October 2022 are that the decree is for substantial amount and the Applicant may not recover it from the Respondent who is a man of straw thus rendering the Appeal nugatory and as a consequence, the Applicant will suffer substantial loss. Further, the Applicant states that she has brought this Application timeously and that he is able, ready and willing to furnish security in form of a bank guarantee for whole decretal sum.
3. The Respondent has opposed this Application by a Replying Affidavit which he swore on 1st November 2022 and filed through the firm of M. Kang'asa & Co. Advocates. Terming the Application vexatious, scandalous, lacking in merit and an afterthought, the Respondent depones that the Memorandum of Appeal raises no triable points of law and facts, lacks merit and is a waste of Court's time. Further, she depones Applicant has not substantiated his allegation that the Respondent is a man of straw.
4. The Respondent depones that he is a person of means and therefore no substantial loss will be occasioned on the Applicant if orders sought are not granted. He however depones that in the unlikely event, the Court grants the orders sought, then she urges the Court to direct the Applicant to pay the Respondent half of the decretal amount plus lower court's costs and the other half be deposited in a joint interest earning account so as to cater the interest of both parties pending the Appeal. Otherwise, the Respondent seeks that the Application herein be dismissed with costs.

Applicants' Submissions

5. In their Submissions dated 5th November 2022, the Applicant highlighted the conditions set by Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) granting such an application and submits that she has fully complied. On issue of substantial loss, the Applicant submits that the burden of prove shifted to the Respondent to show that he can refund the decretal sum if the Appeal succeeds as the Applicant did not know the Respondent's resources.

Respondent's Submissions

6. On their part, the Respondent filed their submissions dated 15th November 2022. He submits that the only issue for determination is whether the Applicant has satisfied the conditions of granting stay of execution pending appeal.
7. The Respondent submits that he suffered bodily injuries and huge financial loss due the accident involving him and the Appellant's motor vehicle and therefore, he stands to suffer even more if the orders sought are granted. He submits that having proved his case on a balance of probabilities, his legitimated expectation is that litigation comes to an end and he is allowed to enjoy the fruits of his judgment.
8. He submits that he is a person of means with a source of livelihood and, able and willing to reimburse the Applicant any excess of the decretal sum paid upon her and further, no substantial loss will arise if he is paid half the decretal sum plus lower court costs pending hearing and determination of the appeal.

Determination

9. This Court has considered the application herein, the Affidavits, the submissions by parties and the authorities cited therein. Parties have aptly captured the three conditions that the Applicant must meet in an application for stay of execution pending appeal as provided for under Order 42 Rule 6 (2) of the [Civil Procedure Rules](#), that is:-



- i. The application must be brought without unreasonable delay.
 - ii. The applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
 - iii. The applicant must furnish 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.
10. From the lower court record, it is noted that at the delivery of the judgment, the Applicant was granted stay of execution for 30 days . There is no dispute that the Application herein was brought timeously but no interim orders were granted as prayed.
 11. On the second issue, the Applicant argues that the decree is for substantial amount which the Applicant may not recover from the Respondent as the Respondent is a man of straw thus rendering the Appeal nugatory. That as a consequence, the Applicant will suffer substantial loss.
 12. It is not enough for the Applicant to make such a bold statement in an attempt to deny the Respondent enjoyment of the money awarded by the trial court. There should be evidence to back it. Indeed, Plat Ag JA (as he then was) in case of *Kenya Shell Limited v Benjamine Karuga Kibiru & another* [1986]eKLR had this to say:-

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”
 13. It is not enough for the Applicant to call the Respondent a man of straw. She must have reasonable grounds to support that conclusion. Having failed to substantiate his allegation that the Respondent is a man of straw who may not refund the money if appeal succeeds, the burden could not shift to the Respondent.
 14. Regarding the burden on the parties, the Court of Appeal in *Superior Homes (Kenya) Limited vs Musango Kithome* [2018] eKLR had this to say:-

“... the issue of substantial loss is the cornerstone of both jurisdictions ...The law, however appreciates that it may not be possible for the applicant to know the Respondent’s financial means. The law is therefore that all an Applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”
 15. On security for costs, the Court record shows that attempt by parties to reach settlement on this application failed even after filing submissions paving way for this Ruling. The Applicant herein offers to provide a Bank Guarantee for the whole amount.



16. On the other hand, the Respondent asks the Court to direct the Applicant to pay the Respondent half of the decretal amount plus lower court's costs and the other half be deposited in a joint interest earning account so as to cater the interest of both parties pending the Appeal.
17. In the circumstances, and to balance the rights of the Applicant to pursue the Appeal, and the right of the Respondent to enjoy at least some of the fruits of his judgment without further delay, this Court grants stay of execution of the judgment/decreed herein pending the hearing and determination of the Applicant's Appeal on condition that:-
 1. The Applicant pays the Respondent to pay the Respondent half of the decretal amount plus lower court's costs within thirty (30) days from the date of this ruling.
 2. The Applicant deposits in Court and the other half of the decretal sum within thirty (30) days from the date of this ruling.
 3. The costs of this Application to abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 25TH JANUARY, 2024

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Applicants

N/A for Respondent

Lauren Njiru/ Aphline, Court Assistant

