



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Macharia v Wachira (Civil Appeal E087 of 2022)  
[2024] KEHC 4223 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4223 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E087 OF 2022  
RM MWONGO, J  
APRIL 24, 2024**

**BETWEEN**

**STEPHEN MWANGI MACHARIA ..... APPLICANT**

**AND**

**AMOS KARANI WACHIRA ..... RESPONDENT**

**RULING**

1. This notice of motion dated 17<sup>th</sup> April, 2023 seeks the following orders:
  - i. Pending the hearing and determination of this application, the Honourable Court be pleased to grant an Interim Order of Stay of Execution of the Judgment and Decree rendered and/or delivered by the Subordinate Court on the 30<sup>th</sup> day of August, 2022 vide Kerugoya CMCC NO.182 of 2018, together with all consequential orders arising there from and/or attendant thereto.
  - ii. The Honourable Court be pleased to grant an order of stay of Execution of the Judgment and Decree rendered and/or delivered by the Subordinate Court on the 30<sup>th</sup> day of August, 2022 vide Kerugoya CMCC NO.182 of 2018, together with all consequential orders arising therefrom and/or attendant thereto, pending the hearing and determination of the instant Appeal.
  - iii. As a condition for stay of execution pending the hearing and determination of this Appeal the Applicant/Appellant be ordered to provide/issue security for the entire decretal sum in the form of a Bank Guarantee to be issued by Family Bank Limited.
  - iv. Costs of this Application do abide the Appeal.
2. The application is based on the grounds on the face of the application and the supporting affidavit of Stephen Mwangi Macharia.



3. In his supporting affidavit, the applicant asserts essentially, that:

The applicant deposed to a 27 paragraphs supporting affidavit with the following major averments:

- v. In the Subordinate Court, (hereinafter referred to as the original suit) a suit was filed and/or lodged by the Respondent herein, which purported that Motor Vehicle Registration Number KBX 501F, Toyota Matatu, (*sic*) belonging to me, had caused and/or occasioned an accident.
- vi. That through the counsel he entered Appearance and filed a Statement of Defence.
- vii. After the suit was heard judgment was reserved for and read on the 30<sup>th</sup> day of August, 2022.
- viii. The Respondent's suit, was allowed and he was awarded the sum of Kshs.250,000/= in General Damages and Kshs.7.630/= in Special Damages all totalling Kshs.257,630/=.
- ix. That being dissatisfied with the judgment, he instructed his Advocates on record to proceed to and lodge the Instant Appeal against the Judgment and Decree of the Trial Court, and an order of Stay of Execution was granted for 30 days, but the same has since lapsed. In the absence of any stay of execution pending Instant Appeal being heard and determined, the Respondent is at liberty to execute the Judgement and Decree in the original suit to my detriment and loss.
- x. That he is ready, able and willing to provide security for the entire Decretal Sum of Kshs. 257,630 in the form of a Bank Guarantee to be issued by Family Bank Limited which is a Reputable Bank in Kenya.
- xi. That the instant application has been made timeously without unreasonable delay.

4. In his replying affidavit the respondent states that:

1. The said application is incompetent, misconceived bad in law and ought to be struck out as it is solely meant to further delay the enjoyment of the fruits of my judgment, and the same should be dismissed with costs.
  2. That the stay of thirty (30) days has already lapsed and he has never been served with any memorandum of appeal and consequently; any record of appeal.
  3. That the Applicant has not demonstrated what substantial loss he will suffer if the stay is not granted.
  4. That this application was filed on 17.04.2023,224 days after delivery of judgment, the Applicant has not bothered to explain the delay satisfactorily to the Court and it follows then that the application for extension for stay of execution should be dismissed.
  5. That any prejudice suffered by the Applicant on the dismissal of this application is wholly and purely their own doing as they were indolent in pursuing their right of appeal.
5. There are no submissions on record for the applicant. The respondent, however, filed submissions.



6. The respondent submits that the applicant has failed to meet the threshold for grant of the orders sought
7. As regards stay of execution, order 42 rule 6 provides that the court must satisfy itself that:
  - a. The application has been made without unreasonable delay;
  - b. Substantial loss may result to the Applicant unless the order is made and;
  - c. The Applicant has furnished security for the due performance of the decree being appealed from.
8. The respondent cited the case of *Isaac Muteti Kisua v Felix Mwangi Ndegwa* [2016] eKLR where the Court rendered itself thus: This Court finds that the Applicant from the reading of the above quoted provisions has the burden to demonstrate that he would suffer substantial loss and not just loss unless stay of execution is granted. I am not convinced that the burden of demonstrating financial means is the other way round as submitted by the Applicant. Looking at the authorities quoted, especially by the Respondent and the provisions of the quoted rules it is clear that an applicant has a duty to demonstrate that a substantial loss may result to him/her unless an order of stay is made.

#### **Extension of time**

9. The Respondent submits that the Applicants are undeserving of any extension of time. *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR. There, the Supreme Court set seven principles that a Court should consider:
  1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases. Like election petitions, public interest should be consideration for extending time.
10. Finally, the respondent submits that the applicant has not offered to deposit a regular form of security but is offering a ban guarantee.

#### **Issues for Determination**

11. The only issue for determination is whether the applicant has met the threshold for stay of execution under order 42 Rule 6.



## Analysis and Determination

12. Order 42, Rule 6 of the [Civil Procedure Rules](#), 2010 which provides as follows: -

- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

### Substantial Loss and Unreasonable Delay

13. The Judgement was rendered on the 30<sup>th</sup> day of August, 2022, the Honourable Court allowed the Respondent's suit, and awarded him the sum of Kshs. 250,000/= in General Damages and Kshs.7,630/= in Special Damages.
14. The applicant proceeded to lodge the instant appeal against the Judgement and Decree of the Trial Court dated 28<sup>th</sup> September, 2022 and filed on 1<sup>st</sup> October, 2022. Hence, there no unreasonable delay.
15. The applicant deposes that there was an order of Stay of Execution which was in force for 30 days, but the same has since lapsed and he is apprehensive that in the absence of any stay of execution pending Instant Appeal being heard and determined, the Respondent is at liberty to execute the Judgement and Decree in the original suit to my detriment and loss.
16. On substantial loss the applicant depose that the decretal sum is for a substantial amount of Kshs. 257,630/= which amount if paid to the Respondent and the appeal is successful, he not be able to recover the same from the Respondent and the Appeal will therefore be rendered nugatory.
17. On unreasonable delay, the application for stay of execution has been brought 8 months after delivery of judgement. This delay is reasonable since the memorandum of appeal had been filed within time. Further, the parties have been negotiating on ways to settle the matter out of court.



18. The purpose for stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in RWW v EKW (2019) eKLR addressed itself on this as hereunder: -

“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.

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.”

### **Security**

19. The applicant states that he is ready, able and willing to provide security for the entire Decretal Sum of Kshs. 257,630 in the form of a Bank Guarantee to be issued by Family Bank Limited which is a Reputable Bank in Kenya. This court has perused the guarantee attached to the application and rejects it on the grounds that: First it is a guarantee for Family Bank in favour of Directline Assurance Company Limited and there is no simultaneous guarantee of Directline Assurance Company Limited to the respondent or to this court for the decretal sum and Secondly, guarantee exhibited is dated 31<sup>st</sup> August 2021 and there is no indication as to whether it is an annually revolving guarantee. That as it has not time frame.
20. The purpose of security was clearly enunciated in Arun C. Sharma v. Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 others [2014] eKLR, where the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

### **Conclusions and Disposition**

21. It is clear that the applicant acted swiftly in filing the memorandum of appeal within time and obtaining a 30 day stay, which has since lapsed. I am satisfied that the issue of stay is curable by extension of time.
22. I am inclined to grant stay of execution and allow the applicant to pursue his appeal on the following conditions:
1. That the applicant shall deposit the full decretal sum into court within twenty one (21) days of the date hereof;
  2. That in default, the stay shall automatically lapse and execution may proceed.



3. That upon making the deposit into court the applicant shall file and serve his Record of Appeal within forty five (45) days.
4. Orders accordingly.

**DATED AT KERUGOYA THIS 24<sup>TH</sup> DAY OF APRIL, 2024**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:-

Kanini holding brief for Kipngetich for Appellant/Applicant.

Mutua holding brief for Ndungu for Respondent

Court Assistant, Murage

