



REPUBLIC OF KENYA



Wanyoike t/a Promise Mwanake Luxury Coach & 2 others v Esinyen (Civil Appeal E012 of 2024) [2024] KEHC 5939 (KLR) (27 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CIVIL APPEAL E012 OF 2024
RN NYAKUNDI, J
MAY 27, 2024**

BETWEEN

**JAMES WANYOIKE T/A PROMISE MWANAKE LUXURY
COACH 1ST APPELLANT**

NEW PROMISE CONTRACTORS CO LTD 2ND APPELLANT

GIDRAF MUIRURI 3RD APPELLANT

AND

ROSA EKAL ESINYEN RESPONDENT

RULING

Coram: Before Justice R. Nyakundi

M/s Gacathi & Company Advocates

M/s Kimondo Gachoka & Company Advocates

1. Before me for determination is a notice of motion application dated 12th February, 2024 brought under the provisions of Section 3A of the *Civil Procedure Act*, Order 42 Rule 6(2) and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010. The applicant seeks orders as follows:
 - a. Spent.
 - b. That there be stay of execution of the judgment and decree of Kshs. 315,000/ = plus costs and interests pending the hearing and determination of this application inter-parties.
 - c. That there be stay of execution of the judgment and decree of Kshs. 315,000/ = plus costs and interest pending the hearing and determination of Lodwar HCCA No. E012 of 2024; James Wanyoike T/A Promise (Mwanke Luxury)



coach, New promise contractors Co. Ltd & Gidraf Muiruri -vs- Rosa Ekal Esinyen.

- d. That this honorable court allow the appellants/Applicants to furnish the court with security in the form of a Bank guarantee from the Family Bank.
- e. That the costs of this application be provided for

2. The application is based on the following grounds:

That the applicant appealed against the impugned judgment and the orders of stay are about to lapse

That the Respondent's financial ability is unknown and is therefore unlikely to refund the judgment sum if paid out to him to the detriment of the Appellants/Applicants

That the Respondent is likely to execute the judgment and decree and the Defendant/Applicant stand to suffer loss.

That the Appellants/Applicants insurer is ready and willing to furnish the honorable court with a Bank guarantee as security in due performance of the decree, within a stipulated period as directed by this honorable court.

3. In response to the application, the respondent filed a replying affidavit sworn by one Rosa Ekal Esinyen on 12th March, 2024.
4. According to the Respondent the instant application is a deliberate attempt to delay the cause of justice and to frustrate her from enjoyment of fruits of the judgment. That there is no possibility and or chances of the intended appeal to warrant the court's discretion.
5. She deponed that this court is not entitled to grant a stay of execution under the provisions of Order 42 Rule 6 and further that the orders sought under this order are at the discretion of the court and thus not automatic. She maintained that the applicants have not demonstrated that the appeal will be rendered nugatory if stay orders are not granted. That the applicants have not demonstrated any hardship or substantial loss they will suffer if stay orders are not granted.
6. The respondent urged this court to consider the overriding objective as defined in Section 1A and 1B of the *Civil Procedure Act* and ensure that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing. She was opposed to a bank guarantee being issued as it would be unfair to him and would deprive and delay his enjoyment of the fruits of judgment. Instead, he proposed that the applicants should pay half of the decretal sum together with costs and the balance be deposited in an interest earning joint account in the names of both counsel within a reasonable period pending the outcome of the intended appeal.

Analysis and determination

7. Having gone through the application, the affidavit in support and the response, the only issue I find for determination is whether the applicants have met the prerequisite for grant of stay of execution.
8. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside.

No order for stay of execution shall be made under sub rule 1 unless:-

- a. The Court is satisfied that substantial loss may result to the 1st 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.

9. Therefore, under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an Applicant should satisfy the court that:

- a. Substantial loss may result to him unless the order is made;
- b. That the application has been made without unreasonable delay; and
- c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

10. These principles were enunciated in [Butt vs Rent Restriction Tribunal](#) [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.



Substantial loss

11. This limb requires the applicant to clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd vs Kibiru and another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows: -

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”

The learned judge continued to observe that: -

“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 cornerstone of both jurisdictions for granting 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.

12. The applicants state that they stand to suffer substantial loss as the respondent’s financial ability is unknown and is therefore unlikely to refund the judgment sum if paid out to him. The respondent on the other hand deponed that the applicants have not demonstrated any hardship or substantial loss they will suffer if stay orders are not granted. It is trite law that a mere claim that the respondent cannot refund the decretal sum is not efficient. There must be reasonable grounds provided by the applicants to show that the respondent cannot make refund of the decretal sum after which the respondent will be called upon to discharge his evidential burden. Though the respondent in the instant case did not provide evidence to show his financial capabilities nor did he swear an affidavit of means. It is for that reason I find that the applicants have demonstrated substantial loss.
13. As to whether the application was made without reasonable delay, Judgment herein was delivered on 17.01.2024 and temporary stay for 30 days was granted. The instant application was filed on 12.02.2024 which was within the period of stay given by the trial court. As such, the application has been filed timeously.
14. The other element to be satisfied by the applicants is security is security of costs. The applicants ought to satisfy the condition of security. In the persuasive decision of *Gianfranco Manenthi & another vs Africa merchant Assurance Co. Ltd* [2019] eKLR the court observed: -

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the



opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

15. Similarly in *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR 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 the 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.”

16. From the foregoing decisions, it is evident that the issue of security is discretionary and it is upon the court to determine the same. Notably, in their application, the applicants stated that they are willing to offer security in the form of a bank guarantee if called upon by this Honourable Court to do so. The respondent on the other hand prays that if the court is inclined to grant the applicants stay orders and since the issue on appeal is on quantum of damages which the applicants feel is on the higher side, they should be granted conditional stay with terms that the applicants do pay half the decretal sum together with costs and the balance be deposited in an interest earning joint account in the names of both counsel with a reasonable period pending the outcome of the intended appeal.

17. It is important to note that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR where the court upheld the decision of *Portreitz Maternity vs James Karanga Kabia* Civil Appeal No. 63 of 1991 and stated that: -

“That right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

18. From the above analysis, it is my considered view that on a balance of interests, since the applicants are willing to deposit the decretal sum, I am convinced that the fair balance would be for the applicants to provide a bank guarantee from a reputable bank and in which case they have proposed family bank.



19. In the end, the motion dated 12th February, 2024 is allowed. Consequently, an order for stay of execution pending appeal is granted on condition that the appellant provides a bank guarantee from a reputable bank as security for the decretal sum pending the hearing and determination of the Appeal. In default the stay order shall automatically lapse.
20. Costs of the motion to abide the outcome of the appeal.
21. It is hereby so ordered.

DATED SIGNED AND DELIVERED VIA E-MAIL AT LODWAR THIS 27TH DAY OF MAY 2024

.....

R. NYAKUNDI

JUDGE

