



Munywoki v Muia (Suing as Administrators of the Estate of Joseph Matheka Muia - Deceased) (Civil Appeal E305 of 2024) [2024] KEHC 7601 (KLR) (26 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E305 OF 2024**

**FR OLEL, J
JUNE 26, 2024**

BETWEEN

AUGUSTUS MUTHIANI MUNYWOKI APPELLANT

AND

ANGELINA NDUNGE MUIA (SUING AS ADMINISTRATORS OF THE ESTATE OF JOSEPH MATHEKA MUIA - DECEASED) RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 17th April 2024 brought pursuant to provisions of Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (1) and (2) of the said application are basically spent and the main prayer sought is prayer (3) & (4) that this court be pleased to issue an order of stay of execution of the judgment/decree of Honourable K. Benson Senior Principal Magistrate delivered on 24th January 2024 in Kithimani SPMCC No 114 of 2020 pending the hearing and determination of the appeal filed herein and that they be allowed to furnish security in the form of a bank guarantee from a reputable bank pending determination of the said Appeal. The application is supported by a supporting affidavit dated 15th April 2024, sworn by one Augustus Muthiani Munyoki.
2. This application is opposed by the Respondent who filed her Replying Affidavit dated 16th May 2024 sworn by her advocate Doreen Namagembe, who maintained that the said application was misconceived and the applicant had not met the conditions for granting stay under Order 42 Rule 6(2) (b) of the *Civil Procedure Rules*, 2010 and thus the said application should be dismissed.

Analysis & Determination

3. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issue which arise for determination is whether this court should grant stay



of execution of the Judgment/Decree dated 24th January 2024 issued in Kithimani SPMCC No 114 of 2020.

4. Stay of Execution is provided under Order 42 Rule 6 of the *Civil Procedure Rules* 2010 as follows;

- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”

5. The three conditions to be fulfilled can therefore be summarized as follows;

- a. that substantial loss may result to the applicant unless the order is made
- b. application has been made without unreasonable delay
- c. security as the court orders for the due performance

6. These principles were enunciated in *Butt v 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.



7. To the foregoing I would add that an order of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay shall also consider the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, to enable court give effect to the overriding objective, while in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman v. Amboseli Resort Limited [2004] 2 KLR 589.
8. The judgment appealed against was delivered on 24th January 2024. The Appeal herein was filed on 19th February, 2023 and this application filed on 17th April 2024. Thus, it can be said that this appeal and application for stay of execution have been file timeously.
9. On the likelihood of suffering substantial loss, it was sufficient if an applicant seeking a stay of execution demonstrated that he/she would have to go through hardship to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful. See G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another (2010) eKLR , National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another (2006) eKLR.
10. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person of means, I find that the Appellant has satisfied this court that he would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
11. On the security, the Appellant has indicated that he is ready and willing to abide by this courts orders as to security for due performance of the decree. In particular he has offered to provide a bank guarantee for the entire amount pending hearing and determination of this Appeal.
12. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See Attorney General v Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008; Kenya Shell Ltd v Kibiru & another (Supreme); Mukuma v Abuoga (1988) KLR 645.

Disposition

13. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;
 - a. The Appellant/Applicant do pay the respondent a sum of Kshs.1,000,000/= and provide a bank guarantee for the balance of the decretal amount, which bank guarantee will be specific to this Appeal and valid for the entire period of the Appeal.
 - b. This condition is to be met within 60 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
14. The costs of this Application will be in the cause.
15. It is so ordered.



RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF JUNE, 2024

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 26th day of June, 2024

In the presence of: -

No appearance for Appellant

Mr Munyua Respondent

Sam Court assistant

