



Momanyi v Chege & another (Suing as Personal Representative of the Estate of Naomi Waithera Kamamu - Deceased) (Civil Appeal E077 of 2024) [2024] KEHC 9372 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E077 OF 2024**

**FR OLEL, J
JULY 30, 2024**

BETWEEN

JEFF STANFORD MOMANYI APPELLANT

AND

SAMUEL MUGO CHEGE 1ST RESPONDENT

JOHN CHEGE MUGO 2ND RESPONDENT

**SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NAOMI
WAITHERA KAMAMU - DECEASED**

RULING

A. Introduction

1. The application before this court for determination is the Notice of Motion application dated 7th May 2024 brought pursuant to provisions of Section 1A, 1B, 3, & 3A of the *Civil Procedure Act*, Order 42 Rule 4,5, & 6(1),(2), Order 51 rule 1 of the *Civil Procedure Rules*. Article 50(1) and all other enabling provision of law. The applicant seeks for prayers that;
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this Appeal this Honourable court be pleased to stay the execution of the Judgement delivered on 23rd February 2024, the resultant decree and all other consequential proceedings in Mavoko CMCC No 653 of 2021; John chege & Samuel Mugo chege (Suing as the personal representatives of the Estate of Naomi Waithera Kamamu (Deceased) Versus Jeff Stanford Momanyi



- d. That costs of this Application abide the outcome of the Appeal.
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of the appellant Jeff Stanford Momanyi dated 7th May 2024 while it has been opposed by the Respondents who filed their replying affidavit dated 8th June, 2024 sworn by their advocate Evans Mochama.

B. Pleadings

3. The applicant averred that the trial Magistrate did deliver its judgment dated 23rd February, 2024 and awarded the Respondents a sum of Kshs.6,997,088.20/= together with costs of the suit. He had lodged his Appeal on 18th March 2024 and also his insurer, Pioneer General Insurance company Ltd had indicated that they were obliged to indemnify him to the tune of Kshs.3,000,000/= and the rest of the decretal sum he was to satisfy directly. His appeal was filed timeously, was merited and had high chances of success. If the orders sought were not granted, there was real danger that the respondents would execute the decree to his loss and detriment. The applicant also averred that he was willing to furnish security as the court may deem fit to grant.
4. This application was opposed by the Respondents through the replying affidavit sworn by their advocate Evans Mochama. He stated that the respondents had proved their case before the trial court and were entitled to receive a token of the said judgment. The appeal filed was frivolous and had no chance of success. Further no single allegation had been made by the applicant that the respondents were not persons of means and therefore if paid, they would not be able to refund the sums so paid out in the event the appellant was successful in this appeal.
5. Be that as it may should the court be minded to grant the orders sought, the respondents urged the court to direct that they be paid the Kshs.3,000,000/= due from the appellants insurer and secondly the balance of the decretal sum be deposited in a joint interest earning account pending determination of this Appeal

Analysis & Determination

6. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit, and both sets of written submissions filed and discern that the issue which arise for determination is; whether the applicant has satisfied the conditions set under Order 42 Rule 6 of the Civil Procedure Rules to allow the court exercise discretion in his favour to grant an order of stay of execution of the Judgement/decreed and all other consequential proceedings in Mavoko CMCC No 653 of 2021; John chege & Samuel Mugo chege (Suing as the personal representatives of the Estate of Naomi Waithera Kamamu (Deceased) Versus Jeff Stanford Momanyi.
7. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security for the due performance of any decree or order as may ultimately be binding on the Applicant.(see Butt v Rent Restriction Tribunal (1982) KLR 417 and James Wangalwa & Another v Agnes Nalika Chereto (2012) eKLR)
8. In the case of Masis Mwita v Damris Wanjiku Njeri (2016) eKLR the court provided the guiding principles which it should consider while determining an application of this nature. These were;



- a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. 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 to be rendered nugatory should that appeal court reverse the judge's discretion.
 - c. A judge should not refuse 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. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements.
9. Further in considering an application for stay of execution, the court in deciding whether or not to grant stay should also consider the provisions of Section 1A and 1B of the [civil procedure Act](#), which enjoins the court to give effect to the overriding objective in exercise of its powers under the [civil procedure Act](#) or in the interpretation of any of its provisions. See [Micheal Ntouthi Mitheu Vrs Abraham Kivondo Musau](#) (2021) eKLR, where Justice G.V Odunga quoted the case of [Visbram Ravji Halai v Thornton Turpin](#) Civil Application No. Nai 15 of 1990 (1990) KLR 365.
 10. The Judgement/decree appealed against was delivered on 23rd February 2024. The Appeal herein and this application were simultaneously filed on 18th March, 2023 Thus, it can be said that this appeal and application for stay of execution have been file timeously.
 11. 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 such as instituting legal proceedings 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 was successful. See [G. N. Muema P/A \(516\) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & Another](#) (2010) eKLR, [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another](#) (2006) eKLR.
 12. The applicant has admitted that his insurer is willing to settle and/or indemnify him to the tune of Kshs.3,000,000/= leaving a balance of Kshs.6,997.088.20/=. Guided by the above authorities and also considering the substantial amount involved and also the fact that the respondents have not filed their affidavit of means. I find that the Appellant has satisfied this court that he would suffer substantial loss if the respondents are allowed to execute for the decretal sum. The Appellant has therefore fulfilled this condition.
 13. As regards the issue of security, 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 respondent but also consider, in all fairness, the interest of the applicant who in this appeal is 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](#)
 14. This issue of adequacy of security was dealt with in the Court of Appeal in [Ndubiu Gitahi v Warugongo](#) (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal expressed itself as follows;

“The process of giving security is one which arises constantly so long as the opposite party can be adequately protected. It is right and proper that security should be given in a way



which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even handedly without prejudicing the issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There are absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even-handed manner, that there would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant so as to tempt him into settling the appeal or will any party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”

15. The appellant averred that they are ready and willing to abide by any order of this court as will be made as regards issuance of security. The respondents on the other hand have proposed that half the decretal sum be released to them or in the alternative the sum due from the insurance Kshs.3,000,000/= be released to them and the balance of the decretal sum be deposited in a joint interest earning account. From the record it is clear that the applicant’s insurer has instructed him to appoint his own advocate and have washed their hands off this Appeal. There is therefore no good reason as to why they should not release their statutory portion of the decretal sum.

Disposition

16. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do grant the following orders that;
 - a. The Appellant will pay the respondents a sum of Kshs.3,000,000/= within the next 21 days and the Appellant is directed to liaise with his insurer Pioneer General Insurance co ltd to ensure this amount is released within the stipulated period.
 - b. The Appellant will further deposit the sum of Kshs.2,000,000/= in a joint interest earning account held at a reputable bank, in the joint names of the counsels of the parties herein and this is to be effected within the next 60 days from the date of this ruling.
 - c. In default, this application shall be deemed to have been dismissed with costs and the Respondents shall be at liberty to execute.
17. The costs of this Application will abide the Appeal.
18. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 30TH DAY OF JULY, 2024

In the presence of: -



Mr. Orina for Appellant

Mr. Muchemi for Respondent

Susan/Sam Court Assistant

