



**Mwaniki & another v Kathuro & another (Civil Appeal E008 & E009 of 2024
(Consolidated)) [2024] KEHC 9260 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E008 & E009 OF 2024 (CONSOLIDATED)
LM NJUGUNA, J
JULY 30, 2024**

BETWEEN

NEWTONS MWANIKI 1ST APPELLANT

ISLAM MOHAMED SALIM 2ND APPELLANT

AND

NICHOLUS MAINA KATHURO 1ST RESPONDENT

GIDGRAPH MAINA MACHAU 2ND RESPONDENT

RULING

1. Vide 2 separate notice of motion applications dated 02nd February 2024, the applicants seek the following orders:
 - a. Spent;
 - b. That this honourable court does hereby issue stay of execution orders of the Judgments delivered on 21st December 2023 in Runyenjes MCCC 63 & 64 of 2023 pending determination of the appeal;
 - c. That the costs of this application be provided for.
2. The applications are supported by the grounds on their faces and identical facts deposed in the supporting affidavits thereof.
3. Following an award of Kshs.205,550/= in favour of the respondents, the appellants were found 100% liable and they have challenged both liability and quantum through the appeals herein. They have deposed that the respondents are threatening to initiate execution and if this is left to happen, they will suffer irreparable loss and damage. That the respondents have threatened to serve a notice of proclamation with the intention of seizing their motor vehicles to make good the decretal sum. That



the applications have been brought without delay and that no prejudice will be occasioned to the respondents if the orders are granted.

4. The applications were opposed through replying affidavits by Gidgraph Maina Machau dated 14th February 2024 in which the respondents stated that the applications are targeted at denying the respondents the fruits of his judgments by delaying execution. That the applications are based on baseless apprehension and that the applicants have not demonstrated what loss they would suffer if the stay orders are not granted. That he is a man of means and if the appeals are allowed, he is capable of refunding the decretal sum. He termed the application as frivolous, trivial and an abuse of the court process.
5. He deposed that, in any event, the applicants have not offered any security deposit, neither have they demonstrated that the appeal has high chances of success, thus the applications fall short of the requirements for allowing the same. He urged that if the court should allow the application, then it should also order that the decretal sum be deposited into a joint interest-earning account in the names of the parties' advocates within 14 days.
6. The court directed that the application be canvassed by way of written submissions but none of the parties complied.
7. The issue for determination is whether the application meets the threshold for issuance of stay of execution orders.
8. In considering whether or not to grant stay of execution, the court is guided by Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides:
 - (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.
9. The applicants have sought stay of execution orders, being apprehensive that the respondents will initiate execution of the judgments where each of them were ordered to pay the respondents Kshs.205,550/=. They stated that they are bound to suffer irreparable harm if the respondents are left to execute since he has already threatened to serve them with notices of proclamation. Execution is a legal process which the respondents are entitled to pursue given that there is a valid decree in its favour.
10. The question is whether the execution will render the appeal nugatory. In the case of [James Wangalwa & Another vs. Agnes Naliaka Cheseto](#) [2012] eKLR, the court was of the view that substantial loss is indeed dependent on whether alteration of status quo will substantially affect the case. It was held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of



substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. The impugned judgments were delivered on 21st December 2023 while the applications were filed on 02nd February 2024. In my view, there is no inordinate delay in filing the application. There is the question of security for performance of the decree as provided for under Order 42 Rule 6(2)(b) of the Civil Procedure Rules. The applicants have not offered any form of security for performance if stay is granted. Security for performance enables the applicant to be held accountable for prosecuting the appeal without delay and guarantees the respondents of payment in the event that the appeal does not succeed. Even if the appeal succeeds, the applicants will not lose their money because it is held at stake.
12. Article 48 of *the Constitution* of Kenya 2010 guarantees every person the right of access to justice. Further, Article 50(1) of *the Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. More importantly, Article 159(2) of *the Constitution* guides me in application of discretion in order to serve justice to all parties in this matter. I am therefore inclined to grant the orders only on the strength of *the Constitution*. Further, justice is meant to serve both the applicants and the respondents herein. While the applicant has a right to appeal, the respondents have a right to be compensated in the event that the appeal does not succeed.
13. In the end, I find that it is in the interest of justice that the following orders do issue:
 - a. Pending hearing and determination of the appeal, stay of execution orders of the Judgments delivered on 21st December 2023 in Runyenjes MCCC 63 & 64 of 2023 is hereby issued on condition that the applicants deposit the full decretal amounts into a joint interest-earning account to be held in the names of the advocates for all the parties within 30 days of this ruling, failing which the respondents may proceed to execute; and
 - b. Costs of this application shall abide the outcome of the appeal.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

..... for the 1st Appellant/Applicant

..... for the 2nd Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent

