



**Nzuki & another v Muthengi & Muthengi (Suing as the Legal Representatives of the Estate of Josephat Muthengi Musembi - Deceased); Musembi (Third party) (Civil Appeal E156 of 2024) [2024] KEHC 9369 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9369 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E156 OF 2024**

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

**BETWEEN**

**WINFRED KAKUI NZUKI ..... 1<sup>ST</sup> APPELLANT**

**RYCE EAST AFRICA LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AGNES KASIVA MUTHENGI & JOSHUA MUSEMBI MUTHENGI (SUIING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOSEPHAT MUTHENGI MUSEMBI - DECEASED) ..... RESPONDENT**

**AND**

**JANE MUNYINDI MUSEMBI ..... THIRD PARTY**

**RULING**

1. The application before this court is the Notice of Motion application dated 24<sup>th</sup> May 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 and the main prayer sought is prayer (3) that; this court be pleased to issue an order of stay of execution of the judgment/decree issued in Kithimani CMCC NO E195 OF 2021 pending the hearing and determination of the appeal filed herein. The application is supported by a supporting affidavit dated 24<sup>th</sup> May 2024, sworn by the 1<sup>st</sup> respondent; Winfred Kakui Nzuki.
2. The applicant stated that judgement was entered against them on 16<sup>th</sup> May, 2024 and being aggrieved by the said judgement, they had filed this Appeal. Unless stay of execution was granted, they would suffer substantial loss and prejudice as execution would be levied to their loss and detriment. The applicants further averred that this appeal was brought without delay and that they were ready and willing to comply with any terms of security as maybe ordered by court.



3. This application is opposed by the Respondents who filed a Replying Affidavit through the 1<sup>st</sup> respondent Agnes Kasiva Muthengi dated 24<sup>th</sup> June 2024. They maintained that the application as filed was vexatious, frivolous and that the applicants were guilty of indolence in filing this instant Application and Appeal. The applicant had not fulfilled and/or met the requirements of Order 42 Rule 6 of the Civil Procedure Rules and further had not demonstrated that they will suffer substantial loss should the orders sought not be granted. The application therefore lacked merit and ought to be dismissed.
4. The respondent further averred that, if the court was inclined to grant the orders sought, the appellants should be directed to pay half the decretal amount being Kshs.1,331,459.50/= as per the tabulations dated 27<sup>th</sup> May 2024 served upon the applicants and deposit the balance of the decretal sum in a joint interest earning account held in the joint names of the advocates of the parties herein.
5. The applicants did file a supplementary Affidavit sworn by the 1<sup>st</sup> Appellant dated 28<sup>th</sup> June 2024, and stated that this Application had been brought in good faith and without unreasonable delay. They were well within their rights to Appeal as against judgement of the lower court and had meet all the parameters required under Order 42 Rule 6 of the Civil procedure Rules and were thus deserving of the orders sought. The Appeal as filed was not frivolous as the award was excessive and they had high chances of success. Finally, the appellant averred that they were willing to offer security as may be required by the court for due performance of the decree appealed against.

### **Analysis & Determination**

6. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and the Supplementary Affidavit filed and discern that the only issue which arise for determination is whether this court should grant stay of execution of the Judgment/Decree dated 16<sup>th</sup> May 2024 issued in Kithimani CMCC No E195 of 2021.
7. 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.”



8. 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
9. 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.
10. 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 same, shall also consider the overriding objective as stipulated under sections 1A and 1B of the [Civil Procedure Act](#), which enables the court to give effect to the overriding objectives, while exercising its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions. The Court, in exercising its discretion, should also always opt for the lower rather than the higher risk of injustice. See [Suleiman vs. Amboseli Resort Limited](#) [2004] 2 KLR 589.
11. The judgment before the trial Magistrate was delivered on 16<sup>th</sup> May, 2024, and this Appeal filed timeously on 25<sup>th</sup> May 2024. Thus, it can be said that this appeal and application for stay of execution have been file timeously.
12. On the likelihood of suffering substantial loss, It was sufficient if an applicant seeking for stay of execution demonstrated that he/she would have to go through hardship to recover the decretal sum if paid to the 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 Vs Miriam Maalim Bisbar & Another](#) (2010) eKLR , [National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another](#) (2006) eKLR.
13. Guided by the above authorities and in the absence of the requisite proof from the Respondents that they are person of means, I find that the Appellants have satisfied this court that they would suffer substantial loss if the entire decretal sum is paid to the Respondents before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.



14. On the security, the Appellant has indicated that they are willing to abide by court directions on the same, with a view of preserving the subject matter. The respondents on the other hand have averred that they should be paid half the decretal amount and the other half be deposited in a joint interest earning account held jointly by advocates for the parties herein.
15. 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/her 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 Vs Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd Vs Kibiru & another* (Supreme); *Mukuma Vs Abuoga* (1988) KLR 645.

### **Disposition**

16. 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 Appellants will pay the respondents a sum of Kshs.1,250,000/= being half of the decretal sum after taking into account the finding of liability as determined by the trial court.
  - b. The Appellants herein shall deposit the other half of the decretal being the sum of Kshs.1,250.000/= in a joint interest earning account held at a reputable bank, in the joint names of the counsels of the parties herein pending determination of this Appeal
  - c. These conditions are to be met within 45 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.
17. The costs of this Application will be in the cause.
18. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30<sup>TH</sup> DAY OF JULY, 2024**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Team this 30<sup>th</sup> day of July, 2024.

In the presence of: -

Mr Muhoro Appellant

Ms Sirma Respondent

Sam/Susan Court assistant

