



REPUBLIC OF KENYA



Matuura Investment Limited a.k.a Matula Investment & another v Kuria (Civil Appeal E033 of 2024) [2024] KEHC 9049 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E033 OF 2024
PN GICHOHI, J
JULY 29, 2024**

BETWEEN

**MATUURA INVESTMENT LIMITED A.KA MATULA INVESTMENT 1ST
APPELLANT**

MWANGI NDIRANGU 2ND APPELLANT

AND

CHARLES MUNYORA KURIA RESPONDENT

RULING

1. Under a Certificate of urgency and through the firm Matiri Mburu & Chepkemboi Advocates, the Appellants filed on 13/03/2024 a Notice of Motion dated 11/03/2024 under Section 3, 3A of the [Civil Procedure Act](#), Order 42 Rule 6 (10 and (6) of the Civil Procedure Rules and Section 1 A, 1B and 3A of the [Civil Procedure Act](#). They seek orders:-
 2. Spent
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 4. That this Court be pleased to grant a stay of execution of the judgment/decree in Nakuru CMCC No. E1342 of 2021 delivered on 22nd February pending the hearing and determination of this Appeal.
 5. That the costs of this application be provided for.
2. The main grounds on the face of the application which is supported by the Affidavit sworn on 11/03/2024 by Millan Egehiza legal Officer of the Appellants' insurers M/S Britam General Insurance Company Limited are that the decretal amount is substantial and that from the Respondent's testimony, the Respondent would not be in a position to refund the it.



3. It is further stated that if the decree is not stayed, the appeal will be rendered nugatory and that would occasion substantial and irreparable loss to the Applicants. Further, it is stated that the Appellants are amenable to furnishing of security pending appeal.
4. In response and through the firm J. Ndungu Njuguna & Co. Advocates, the Respondent filed a replying affidavit sworn by Charles Munyora Kuira on 25/04/2024. Reiterating the conditions that must be met in an application for stay pending appeal, it is deponed that bare allegations of substantial loss without any evidence would not suffice.
5. Further, it was deponed that the allegation that the Respondent is not a person of means is not proved by any evidence. That the Respondent is a licenced boda boda operator, a fact that led the court to award him damages for loss of income /earnings.
6. with a lis and through the firm J. Ndungu Njuguna & Co. Advocates and sworn the insurers the decree is for substantial amount and the Applicant may not recover it from the Respondent who is a man of straw thus rendering the Appeal nugatory and as a consequence, the Applicant will suffer substantial loss. Further, the Applicant states that she has brought this Application timeously and that he is able, ready and willing to furnish security in form of a bank guarantee for whole decretal sum.
7. He therefore urged that the Application herein be dismissed with costs.

Appellants' Submissions

8. Their Submissions dated 20/05/2024 are an emphasis of the Affidavit in support of their application and backed with case law pertaining such an application.
9. They submitted that having filed the Memorandum of Appeal approximately 15 days after delivery of judgment and having filed this application approximately 30 days of delivery of the judgment, then they moved this Court timeously thus satisfying the first Condition under Order 42 of Rule 6 (2) of the Civil Procedure Rules.
10. On substantial loss, they submitted that if the appellant is condemned to pay the decretal sum of Kshs. 951,885 plus costs and interest, then they are apprehensive that they will suffer the loss and the Respondent has not demonstrated that he would be in a position to refund the same should the appeal succeed.
11. It was further submitted that the evidential burden is on the Respondent that he has resources and indeed in a position to refund the Appellants should the appeal succeed but he has failed to discharge that burden yet it is him and not the Appellant who is in a position to know such resources.
12. On security, it was submitted that should the Court exercise its discretion and allow this application, then the Appellants are willing to deposit the entire amount in court since paying half the decretal amount to the Respondent would expose the Appellants to substantial loss should the appeal succeed.

Respondent's Submissions

13. On his part, the Respondent filed their submissions dated 21/06/2024 backing his arguments on case law. On security, he urged the Court to consider the appropriateness, Proportionality and need to create a level playing ground and the special circumstances 15th November 2022. He submits that the only issue for determination is whether the Applicant has satisfied the conditions of granting stay of execution pending appeal.



14. The Respondent submits that the proposal by the Appellants to deposit the entire amount in the joint interest earning account in the joint names of the advocates does not balance the interest of parties and hence does not meet the principal of proportionality.
15. He reiterated that the Appellant failed to demonstrate by way of evidence that the Respondent cannot refund the sum to the Appellant. He therefore submitted that the application has failed on the issue of security. He therefore urged the Court to dismiss the application with costs.

Determination

16. This Court has considered the application herein, the Affidavits, the submissions by parties and the authorities cited therein. Parties have aptly captured the three conditions that the Applicant must meet in an application for stay of execution pending appeal as provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules, that is:-
 - i. The application must be brought without unreasonable delay.
 - ii. The applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
 - iii. The applicant must furnish 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.
17. It is not disputed that the Appellant has moved this Court timeously thus satisfying the first condition that the application must be brought without unreasonable delay.
18. On the second issue, the Applicant argues that the decree is for substantial amount which the Applicant may not recover from the Respondent as the Respondent going by his testimony before the trial court and therefore the Respondent will suffer substantial loss.
19. It is not enough for the Applicants to make such a bold statement in an attempt to deny the Respondent enjoyment of the money awarded by the trial court. There should be evidence to back it. Indeed, Plat Ag JA (as he then was) in case of Kenya Shell Limited v Benjamine Karuga Kibiru & another [1986]eKLR had this to say:-

“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 corner stone of both jurisdictions for granting a 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.”
20. They must have reasonable grounds to support that conclusion. The Respondent has stated that he operates as a boda boda rider and . This is confirmed by the trial court’s judgment. Having failed to substantiate his allegation that the Respondent may not refund the money if appeal succeeds, the burden cannot not shift to the Respondent and regarding the burden on the parties, the Court of Appeal in Superior Homes (Kenya) Limited vs Musango Kithome [2018] eKLR had this to say:-

“... the issue of substantial loss is the cornerstone of both jurisdictions ...The law, however appreciates that it may not be possible for the applicant to know the Respondent’s financial means. The law is therefore that all an Applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund



the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”

21. On security for costs, the Applicant herein offers to deposit the entire decretal sum in Court not in an interest earning account in the joint names of the Advocates as submitted by the Respondent.
22. On the other hand, the Respondent asks the Court to direct the Applicant to pay the Respondent half of the decretal amount plus lower court’s costs and the other half be deposited in a joint interest earning account so as to cater the interest of both parties pending the Appeal.
23. In the circumstances, and to balance the rights of the Applicant to pursue the Appeal, and the right of the Respondent to enjoy at least some of the fruits of his judgment without further delay, this Court grants stay of execution of the judgment/decreed herein pending the hearing and determination of the Applicants’ Appeal on condition that:-
 1. The Applicants to pay the Respondent half of the decretal amount within thirty (30) days from the date of this ruling.
 2. The Applicants deposit in Court and the other half of the decretal sum within thirty (30) days from the date of this ruling.
 3. The costs of this Application to abide the outcome of the Appeal.

. DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH JULY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Karanja for Applicants

N/A for Respondent

Ruto, Court Assistant

