



REPUBLIC OF KENYA



Muthui v Kasivu (Civil Appeal E268 of 2023) [2024] KEHC 9627 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E268 OF 2023**

MW MUIGAI, J

JULY 29, 2024

BETWEEN

SOLOMON MWANGI MUTHUI APPLICANT

AND

MARY MUTHUE KASIVU RESPONDENT

*(judgment/decree delivered on 19th September<sup>{}^{} 2023 by Honourable
B.A. Luova (RM) sitting at Machakos in Small Claims SCCC E508 of 2023)</sup>*

RULING

1. Vide application dated 13.10.2023 brought under Section 3A, 79G and 95 of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and order 51 Rule 1 and 3 of the Civil Procedure Rules, 2010 the Applicant seeks the following orders, that;
 - a. Spent
 - b. Spent
 - c. This Honourable Court to stay the execution of the judgment/decree delivered on 19th September^{{}^{} 2023 by Honourable B.A. Luova (RM) sitting at Machakos in Small Claims SCCC E508 of 2023 pending the full hearing and determination of this Appeal.}
 - d. Spent
 - e. This Honourable Court allow the Applicant to furnish the court with security in the form of a bank guaranteed from a reputable bank pending the full hearing and determination of this Appeal.
 - f. The costs of this Application abide the outcome of this Appeal.



2. The Application is supported by an affidavit sworn by James Muema Kitetei stated that he is aware that judgment in Machakos Civil suit Number E50 of 2021 was delivered against him in the following terms; liability 100%, general damages Kshs.250,000/- and special damages Kshs.2,100/ plus costs and interest at court rates. Being dissatisfied by the decision, Applicant indicates that he intends to appeal and it will be rendered nugatory and he stands to suffer irreparable loss and damage if the orders sought are not granted.
3. The Applicant contends that corona virus pandemic compromised his financial status and the underwriter is ready, willing and able to give bank guarantee as security for the entire judgment award.

Replying Affidavit

4. The Respondent filed a Replying Affidavit on 10.11.2023 and stated that the Application is fatally defective, misconceived, a non-starter, incompetent, improperly before the court and is an abuse of the court process. It was contended there is no imminent threat of execution currently since no decree has been extracted in the lower court suit so far. That the Applicant has not stated and demonstrated to the court at all the irreparable loss he is likely to suffer if the orders sought
5. The Respondent contended that the Appellant should be ordered to release to the Respondent's Advocates Kshs 200,000 and Deposit the balance of the decretal sum plus costs of the suit and interest of Kshs 133,021 in a joint interest earning account with a reputable bank in the name of the Advocates of the parties. It was deposed that the proposed bank guarantee by the Applicant as security for costs of the Appeal since the guarantee is not being used as security specifically for this appeal and has not stated nor demonstrated to the court the irreparable loss he is likely to suffer if the orders sought are not granted.
6. The Application was canvassed by way of written submissions.

Submissions

7. The Appellant filed submissions Vide submissions filed on 13.12.2023 the Applicant reiterated the contents of the Supporting affidavit and while relying on the case of Bake 'N' Bite (Nrb) Limited vs Daniel Mutisya Mwalonzi [2015] eKLR , Esther Wamaitha Njihia & 2 others vs Safaricom Limited [2014]e KLR, Tabro Transporters Ltd vs Absalom Dova Lumbasi [2012] eKLR further opined that it had satisfied the conditions for stay provided for in order 42 Rule (6)of the Civil Procedure Rules.
8. On the occurrence of substantial loss, It was submitted that the Applicant had stated that his insurer was willing to provide a bank guarantee while the Respondents financial status is unknown and is highly likely unable to refund the decretal sum if the appeal succeeds. This because he has not furnished the court with any documentary evidence to prove his financial standing. Reliance was placed on the case of Edward Kamau & Another vs Hannah Mukui Gichuki & Another [2015] e KLR and Empower Intallations Limited va Eswari Electricals (Pvt) Limited Interested Party Kenya Electricity Generating Company Limited[2016] e KLR
9. It was submitted that there has been no inordinate delay in filing the application.

Respondent Submissions

10. The Respondent filed submissions dated 19.01.2024 and submitted that the Application is a waste of the courts time and an abuse of the court process since the appeal has no chances of success and is intended to frustrate the Respondent from enjoying the fruits of her lawfully obtained judgement.



11. It was submitted that the bank Guarantee was not a sufficient form of security as it will expire on 6.07.2024 and they are not certain of the Appellant/ Applicant will renew the same. In that event, there will be no security. Further, the bank guarantee is a general bank guarantee and was not taken specifically for this appeal meaning it can be used in several other appeals in various courts.
12. The Court was asked to order that the Appellant/ Applicant should be ordered to release half the decretal sum plus costs and interest to the Respondent's a condition and the other half deposited in a joint interest earning account in the name of the advocates. Reliance was placed on the cases of Caneland Limited & 2 others vs Dephis Bank Limited, Civil Application no Nai 344 of 1999, *James Wangalwa & another vs Agnes Naliaka Cheseto, Bungoma HC Misc App 42 of 2011* and David Kangethe & Another vs Densis Nyangicha Nyairo [2020] e KLR.
13. On the issue of whether the application has been made without unreasonable delay, the application herein was filed on 3rd October, 2023, 2 months after the Trial Court Judgment was delivered. The Appellant/Applicant has not stated the reason for delay in filing this application therefore the application should be dismissed.

Determination

14. I have considered the Application and the submissions of parties on record and I find that the issue for determination is whether the court should issue an order of stay of execution pending the hearing and determination of the appeal.
15. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules,2010 is a proviso on stay of execution, it provides 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.”
16. The first issue is whether the application has been filed without unreasonable delay. I note that the judgment was delivered on 19.09.2023.This application was filed on 17.10.2023 and the Memorandum of appeal on the same date. This Application has been filed about 19 days after the judgment was delivered. I find that there was no inordinate delay and therefore this ground succeeds.
17. Secondly, the Applicant has stated that he stands to suffer loss if the orders sought are not granted but has not demonstrated how exactly it will suffer. It was contended that he was apprehensive that the Respondent will proceed to execute at any time. On the other hand, the Respondent contends that substantial loss has not been demonstrated.



18. Substantial loss was discussed in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, as:

“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.”

19. In the case of Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR, observed thus:-

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

20. On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted as submitted by the Applicant, I beg to differ. The onus of proving the Respondent’s inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income.
21. On the issue of security, furnishing of security is key in getting orders of stay pending appeal. The Applicant indicated that the insurer is willing to provide a bank guarantee. I note that the Bank Guarantee is from Family bank and has been executed by Directline Assurance Company Limited. There is no clause specific to this appeal. Further to that, the same is valid for 12 months from 6th July



2023. I am thus inclined to agree with the Respondent that there is no guarantee that the same will be renewed or take care of the interest of the Respondent to the finalization of this Appeal.

22. In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

23. Reliance is made in the case of *Mwaura Karuga t/a Limit Enterprises –vs- Kenya Bus Services Ltd & 4 others* [2015] eKLR where it was held that;

... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words “ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

24. The decretal sum in this case is general damages of Kshs.250,000/- and special damages Kshs.2,100/ plus costs and interest at court rates.

Disposition

1. In the circumstances, I hereby grant stay of execution pending the hearing and determination of the Appeal on condition that the Applicant pay the Respondent half the decretal sum within 90 days through advocate on record and half through a bank guarantee within 90 days failure to which the order of stay lapses.

It is so ordered.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS HIGH COURT
ON 29/7/2024 (VIRTUAL/ PHYSICAL CONFERENCE).**

M.W.MUIGAI

JUDGE

