



**Amarshan Limited v Muthui & another (Suing as Legal Representatives of the Kihome Muthui (Deceased)) (Civil Appeal E054 of 2024) [2024] KEHC 10426 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10426 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E054 OF 2024  
FN MUCHEMI, J  
AUGUST 23, 2024**

**BETWEEN**

**AMARSHAN LIMITED ..... APPELLANT**

**AND**

**JOHN MUTIA MUTHUI ..... 1<sup>ST</sup> RESPONDENT**

**ANNAH KAMOLA KATHAMBO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS LEGAL REPRESENTATIVES OF THE KIHOMU MUTHUI  
(DECEASED)**

**RULING**

**Brief Facts**

1. The application dated 23<sup>rd</sup> April 2024 seeks for orders of stay of execution in respect of the judgment in Thika CMCC No. 708 of 2019 delivered on 4<sup>th</sup> March 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit sworn on 20<sup>th</sup> May 2024.

**Appellant's/Applicant's Case**

3. The applicant states that judgment in Thika CMCC No. 708 of 2019 was delivered on 4<sup>th</sup> March 2024 whereby the appellant was found liable for injuries caused to the respondent and damages awarded. The applicant states that they were granted thirty (30) days stay of execution by the court below.
4. Being aggrieved with the decision of the magistrate, the applicant lodged an appeal by filing their Memorandum of Appeal dated 20<sup>th</sup> March 2024. On 7<sup>th</sup> March 2024, the applicant states that through their advocates, a letter to the Executive Officer Thika Law Courts requesting for certified copies of the judgment and proceedings was sent. Upon delay in availing the certified copy of the judgment and



copies of typed proceedings, the applicant says their advocates wrote a further letter to the Executive Officer.

5. The applicant states that they have not been furnished with the certified copy of the judgment and proceedings until to date. Further the thirty (30) days stay of execution has since lapsed and the applicant is yet to file a Record of Appeal.
6. The applicant is apprehensive that the respondent may move to execute the decree. He further argues that should any execution proceed against them, the appeal shall be rendered nugatory and a mere academic exercise.
7. The applicant states that they have good grounds of appeal with a reasonable chance of success. Further the application has been filed without any undue delay and the applicant states that they are willing to abide by any conditions and terms that the court may deem fit to impose.

### **The Respondents' Case**

8. The respondents state that judgment was entered in their favour on 4<sup>th</sup> March 2024 for a total sum of Kshs. 3,408,795.60/-. The respondents further state that the applicant has not demonstrated the manner in which it is likely to suffer substantial loss if execution were to proceed against it. The respondents state that they are able and willing to refund any such amount of money that would have been realized from the execution against the applicant.
9. The respondents state that the lower court's judgment is very sound in law and a close look at the memorandum of appeal attached therein shows that the appeal has no chance of success.
10. The respondents further state that if an order of stay of execution is granted, they will be highly prejudiced as they have been seeking justice as a result of the death of their kin for more than 5 years and they should be allowed to enjoy the fruits of their judgment.
11. Parties disposed of the application by way of written submissions.

### **The Applicant's Submissions**

12. The applicant relies on Order 42 Rule 6 of the *Civil Procedure Rules* and the case of *R.W.W. v E.K.W* [2019] eKLR and submits that one of the core circumstances surrounding the appeal is that the learned magistrate despite finding that the respondent was employed by Mr. Justus Mutisya, the alleged contractor at the time of the accident, erred in fact and in law in finding the applicant liable for the injuries occasioned to the respondent. The applicant submits that the learned magistrate in the lower court failed to adequately consider the facts presented before her in reaching a determination.
13. The applicant relies on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and submits that although the respondents have provided in their affidavit that they are willing and able to refund the amounts realized in execution of the decree, they have failed to attach the necessary proof to substantiate that they are not persons of straw. Further, the applicant argues that the 1<sup>st</sup> respondent has sworn the affidavit but failed to attach the necessary consent from the 2<sup>nd</sup> respondent.
14. The applicant further submits that the respondents submitted in the lower court that they were dependents of the deceased and as such had no income and therefore it is not clear how they intend to reimburse the decretal amount when they have no income.
15. The applicant submits that they are facing financial constraints due to health issues of the director and the applicant company is unable to run its daily activities.



16. The applicant further submits that it has not been able to raise or deposit the decretal sum within the stipulated period and thus requests for substitution of the security. The applicant states that the application was filed within time and without unreasonable delay. The applicant urges the court to be guided by the case of *Butt v Rent Restriction Tribunal* [1979] and grant them orders of stay of execution.
17. Relying on the case of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, the applicant argues that the grounds in the memorandum of appeal touch on both facts and law and are arguable. As such, in the event stay is not granted, the appeal will be nothing short of an academic exercise. The applicant maintains that they have a meritorious appeal with a high probability of success as it raises serious and arguable factual evidentiary and legal issues.

### **The Respondents' Submissions**

18. The respondents rely on Order 42 Rule 6 of the *Civil Procedure Rules* and submit that the decree being appealed from is a money decree. The respondents argue that they are not people of straw. The respondent further submit that the applicant shall not suffer substantial loss if the court directs that the decretal sum is deposited in a joint account of the parties' advocates.
19. The respondent further submits that the financial constraints of the applicant company and those of its director are different and they should not be conflated as a company is separate entity from its shareholders.
20. The respondents submit that the applicant has not satisfied the conditions of stay but in the event the court should grant stay, they urge the court to order that the decretal sum be deposited into an interest earning account in the name of the respective advocates.
21. The main issue for determination is whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules* for stay of execution pending appeal.

### **The Law**

#### **Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.**

22. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-
  1. "No appeal or second appeal shall operate as a stay of execution or proceedings 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 orders set aside.
  2. No order for stay of execution shall be made under sub rule 1 unless:-
    - a. The Court is satisfied that substantial loss may result to the 1<sup>st</sup> 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.

23. Thus, under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

24. Substantial loss was clearly explained in the case of [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR:-

“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.

25. The applicant in its affidavit, states that they stand to suffer irreparably if the respondents levy execution against them. It is only in the submissions that the applicant argues that they shall suffer substantial loss in the event execution proceeds.

26. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect them or will alter the status quo to their detriment therefore rendering the appeal nugatory. It is therefore my considered view that the applicant has not demonstrated substantial loss they stand to suffer.

#### **Has the application has been made without unreasonable delay.**

27. Judgment was delivered on 4<sup>th</sup> March 2024 and the applicant filed the instant application on 23<sup>rd</sup> April 2024. It has taken the applicant 1 month and 19 days between the date judgment was delivered and the time they filed the instant application. It is therefore my considered view that a delay of 1 month and 19 days is not inordinate.

#### **Security of costs.**

28. The purpose of security was explained in the case of [Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others](#) [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the [Civil Procedure](#)



Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

29. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The court on 25<sup>th</sup> April 2024 granted temporary stay and ordered the applicant to deposit half the decretal sum in court within 30 days and in default, the orders were to be vacated. The applicant in its submissions stated that they were unable to deposit the said sum in court and hoped that would security be substituted in due course. In due course. It is not indicated that the orders of the court were clear that in the event of default of depositing security, the stay orders stood vacated. The said orders were vacated automatically on 24<sup>th</sup> May 2024 upon expiry of 30 days. It is noted that the applicant never applied for review of the said orders which perhaps lack of seriousness in this application for stay. Or was it intended to buy time, thus delaying the execution of the decree?
30. It is trite law that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
31. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises is whether there is just cause for depriving the respondents their right of enjoying their judgment. The matter in the court below whereas the suit was instituted in 2019 and judgment delivered on 4<sup>th</sup> March 2024. This shows that the respondents have been in the corridors of justice for 5 years awaiting for justice. I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise any arguable points of law.
32. The applicant having failed to prove substantial loss and having not demonstrated sufficient cause have not passed the test under Order 42 Rule 6 on granting orders for stay pending appeal.
33. Accordingly, it is my considered view that the application dated 23<sup>rd</sup> April 2024 lacks merit and is hereby dismissed with costs.
34. It is hereby ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 23<sup>RD</sup> DAY OF AUGUST 2024.**

**F. MUCHEMI  
JUDGE**

