



**Mutwiri v Mwangi & 2 others (Civil Appeal E112 of 2022)
[2024] KEHC 10663 (KLR) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E112 OF 2022
DO CHEPKWONY, J
AUGUST 16, 2024**

BETWEEN

SAMWEL MAINA MUTWIRI APPLICANT

AND

JOHN MWANGI 1ST RESPONDENT

NAOMI WAMBUA MACHARIA 2ND RESPONDENT

**MICHAEL CHEGE NDUNGU (LEGAL REPRESENTATIVE OF THE ESTATE OF
GEORGE KIMANI NDUNGU) 3RD RESPONDENT**

RULING

1. For determination before this court is the Notice of Motion application dated 22nd December, 2023 which seeks the following orders:
 - a. That an Order do issue compelling the Respondent/Appellant to release the pending half of the decretal sum of Kenya Shillings Six Hundred and Thirty Five thousand Nine Hundred and Ninety (Kshs 635,990/=) to the Respondent herein pending the determination of the Appeal.
 - b. That the costs of the Application be provided for.
2. The application is based on the grounds set out on its face and the Supporting Affidavit of Naomi Wambua Macharia sworn on the even date. According to the Applicants, they were awarded a sum of Kshs 1,271,981/= and on being aggrieved, the Appellant lodged the present appeal. It is their argument that the Appellant filed an application for stay of execution and in its ruling issued on 2nd June 2022, the court directed that half of the decretal sum being Kshs 635,991/= be deposited in court as security which was done on 1st July, 2022.
3. The Applicants hold that the outstanding half of the decretal sum is still pending and is yet to be released to the 2nd and 3rd Respondents/Applicants who continue being prejudiced. It is averred that it



would be in the interest of justice that the application be allowed as the Appellant will not be prejudiced in any way.

4. From the record, the application was served upon the Appellant/Respondent's Counsel and there is an Affidavit of Service sworn by Okusireba Judith Oyala on 16th February, 2024 to confirm this but no response has been filed to date.
5. Be that as it may, the court is still required to consider the merits of the said application.

Analysis and determination.

6. This court has gone through the record and notes that the court order issued on 2nd June 2022 was specific in respect to the Applicant depositing half of the decretal sum in court which the appellant has complied with. However, it will be noted that it did not give any orders with respect to the remaining half of the said sum. It should then be noted that the purpose of being required to deposit security for due performance is not meant to punish the judgment debtor but the same is meant to act as a guarantee for the due performance of the decree. This was clearly explained in the case of *Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR, where 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 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.”

7. In this case, the court finds that the security of the deposit of half of the decretal sum was sufficient guarantee for the due performance of the decree, so that in the event the applicants were aggrieved by the ruling of the court, then he ought to have appealed on the same.
8. In view of this finding, the court's hands are tied given that the court had already rendered itself on the issue. Therefore, this court finds that the application dated 22nd November 2023 lacks merit and the same is dismissed with costs.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 16TH DAY OF AUGUST, 2024.

D.O. CHEPKWONY

JUDGE

In the presence of;

M/s Okusimba holding brief for Ndolo counsel for Applicant

Non-appearance for Respondent

Martin - Court Assistant

Mr. Martin – Court Assistant

