



Mukindu v Miriti ((Suing as the personal representatives and legal administrators of the Estate of KMM)) (Civil Appeal E058 of 2021) [2024] KEHC 11579 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E058 OF 2021
LW GITARI, J
SEPTEMBER 26, 2024**

BETWEEN

THADEUS MUKINDU APPELLANT

AND

FRANCIS MIRITI RESPONDENT

(SUING AS THE PERSONAL REPRESENTATIVES AND LEGAL ADMINISTRATORS OF THE ESTATE OF KMM)

RULING

1. Before me is a Notice of Motion dated 15th June, 2024 brought under sections 1A,1B,3A ,94, 95 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya and order 45 rule 1, order 42 rule 6, order 42 rule 21, order 49, order 22 rule 22,52 and 50, order 50 rule 6 and order 51 Rule 1 of the Civil procedure rules 2010 and all Enabling Provisions of the Law. The motion seeks for the following orders: -
 1. Spent.
 2. That pending the hearing and determination of this application there be an order of stay of execution of the judgement and/or decree of the Hon. Lady Justice Gitari delivered on 29th February,2024 in Meru HCCA 58 of 2022.
 3. That pending the hearing and determination of this Application there be an order of stay of execution of the sale of motor vehicle registration number KAH 205C on 20th June 2024.
 4. That pending the payment and full settlement of the decretal amount this honourable Court grant the Applicant stay of execution of the sale of motor vehicle registration number KAH 205C on 20th June 2024.
 5. That the auctioneers herein, Quickline Auctioneers, tax their costs.



6. That this Honourable Court do make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.
7. That each party bears its own costs.
2. The motion is supported by the grounds on its face and a supporting affidavit sworn by Lawrence Njuguna on 15th June, 2024 together with annexures thereto.
3. The applicant avers that the appeal arises from the decision of Hon. G. Sogomo delivered on 8th April, 2021 in Tigania CMCC 2/2020. That being aggrieved by the decision the appellant initiated Meru HCCA E058 of 2021. That pending the hearing and determination of the appeal the Appellants provided a bank guarantee of kshs 2,923,655.
4. The Applicant states that the judgement was entered by Hon Lady Justice Gitari on 29th February, 2024 in favour of the respondent. That the respondent has now instituted execution proceedings against the Appellant and has proceeded to advertise the motor vehicle registration number KAH 205C on 7th June, 2024. The applicant produced warrants of attachment.
5. The Applicant states further that the respondent will proceed with the sale of motor vehicle registration number KAH 205C on 20th June, 2024 and the applicants will suffer irreparable damage and loss. The applicant annexed an advertisement of sale of the motor vehicle marked LN2.
6. The Applicant avers that it will be in the interest of justice that the court grant the applicant stay of execution of the sale of motor vehicle registration number KAH 205C pending payment of the decretal amount by the applicant to the respondent. That the application will not occasion any prejudice to the respondent or any damage that cannot be compensated by way of costs if this Application is allowed.
7. The Applicant states that the Application has been made without unreasonable/inordinate delay.
8. In opposing the application, the respondent filed a replying affidavit dated 19th July, 2024. The respondent avers that the application was filed on 16th April, 2024 seeking to stay execution pending the settlement of the decretal sum of kshs 1,634,500. That to date three months down the line the amount is yet to be settled.
9. The respondent states that to date the decision of the High court has not been challenged in the court of Appeal. That the Appellant/Applicant has not explained why three months down the line the judgement of Justice Lucy Gitari is yet to be settled.
10. The respondent avers that the Applicant has been forum shopping to avoid settling his decree. That he is aware that the Appellant has filed an application before the lower court in Meru Chief Magistrate's court No. E152 of 2024 where the resident magistrate has issued orders purporting to stay execution of the judgement of this court despite lacking jurisdiction to do so. The respondent annexed a copy of the notice of motion dated 20th June, 2024 and an order issued by honourable Nyamweya RM on the 21st day of June 2024 marked FM1 (a) and (b).
11. The respondent states that from the foregoing it is clear that the Application lacks bona fides and is meant to defeat the execution of the court's judgement and should be dismissed with costs.
12. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the Response filed. The main issue for determination is whether the applicant has demonstrated that the orders of stay of execution pending appeal is merited.



13. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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.

14. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.

15. Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

16. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.

17. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”

18. In the instant case, the applicant aver that he stands to suffer substantial loss if the respondent will proceed with the sale of motor vehicle registration number KAH 205C on 20th June 2024 which will cause him damage and loss.



19. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.

20. I am satisfied that the applicant has proved substantial loss however the same can be compensated by an award of damages if the motor vehicle is sold.

21. Regarding the issue on whether the application was filed timely. I note that the judgement is dated on 29th February, 2024 while the application is dated 15th June, 2024. That is three months since the judgement was delivered as such there is inordinate delay.

22. As to security of costs, the appellant has not provided any security which is one of the pre-requisites of stay.

23. Taking all the above factors into account, I note that the grant of orders of stay is discretionary. I find and hold that the applicant has not fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.

24. Accordingly, I hereby dismiss the applicant/appellants' application dated June 15, 2024 with costs to the respondent.

25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF SEPTEMBER, 2024.

In the presence of:

Court Assistant – Tupet

Applicant – Absent

Respondent – Absent

L. W. GITARI

JUDGE

