



REPUBLIC OF KENYA



KENYA LAW
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**Ndiritu v Muigai & 3 others (Civil Appeal E258 of 2023)
[2024] KEHC 11126 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E258 OF 2023
JK NG'ARNG'AR, J
SEPTEMBER 25, 2024**

BETWEEN

ANTHONY WAMBUGU NDIRITU APPELLANT

AND

DAVID WANYOIKE MUIGAI 1ST RESPONDENT

THE HONORABLE ATTORNEY GENERAL 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

RULING

1. The 1st Respondent/Applicant filed a Notice of Motion application dated 14th May 2024 under Certificate of Urgency pursuant to Order 51 Rule 1, Order 42 Rule 6(1) of the *Civil Procedure Rules*, Section 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law.
2. The 1st Respondent/Applicant seeks that there be a stay of execution of the judgment entered against the Applicant herein made on 15th April 2024, and any consequential orders arising there from pending the hearing and determination of the application inter-parties. The 1st Respondent/Applicant also seeks that there be a stay of execution of the judgment entered against the Applicant herein made on 15th April 2024 and any consequential orders arising therefrom pending the hearing and determination of the Applicant's appeal or in the alternative the Applicant do deposit a sum of Kshs. 50,000/- in court pending the determination of the appeal in the Court of Appeal. That the costs of this application be provided for.
3. The application is premised on grounds on its face and the Supporting Affidavit of the 1st Respondent/Applicant sworn on 14th May 2024 that the Applicant is dissatisfied with the whole judgment of the court made on 15th April 2024 and has preferred an appeal in the Court of Appeal which appeal



- has overwhelming chances of success. That currently there are no orders of stay and the Appellant/ Respondent is likely to embark on execution process any time upon the lapse of the grace period of 30 days.
4. The 1st Respondent/Applicant averred that the Appellant/Respondent will not suffer any prejudice if orders herein sought are granted and the court has in this matter granted the Appellant stay without conditions or any order for deposit of the decretal amount in similar circumstances. That unless the orders of stay are granted, the Appellant will suffer irreparable loss as the claimant may execute against him thereby rendering the appeal nugatory in the event the appeal is successful. The 1st Respondent/Applicant prayed that the application be allowed to meet the ends of justice.
 5. The Appellant/Respondent filed Grounds of Opposition dated 4th June 2024 in opposition to the application that there is no threat of execution demonstrated as even the decree is yet to be extracted. That the 1st Respondent/Applicant has not met the threshold for granting of the orders of stay under Order 42 Rule 6, and particularly there is no allegation or evidence of substantial loss that would result if the order is not made and that there is no offer of security as to the due performance of the decree as may ultimately be binding on him and if any such offer for security is made then the same is not sufficient.
 6. The Appellant/Respondent in the Grounds of Opposition further states that the draft memorandum of appeal raises only issues of fact which is not allowed in the case of a second appeal which must be based on issues of law only. That the only issue for execution herein is just costs which there is no allegation that they are substantial or that the 1st Respondent/Applicant is unable to meet. That the costs granted in the appeal are Kshs. 175,000 excluding the costs in the lower court which amounts to Kshs. 291,100 as assessed by the Respondent/Applicant himself amounting to Kshs. 466,100.
 7. The application was canvassed by way of written submissions. The 1st Respondent/Applicant filed submissions dated 1st July 2024 and argued that they have filed an appeal in the Mombasa Court of Appeal, Civil Appeal No. E114 of 2024, [*David Wanyoike Muigai v Antony Wambugu Ndiritu & 3 Others*](#). That the Record of Appeal has been served and the appeal is awaiting direction from the Court of Appeal Deputy Registrar. The 1st Respondent/Applicant urged the court to grant the orders sought as no prejudice shall be suffered as what is claimed is only the cost of the appeal and the 1st Respondent/Applicant has offered security of Kshs. 50,000 for execution in case of failure of the appeal. To support this position, the 1st Respondent/Applicant relied on Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules and the decision of the court in [*Jamii Bora Bank Ltd & Another v Samuel Wambugu Ndirangu*](#) (2021) eKLR.
 8. The Appellant/Respondent in their submissions dated 14th July 2024 argued that for a court to grant stay of execution, there are certain conditions that need to be met. On the issue of substantial loss, the Appellant/Respondent submitted that there is no allegation that the same would occur if stay of execution is granted. That the total costs payable is Kshs. 466,100 and that there is no allegation that the applicant is not capable of paying this amount in costs. Therefore, the issue of substantial loss does not arise. On unreasonable delay, the Appellant/Respondent contended that the application was filed 1 month after judgment when it could have been filed much earlier.
 9. On security, the Appellant/Respondent argued that the 1st Respondent/Applicant has not offered any security when it is a requirement of the law that security must be offered as a pre-condition for stay pending appeal. That the total security applicable to this case is Kshs. 466,100 being the total costs in the High Court and the lower court, and that no stay of execution can be issued until this critical requirement is fulfilled. That the power of the court to grant stay of execution is discretionary, that the court is guided by Order 42 Rule 6 of the [*Civil Procedure Rules*](#) and the Appellant/Respondent



invited the court to look at the principles in the case of Tassam Logistics Ltd v David Macharia & Another (2018) eKLR.

10. I have considered the Notice of Motion application dated 14th May 2024, the Grounds of Opposition dated 4th June 2024 and submissions by the parties. The issue for determination is whether the 1st Respondent/Applicant's application for stay of execution pending appeal at the Court of Appeal is merited.
11. The 1st Respondent/Applicant brought to the attention of this court that that they have filed an appeal in the Mombasa Court of Appeal, Civil Appeal No. E114 of 2024, David Wanyoike Muigai v Antony Wambugu Ndiritu & 3 Others. That the Record of Appeal has been served and the appeal is awaiting direction from the Court of Appeal Deputy Registrar.
12. The court in Dickson Muricho Muriuki v Timothy Kagundu Muriuki & 6 others (2013) eKLR held the position that: -

“We take cognizance that when this Court has delivered judgment; all pertinent issues and points of law have been fully canvassed and considered. Upon delivery of judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment should be executed. The submissions by counsel, evidence on record, points of law and relevant authorities all have been raised, re-examined, weighted, deliberated upon and judgment made. What new point of law can subsequently be raised in an interlocutory application for stay of execution that will make this Court change its mind after delivery of judgment and order stay of execution? If there are new points of law or circumstances that arise after judgment, this Court is *functus officio* and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court ...”

13. It is trite law that a court cannot sit on appeal of its own judgment. I find that this court lacks jurisdiction to entertain the 1st Respondent/Applicant's Notice of Motion application dated 14th May 2024. The 1st Respondent/Applicant ought to pursue the application for stay in the Court of Appeal which ranks higher than this court. The 1st Respondent/Applicant's application therefore lacks merit and is dismissed.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH SEPTEMBER 2024

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Origi Advocate for the Appellant

Muchiri Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

