



Muli v Kive (Civil Appeal E207 of 2024) [2024] KEHC 13746 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E207 OF 2024
MW MUIGAI, J
OCTOBER 31, 2024**

BETWEEN

NICHOLAS MAIKO MULI APPELLANT

AND

DORCAS MBITHE KIVE RESPONDENT

RULING

Notice Of Motion Application

1. Vide application dated 17/11/2023 brought under section 1A,1B 3A of the *Civil procedure Act* Cap 21, Rules 1(2). 2(2) (a) & 3(1) of the High Court Practice Rules, Order 42 Rule 6, Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law the Applicant sought the following orders, that;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the hearing and determination of the application, the Court to grant a stay of execution of the judgment/Decree in Machakos SCCC No. E052 of 2024 delivered on 8th July 2024.
 - e. That the Court to grant a stay in Machakos SCCC No.E052 of 2024 pending the hearing and determination of the appeal.
 - f. The costs of this Application be in the cause.
2. The Application is supported by an affidavit sworn by Esther Ndungu a Legal Officer with M/S Fidelity Insurance Company Limited sworn on 8th August, 2024 stating as follows; that the judgment in the Trial Court was delivered on 08/04/2024 in favour of the Respondent herein against the



Appellant/Applicant who were ordered to pay Kshs.225,550/-; that the matter was under investigation which report was received after delivery of the judgement that established that the respondent was not captured in the occurrence book and treatment notes had been denounced by the purported issuing hospital. They filed for a review on the basis of the new evidence which demonstrated that the respondent was never involved in the subject accident. The application for review was dismissed and prompted the instant appeal. The respondent has since initiated the execution process and M/S Betabase Auctioneers proclaimed the appellant's good on 5th August and was due to attach the appellant's goods on 13th August upon expiry of the 7 days period. The applicant further stated that they would suffer irreparable loss if execution was to run its full course and was amenable to having the entire decretal sum deposited in an interest earning account in the joint names of counsels.

REPLYING AFFIDAVIT

3. The Respondent through a Replying Affidavit sworn on 26/08/2024 deposed by Munyoki Muthangya in which he stated as follows; that he shall not oppose the application on condition that the appellants pay half of the decretal sum of the suit to the respondent being kshs 157,187 within 30 days from the date of the order and the balance of kshs 157,187 be deposited in a joint interest earning account in the names of both advocates within 30 days from the date of the order and in default the stay of execution lapses
4. The Application was canvassed by way of written submissions.

Submissions

5. The Applicant did not file submission.

Respondent's Submissions Dated 28.08.2024

6. On behalf of the Respondent, it is submitted that part of the decretal sum to be paid to the respondent and half be deposited in a joint interest earning account within 30 days and that no prejudice would be sustained by the appellant if the said orders were granted.

Determination

10. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.
11. The application is premised on Order 42 rule 6(2) of the Civil Procedure Rules,2010 provides that:-

“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 order 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 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.

12. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See *Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nairobi 15 of 1990* [1990] KLR 365.

13. The Court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to 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.”

14. The only issue necessary for determination would be whether the application seeking stay of execution is merited.

Substantial Loss

15. On the first condition, the court in *Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

16. In *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd vs. Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

17. In *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. We repeat that the decretal sum was awarded to the 1st respondent, not the 2nd respondent and all that the 2nd respondent is entitled to from the judgment are the costs of the applicant's



dismissed suit. The sum awarded to the 1st respondent was on a counter-claim. On the material before us, the means or resources of the 1st respondent remain wholly unknown and, in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back and in that case, if the applicant's intended appeal were to succeed, that success would be rendered nugatory."

18. The Applicant averred that respondent has since initiated the execution process and M/S Betabase Auctioneers proclaimed the appellant's good on 5th August and was due to attach the appellant's goods on 13th August upon expiry of the 7 days period.
19. The applicant has thus demonstrated that they would suffer substantial loss as there was imminent threat of execution.

Unreasonable Delay

20. On the second condition, the Applicant stated that his application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgement of the Trial Court was entered on 8.04.24 and the application was filed on 08.08.23. months later is unreasonable delay.
21. The Court finds that there is undue delay in filing the application herein.

Furnish Security

22. The Applicant stated that it was amenable to having the entire decretal sum deposited in an interest earning account in the joint names of counsels.
23. The Court in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, stated that:-

"Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."

24. It follows therefore that it is the discretion of the court to determine the security. It is not disputable that the Applicant has shown some step of good faith by willing to having the entire decretal sum deposited in a joint interest earning account in the name of both counsels.

Disposition

In the premises: -

1. There will be a stay of execution pending the said appeal on condition that the Applicant ½ of the decretal sum in favour of the respondent and deposits the other ½ decretal amount in a joint interest earning account of both Advocates on record within 90 days and in default, the application for stay shall stand dismissed.
2. The costs of this application abide the outcome of the appeal.
3. Memorandum of appeal shall be filed in this matter forthwith within 30 days in default appeal stands dismissed.



It so ordered.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 31/10/2024 IN MACHAKOS
HIGH COURT (VIRTUAL/
PHYSICAL CONFERENCE).**

M.W. MUIGAI

JUDGE

In The Presence Of:

Ms Masila H/B/ Ms Musyoki for the Appellant/Applicant

No Appearance for The Respondent

Geoffrey - Court Assistant

