



REPUBLIC OF KENYA



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**Mutua v Kilonzo (Civil Appeal E040 of 2024)
[2024] KEHC 13779 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E040 OF 2024
MW MUIGAI, J
OCTOBER 31, 2024**

BETWEEN

JACKSON KITULU MUTUA APPELLANT

AND

CHRISTOPHER MUTIE KILONZO RESPONDENT

*(Being an Appeal from the judgment of Hon. C. N. Ondieki (Principal Magistrate)
in Machakos CMCC No. E50 OF 2021 dated and delivered on 28.09.2023)*

RULING

Notice of Motion Application

1. Vide application dated 26/02/2024 brought under Section 3A, 79G and 95 of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 the Applicant sought the following orders, that;
 - a. Spent
 - b. That this Honourable Court be pleased to order a stay of execution of the judgement of Machakos CMCC E122 of 2022 delivered by the Honourable Otindo on 30th January 2024 pending the hearing and determination of this application
 - c. That this Honourable Court be pleased to order a stay of execution of the judgement of Machakos CMCC E122 of 2022 delivered by the Honourable Otindo on 30th January 2024 pending the hearing and determination of this appeal.
 - d. This court allows the Appellant/Applicant to furnish the Court with security in the form of a bank guarantee from a reputable Bank pending the full hearing and determination of this Appeal.



- e. The costs of the application abide the outcome of the appeal
2. The Application is supported by an affidavit sworn by Jackson Kitulu Mutua the Applicant herein sworn on 26th February, 2024 stating as follows; that the Applicant being dissatisfied with the judgment of the Trial Court delivered on 30/01/2024 which found him liable 100% intends to appeal the decision and has in this regard lodged a Memorandum of Appeal to that effect; that the intended Appeal has high chances of success; that the Respondent may proceed and levy execution against the Applicant after the lapsing of 30 days stay granted by the Trial Court hence rendering the Applicant's Appeal nugatory and the Applicant will suffer irreparable loss and damages; that if the Respondent is paid the decretal amount and in the event the appeal is successful, the Applicant might not be able to recover the same from the Respondent since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove her financial standing; that the Applicant insurance is ready, willing and able to furnish the Court with a Bank Guarantee as security to the Court; that the Applicant has appealed against the Judgment of the Trial Court particularly on Liability which were excessive as the third party was the one liable for the accident and finally that the Respondent will not suffer any prejudice or any damage not capable of being compensated by way of costs.

Replying Affidavit

3. The Respondent opposed the Application through a Replying Affidavit sworn on 07.03.2024 deposed by Christopher Mutie Kilonzo in which he stated as follows; that the appellants have failed to prove or establish substantial loss they are likely to suffer if the orders sought are not granted and that the bank guarantee is not specific as to the exact amount which would act as adequate security. the respondent stated that he was a person of means capable of remitting the security if the appeal succeeds. That the application was a delaying tactic to hinder them from enjoying the fruits of the judgement
4. The Application was canvassed by way of written submissions.

Applicant's Submissions dated 25.09.2024

5. On the issue of whether the Appeal herein is arguable, it is submitted that the Appeal herein raises serious points of law and facts that warrant this Court's intervention to avoid injustice or inadvertence errors.
6. Reliance was placed in the case of Kenya Revenue Authority vs Sidney Keitany Changole & 3 others (2015).
7. On the issue of whether the Applicants have demonstrated that substantial loss will occur unless stay is granted, the Respondent herein has not demonstrated her financial status and thus her means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicant's Appeal succeeds. Reliance is made in the case of Edward Kamau & Anor vs Hannah Mukui Gichuki & Anor [2015] eKLR.
8. On whether the application was filed without unreasonable delay, it was submitted that it was filed without inordinate delay on the part of the applicant.
9. On the issue of security it is submitted that the Applicant's Insurer is ready and willing to provide a Bank Guarantee as a security for stay of execution pending appeal.
10. Reliance was made to the case of Giabfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd [2019] eKLR.



11. It was their final submission that the applicants had satisfied all the conditions set out in order 42 rule 6 and prayed that stay of execution be granted pending appeal.

Respondent's Submissions dated 29.04.2024

12. On behalf of the Respondent, it is submitted that for this Court to grant stay it has to be satisfied that substantial loss will be suffered if stay is not granted, application is made without unreasonable delay and Such security as Court may order in due performance of the Decree as set out in the case of Virginia Muchandi Muthengi Vs Elisha K. Njagi[2021].
13. It was submitted that the applicant neither provided any sufficient evidence and or reason to warrant stay of execution
14. On substantial loss it is submitted the applicants made mere declarations that they stand to suffer substantial loss without any evidence to corroborate the same. Reliance is made in the cases of Jessikay Enterprises Ltd vs George Kahoto Muiruri[2022] eKLR and Kenya Shell Limited vs Benjamin Karuga & Ruth Wairimu Karuga(1982-1988) KAR 1018.
15. Finally, it is submitted that the Bank Guarantee the Applicant is proposing to give is not specific to the exact amount which is intended to act as security. reliance was made to the case of Amoke Otieno Pascal v Melvin Anyango Owuor [2022] eKLR and the case of Nobel Trading Co. Ltd & 2 others v Peter Odhiambo Marega [2022] eKLR.
16. It was finally submitted that it was clear that the application was mischievous and delaying tactic to hinder the respondent from enjoying the fruits of the judgement. Reliance was made to the case of Esther Nungari Gachomo vs Equity Bank Limited [2019] eKLR.
17. On cost it was submitted that cost follows the event and thus the respondent be awarded the cost.

Determination

18. The Court has considered the Application, the Response thereto and the submissions on record and the issue for determination is whether the Applicant should be granted an order of stay of execution pending appeal.
19. Stay of Execution is provided by the proviso under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”

20. The three conditions to be fulfilled can therefore be summarized as follows;

that substantial loss may result to the applicant unless the order is made application has been made without unreasonable delay security as the court orders for the due performance

21. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Substantial Loss

22. On the issue of substantial loss, Ogolla, J gave stated as follows in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 that:

“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.’

23. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

“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.”

24. The Applicant contends that the appeal shall be rendered nugatory if the orders sought herein are not granted as the Respondent may proceed to execute the decree.

Arguable Appeal

25. The Applicant has submitted that it has a strong arguable appeal which has high chances of success that will be rendered nugatory if the orders sought are not granted.

Undue Delay

26. As to whether the Application has been filed without undue delay, judgment was entered on 30.01.2024 and this application was filed on 29.02.2024, less than a month later. The court finds that the Application has not been filed without undue delay.

Security

27. As regards deposit of security, the court observed in the case of Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd [2019] eKLR it was held that:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

28. The Applicant contended that he is willing and ready to abide by any reasonable condition set forth by the Court in due performance of the decree pending the hearing and determination of the appeal and proposed furnishing security in terms of a bank guarantee, a proposal which was vehemently opposed by the Respondent terming the bank Guarantee as a general one and not clear how many cases it had been used for.
29. This Court is persuaded that the Applicant has demonstrated that he has met the threshold for grant of stay of execution.



Disposition

1. In Balancing the rights of the parties and in exercise of the court's discretion, I direct as follows;
 - a. Stay of execution pending Appeal of Machakos CMCC No. E122 of 2022 is granted on condition that the Applicant deposits half of the decretal amount in a joint interest earning account of both Advocates on record and other half in a bank guarantee issued within 90 days from the date hereof and in default, the application for stay shall stand dismissed.
 - b. The costs of this application abide the outcome of the appeal.
2. Memorandum of Appeal to be filed within 30 days in default Appeal/stay stand 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

