



Ndubi v M’Laikuru & another (Sued as the administrators and/a personal representatives of the Estate of Jesse Muthamia - Deceased) (Civil Appeal E138 of 2024) [2024] KEHC 13095 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E138 OF 2024
EM MURIITHI, J
OCTOBER 31, 2024**

BETWEEN

ALEX GITONGA NDUBI APPELLANT

AND

HENRY KWARA M’LAIKURU 1ST RESPONDENT

ALICE MWONJIRU 2ND RESPONDENT

**SUED AS THE ADMINISTRATORS AND/A PERSONAL REPRESENTATIVES
OF THE ESTATE OF JESSE MUTHAMIA - DECESAED**

RULING

1. By a Notice of Motion under certificate of urgency dated 11/9/2024 pursuant to Articles 48, 50 & 159 of *the Constitution*, Sections 1A and 1B of the *Civil Procedure Act*, Order 51 (1) of the Civil Procedure Rules, the High Court Vacation Practice and Procedure Rules (Vacation) made pursuant to section 10 of the *Judicature Act* and Rules 3 (1) and (2) of the High Court (Practice and Procedure) Rules, the Applicant seeks that:
 1. Spent
 2. Spent
 3. There be stay of execution of the decree emanating from the judgment delivered in Tigania PMCC No. E037 of 2023 – Henry Kwara M’Laikuru & Anor Vs. Alex Gitonga Ndubi pending the hearing and determination of the Appeal.
 4. Costs of this application be in the cause



2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Dominic Etyang, the legal officer at Sanlam General Insurance Company Limited sworn on even date. He avers that on 6/8/2024 the trial court erred in awarding inordinately high damages that constitute a miscarriage of justice, which necessitated the filing of the appeal herein. There is an imminent and real danger of execution by the Respondents to satisfy the decree emanating from the above judgment, and the Applicant stands to suffer substantial loss unless the orders sought are granted. The Applicant is ready and willing to give security as the court may direct, and the application has been made in good faith without unreasonable delay.
3. The Respondents opposed the application vide a replying affidavit sworn on 20/9/2024 by the 1st Respondent. He avers that his son the late Jesse Muthamia died in a road accident along Mikinduri-Maua Road on 8/3/2023. At the time of his death, his son was married with one child namely Lewis Muchui Muthamia. He sued the Appellant and the court entered judgment in his favour in the sum of Ksh. 3,641,789 less 20% contribution plus costs assessed at Ksh. 163, 853. He faults the Applicant for failing to demonstrate what substantial loss he will suffer if stay is denied. He is nonetheless amenable to grant of stay on condition that the Applicant pays them ½ of the decretal sum being Ksh. 1,538,634 and the balance to be deposited in a joint interest earning account in the names of their advocates.

Determination

4. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, as follows: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

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.
 - 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.”
5. This court respectfully agrees with the court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 that the power to grant stay is discretionary and such discretion should be exercised in a way as not to prevent an appeal.
 6. This court notes that the application was filed on 13/9/2024 while the decision sought to be appealed against was made on 6/8/2024. That delay cannot be termed as inordinate and unreasonable.
 7. The court further notes from the grounds of appeal as raised in the Applicant’s memorandum of appeal inter alia faulting the trial court for adopting a multiplicand of Ksh. 20,000, a dependency ratio of ²/₃ and a multiplier of 20 years for a deceased who was aged 33 years, thus arriving at an inordinate award



for loss of dependency, that the appeal is indeed arguable, which is not one which must necessarily succeed.

8. This court, after delicately balancing the Applicant's undoubted right to appeal against the trial court's decision and the Respondents' right to enjoy the fruits of their judgment, finds that the Applicant will suffer substantial loss if execution is allowed to proceed in the eventuality of a successful appeal.
9. The court appreciates the Applicant's willingness to furnish security for costs for the due performance of the decree, and the Respondents' inclination to payment of ½ of the decretal sum to them whilst the balance is deposited in a joint interest earning account in the names of both advocates.

Orders

10. Accordingly, for the reasons set out above, the court allows the Applicant's application dated 11/9/2024 in the following terms:
 1. An order for stay of execution of the decree emanating from the judgment delivered in Tigania PMCC No. E037 of 2023 – Henry Kwara M'Laikuru & Anor vs. Alex Gitonga Ndubi pending the hearing and determination of the Appeal is hereby issued.
 2. The Applicant shall within 30 days from the date hereof pay to the Respondent ½ of the decretal sum being Ksh. 1,538,634 and deposit the balance of Ksh. 1,538,634 into an interest earning account in the joint names of the advocates for the parties.
 3. The Record of Appeal to be filed within 30 days from the date hereof.
 4. In the event of default of any of the aforementioned conditions, the stay of execution herein granted shall lapse and be of no effect.
 5. The costs of this application shall abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kiruki & Kayika for the Appellant.

Mr. Nkunja for the Respondent.

