



Nzomo v Masesi & another (Suing as the legal representatives of the Estate of Ezekiel Muia Kioko - Deceased) (Civil Appeal E106 of 2024) [2024] KEHC 13778 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13778 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E106 OF 2024
MW MUIGAI, J
OCTOBER 31, 2024**

BETWEEN

FLORIAN MWIKALI NZOMO APPLICANT

AND

ROSE MBETE MASESI 1ST RESPONDENT

FRANCIS KIOKO MUIA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF EZEKIEL
MUIA KIOKO - DECEASED**

RULING

Notice Of Motion

1. Vide an application dated 6.05.2024 under Order 42 Rule 6 & 7, Order 51 Rule 1 of the [Civil Procedure Rules](#), Section 3 and 3A of the [Civil Procedure Act](#) seeking the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. The court be pleased to order stay of execution of the judgment in Mavoko MCCCNo 739 of 2022 delivered on 20th March 2024 pending the hearing and determination of the Appellants appeal against the aforesaid judgement
 - e. Such other additional, suitable and/or alternative orders be made as are just and expedient all circumstances of the case and this application considered.



- f. The insurer of the Appellant/ Applicant be allowed to deposit an insurance bond against the full judgment sum as security for due performance of the judgment/ decree herein pending the hearing and determination of the appeal.
 - g. The costs of the application be in the cause.
2. The Application is supported by the Affidavit of Maureen Gichimu, the legal officer of Pacis Insurance Company Limited who stated that judgment was entered on 20.03.2024 and the Appellant was ordered to pay Kshs 4,435,100 less 30% contribution plus interest and costs and were granted 45 days stay of execution and have lodged an appeal against the decision. It was contended that the stay period has lapsed and the Respondents are at liberty to execute and he is apprehensive that they may do so thus the Appeal will be rendered nugatory.
 3. It was contended that the Respondents may not be able to refund the same to the insurer. In addition, that the insurer was willing to abide by the terms as the court may order and in particular deposit an insurance bond as security for the entire decretal sum.

Replying Affidavit

4. The Respondents filed a Replying affidavit dated 15th May 2024 and contended that the affidavit has been sworn by a person who is not a party to the suit and thus has no capacity to depone on the facts especially the threshold required to be met when considering orders of stay of execution pending appeal. The Respondent contended that the application is a delaying tactic meant to deny him from enjoying the fruits of justice. He asked the court to order that Kshs 3,000,000 to be released to his advocate which amount the Applicant finds as an appropriate sum and the outstanding sum in a joint interest earning account.
5. The application was canvassed by way of written submissions.

Submissions

6. The Applicant did not file submissions
7. The Respondent filed submissions and stated that the conditions set under order 42 rule had not been met and the application should be dismissed. It was submitted that deposit of an insurance bond was untenable as it would be subject to volatility owing to the vicissitudes of the current times.
8. The Respondent submitted that a lumpsum of Kshs 3,000,000 should be released to the Respondent and the outstanding amount deposited in a joint interest earning account in the name of the advocates representing the parties. Reliance was placed on the case of *Mbula vs Nzangani* [2023] KEHC 18249 (KLR) and *Nyatera vs Nyakundi* [2023] KEHC 3086 (KLR).

Determination

9. I have considered the Application, the Replying affidavit and the submissions thereto and find the issue for determination is whether the Applicant is entitled to orders of stay pending Appeal.
10. First and foremost, we need to establish whether what we seek to stay is properly before the court. The judgment being appealed against was delivered on 20th March 2024, the Memorandum of Appeal is dated on 8th of April 2024. The Appeal was filed within time.



11. On the issue of stay, Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules, 2010](#) provides 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.”

12. The first issue is whether the application has been filed without unreasonable delay. I note that the Judgement sought to the appealed was delivered on 20th March 2024 whereas the Application for stay is dated 6th of May 2024, about one and a half months later. I find this not to be ordinate delay. I must however point out that Maureen Gichimu is not a party to the suit and thus did not have the locus standi to speak on behalf of the Appellant.

13. Secondly, the Applicant has stated that she stands to suffer loss if the orders sought are not grated as the Respondent is at liberty to commence execution at any moment. Substantial loss was discussed in the case of [James Wangalwa & Another vs. Agnes Naliaka Cheseto](#) [2012] eKLR, as:

“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.”

14. On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted, I beg to differ. The onus of proving the Respondent’s inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in *Stephen Wanjobi vs. Central Glass Industries Ltd.* Nairobi HCCC No. 6726 of 1991, financial ability of a decree holder solely is not a



reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

15. On the issue of security, the Applicant indicates that she is ready to comply with the orders of the court. Furnishing of security is key in getting orders of stay pending appeal. The Applicant has indicated that the insurer is willing to deposit an insurance bond as security for the entire decretal sum. The Respondent on the other hand indicates that he is being denied from enjoying the fruits of the judgement the Court has a duty to balance the rights of both parties. The insurance bond proposal has not been provided for the court to peruse and there is no guarantee that the interests of the Respondents will be catered for.
16. In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

17. The decretal amount in this case is Kshs.3,104,570 being compensation for pain and suffering, loss of expectation of life, loss of expectancy and special damages. The Respondent contends that the accident occurred and liability is not in dispute and this has not been rebutted by the Applicant.

Disposition

1. In the circumstances, I hereby grant stay of execution pending the hearing and determination of the Appeal on condition that the Applicant pays the Respondent Kshs 1,000,000/- within 90 days and;
2. Deposit the outstanding balance in a joint interest earning account in the name of both advocates within 90 days failure to which the order of stay lapses or bank guarantee deposited.

It is 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:

Mr. Geya for the Appellant – present

Mr. Thuo - For the Respondent – present

Geoffrey - Court Assistant

