



**Muli v SM (Minor Suing through her Mother JKM) (Civil Appeal E214 of 2024) [2024] KEHC 15165 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15165 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E214 OF 2024  
MW MUIGAI, J  
NOVEMBER 28, 2024**

**BETWEEN**

**MICHAEL MULI ..... APPELLANT**

**AND**

**SM ..... RESPONDENT**

**MINOR SUING THROUGH HER MOTHER JKM**

**RULING**

**Notice of Motion**

1. Vide an application dated 15.09.2024 under Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 3A, 79G of the *Civil Procedure Act* seeking the following orders;
  - a. Spent
  - b. Spent
  - c. There be stay of execution of the judgment herein pending the hearing and determination of the Appeal
  - d. The costs of the application be provided for
2. The Application is supported by the Affidavit Joy Muthoka, the legal officer of UAP Old Mutual Insurance Company Limited who stated that the Honourable Court entered judgment against the Applicants on 17.07.2024 for general damages, special damages and future medical expenses amounting to Kshs 487,300 and being aggrieved by the award has lodged an appeal.
3. The Applicant contended that the Respondent may move at any time and proclaim the Applicant's attachable assets. It was stated that the appeal was arguable and had high chances of success. Further,



- that the Respondent was a person of unknown means and she was apprehensive that if the decree is paid out and the appeal is successful, then the appeal would be rendered an academic exercise in future.
4. It was contended that the Insurer was willing to deposit an Insurance bond or Bank guarantee or abide by the terms as the court may order as security for the entire decretal sum.

### **Replying Affidavit**

5. JKM filed a Replying affidavit dated 20.08.2024 and contended that the affidavit in support of the application was incapable of supporting the orders sought and should be struck out with costs. It was contended that after judgment was delivered, the Applicant filed an application seeking stay orders dated 15.08.2024. It was averred that the application was an afterthought and that the Memorandum of Appeal does not raise any point of appeal in favour of the Applicant.
6. The Appellant deponed that the said security has been utilized in thousands of other cases primarily to hoodwink the court to grant stay of execution. That the application was a ploy to deny the Respondent the right to reap and enjoy the fruits of the judgment. It was contended that since it was a money decree, it could be recovered without any substantial loss to the Applicant.
7. The Respondent asked the court if inclined to grant stay, to order that half of the decretal sum be released to the Respondent and the other half deposited in a joint interest earning account.
8. The application was canvassed by way of written submissions.

### **Submissions**

9. The Applicant filed submissions dated 11.09.2024 and stated that the conditions set under order 42 rule 6 had been met. While relying in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] e KLR, it was submitted that the Applicant would suffer irreparable loss as the Respondent would not be able to refund the decretal sum.
10. The Respondent submitted the application had been filed without undue delay. That the judgment was delivered on 17.07,2024 and this application filed on 15.08.2024 thus there was no inordinate delay. Reliance was placed on the case of Jaber Mohsen Ali& another vs Priscillah Boit & another [2014] e KLR.
11. The Respondent filed submissions dated 14.10.2024 and contended that the Applicant has not demonstrated that it shall in any way suffer substantial loss if the application for stay of execution is dismissed. It was stated that the Appeal in question was a monetary one and therefore the appeal cannot be rendered nugatory.
12. Secondly, it was submitted that the court has not been furnished with reasonable security supported by any documentary evidence and therefore the assertions are incapable of being ascertained and the interests of both parties will not be secured without bias.
13. It was contended that the mere fact that the decree holder is not a man of means does not justify him from benefitting from the fruits of his judgment. The court was urged to dismiss the application with costs.
14. the Respondent relied on the following cases; Kenya Shell Limited vs Kibiru & Another, Civil Appeal no 97 of 1986, *Meteine Ole Kilelu & 10 others vs Moses K. Nailole*, Civil Appeal no 340 of 2008, Paul Nderitu Mwangi & Another vs Jacinter Mbete Mutiswa & Another (Suing as he legal representatives of the estate of William Mbithi Musonzzo (deceased) [2018] e KLR, Kenya Shell Limited vs Kibiru [1986] KLR 410, Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002]



### Determination

15. 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.

16. 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.”

17. The first issue is whether the application has been filed without unreasonable delay. I note that the Judgment sought to the appealed was delivered on 17<sup>th</sup> July 2024 whereas the Application for stay is dated 15<sup>th</sup> of August 2024, 29 days apart. I find this not to be inordinate delay.

18. Secondly, the Applicant, on behalf of Insurance Company, stated that she stands to suffer loss if the orders sought are not granted as the Respondent may move and proclaim attachable assets of the Applicant 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.”

19. The onus of proving the financial ability and capacity of the Respondent of paying back the decretal sum goes beyond an allegation that the Respondent cannot pay back if the appeal is not in



Respondent's favour, without evidence. It is upon the Applicant who alleges the Respondent cannot refund monies 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/not granted. This was held in Stephen Wanjohi 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.

20. 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.
21. In the case of Machira T/A Machira & Co Advocates (Supra) it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or fitting 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”.
22. The decretal amount in this case is Kshs. 487,300 being general damages, future medical expenses and special damages. The fact that the accident occurred and liability is not in dispute neither is the award of special damages according to the memorandum of appeal. The issue on appeal is the assessment of damages.

### **Disposition**

1. In the circumstances, I hereby grant stay pending the hearing and determination of the Appeal on condition that the Applicant pay the Respondent Kshs 257,300 within 90 days and;
2. Deposit the outstanding amount of Kshs 260,000 in a joint interest earning account in the name of both advocates within 90 days failure to which the order of stay lapses.
3. Trial Court file typed proceedings and/or record of Appeal to be availed.
4. Further Mention for Direction on 3/2/2025.

It is so ordered.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT ON 28/11/2024 AT MACHAKOS HIGH COURT (VIRTUAL/ PHYSICAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

