



**Mitheu v Musau (Miscellaneous Civil Application E121 of 2023)
[2024] KEHC 16169 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION E121 OF 2023
MW MUIGAI, J
DECEMBER 19, 2024**

BETWEEN

MICHAEL NTOUTHU MITHEU APPLICANT

AND

BONFACE MUNYAO MUSAU RESPONDENT

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. Spent
 - c. That this Honourable Court be pleased to grant the applicant leave to appeal out of time against the judgement delivered on 10th May 2023 by S. Khapoya in Kithimani CMCC No 23 of 2019
 - d. That this honourable Court be pleased to order a stay of execution of the judgement delivered by the Trial court between the hearing and determination of the intended appeal herein
 - e. That this Honourable Court allow the applicant to furnish the court with security in form of a bank guarantee from a reputable bank.
 - f. The costs of the application abide the outcome of the appeal
2. The Application is supported by an affidavit sworn by Michael Ntouthu Mutheu the Applicant herein stating as follows; that the delay in not filing the memorandum of appeal by his failure to get back to his



advocate on time; that the Respondent may proceed and levy execution against the Applicant 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, that the Applicant insurance is ready, willing and able to furnish the Court with a Bank Guarantee as security to the Court;

Replying Affidavit

3. The Respondent opposed the Application through a Replying Affidavit sworn on 10.07.2023 deposed by Bonface Munyao Musau 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 he is a man of means as a successful business man and would be able to refund the decretal sum. That he would suffer substantial injustice as he would be denied the right to enjoy the fruits of the judgement. that should the application be allowed the respondent should pay half of the decretal amount and the balance be deposited in a joint interest earning account in the names of both advocates on record.
4. The Application was canvassed by way of written submissions.

Applicant's Submissions Dated 13.11.2024

5. On the issue of whether the applicant has a plausible reason for the delay in filing the memorandum of appeal it was submitted that the delay was not very inordinate to warrant the court to fail to allow the appeal.
6. Reliance was placed in the case of Kenya Power & Lighting Company Ltd v rose Anyango & Another [2020] eKLR and the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & Others (2013) e KLR
7. It was submitted that no prejudice has been suffered by the respondent that cannot be ameliorated by award of costs
8. On the issue of whether the memorandum of appeal raises arguable issues it was submitted that it does raise serious issues that warrant this court's intervention. He relied of the case of Kenya Revenue Authority v Sidney Keitany Changole & 3 Others(2015) e KLR
9. On substantial loss it was submitted that the respondent means was unknown and was highly unlikely be capable of refunding the decretal amount. He relied on the case of Edward Kamau & Another vs Hannah Mukui Gichuki & Another(2015) eKLR
10. 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.
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 23.10.2023

12. On behalf of the Respondent, reliance was placed on the case of Nicholas Kiptoo Arap Korir Salat vs IEBC where the supreme court stated that extension of time is not a right of party
13. It was submitted that there was no effort or attempt by the applicant to explain the delay apart from merely stating he was no aware of the timeline.



14. Reliance was placed to the case of Bi- Mach Engineering Limited v James Kahoro Mwangi [2011] e KLR.
15. It was finally submitted that the court exercise its discretion and decline to extend time, dismiss the application with cost and in the unlikely event that it is allowed the applicant be compelled to pay the respondent half of the decretal sum and the balance be deposited in a joint interest earning account in the joint name of the advocates on record

Determination

16. 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.
17. 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.”

18. 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

19. 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

20. 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.’

21. 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.”

22. 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

23. 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

24. As to whether the Application has been filed without undue delay, judgment was entered on 10.05.2023 and this application was filed on 30.06.2023, a month and few days later. The court finds that the Application has not been filed without undue delay.



Security

25. 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 falls.

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.”

26. 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.
27. This Court is persuaded that the Applicant has demonstrated that he has met the threshold for grant of stay of execution.

Disposition

28. In balancing the rights of the parties and in exercise of the court’s discretion, I direct as follows;
- a. The Appeal be deemed as filed to be prosecuted within 90 days in default the leave vacates.
 - b. Stay of execution pending Appeal of Kithimani PMCC No. 23 of 2019 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.
 - c. The costs of this application abide the outcome of the appeal.
29. 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 AT MACHAKOS THIS 19TH DAY OF DECEMBER, 2024 (PHYSICAL/VIRTUAL CONFERENCE).

MARGARET W. MUIGAI



JUDGE

