



REPUBLIC OF KENYA



KENYA LAW
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**Mwmbura & another v Baiya (Civil Appeal E025 of 2022)
[2023] KEHC 443 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 443 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E025 OF 2022
DK KEMEL, J
JANUARY 20, 2023**

BETWEEN

ROSE NJOKI MWMBURA 1ST APPLICANT

HARUN GITHINJI MWAMBURA 2ND APPLICANT

AND

NJENGA BAIYA RESPONDENT

RULING

1. The appellants/applicants herein have filed an application dated October 12, 2022 seeking the following prayers:
 - (i) Spent
 - (ii). Spent
 - (iii). That there be stay of execution of the decree herein pending hearing and determination of the appeal.
 - (iv). That the orders issued on October 19, 2022 in respect of Bungoma CMCC No.277 of 2019 be set aside.
 - (v). That the costs of the application be in the cause.
2. The application is supported by the grounds on the face thereof plus the affidavit of Harun Githinji Mwambura the 2nd appellant/applicant herein sworn on even date. The applicants gravamen are *inter alia*; that the appellants have preferred an appeal against the ruling delivered on 7.2.2022 by the trial court in Bungoma CMCC No.277 of 2019 wherein the Respondent had sued the Appellants in their capacity as legal representatives of the estate of one Henry Gitonga Mwambura (deceased) and Judgement entered such: that the respondent was supposed to execute against the estate of the deceased



but has started executing against the applicants prompting the applicants to raise an objection, but which was dismissed on September 19, 2022; that the trial court has ordered the applicants to deposit a sum of Kshs.643,533/- into a joint interest earning account in the names of both Advocates within 30 days pending determination of the appeal; that the applicants are unable to meet the condition ordered by the trial court; that they are apprehensive that the respondent will execute the decree and thereby render the appeal nugatory; that the application has been brought in good faith and without unreasonable delay; that the applicants have a good and arguable appeal with high chances of success.

3. There was no response filed by the respondent even though the respondent's counsel alludes to some response in form of a replying affidavit. However, a perusal of the pleadings does not reveal the same but the applicant's counsel indicated on the record of October 18, 2022 that a replying affidavit had been served upon them.
4. The application was canvassed by way of written submissions. Both parties have duly filed and exchanged submissions.
5. I have given due consideration to the application and the submissions. The only issue for determination is whether the application has merit.
6. The relevant provision regarding the determination of such applications is found in Order 42 Rule 6(2) of the *Civil Procedure Rules* wherein an applicant must satisfy three conditions in order to secure an order for stay of execution pending an appeal. The same provides as follows:

“No order for stay of execution shall be made under sub rule (i) unless-

- (a). The court is satisfied that substantial loss may result in the applicant unless the order is made and that the application has been made without reasonable delay; and
- (b). Such security as the court orders for the due performance of such decree or order as may be binding on him has been given by the applicant.”

From the above provision, it is clear that the court is empowered to order for stay of execution pending an appeal and that such power is at the court's discretion which must be exercised judiciously and not whimsically. In the exercise of such power, the court is expected to balance between the competing rights of successful litigant to enjoy the fruits of his /her Judgement and the rights of the appellant to exercise his/her unassailable right of an appeal which should not be rendered nugatory. Indeed, the main purpose of stay of execution is to preserve the subject matter of the appeal.

7. As regards the first condition on substantial loss, the applicants contend that the appeal will be rendered nugatory if the order for stay is not granted since from their stand point, they are not to suffer personally as representatives of the estate of the deceased but that the decree ought to be executed against the estate of the deceased directly. The applicants are under obligation to establish that the execution of the decree or Judgement will create a chain of events or state of affairs that will irreparably affect or negate the core of the applicants as successful party in the appeal. It was thus incumbent upon the applicants to go beyond the usual loss to which every judgement/debtor is necessarily subjected when he or she loses a case and is deprived of his/her property in consequence. In the case of *James Wangalwa and another vs Agnes Naliaka Cheseto* (2012) eKLR the court observed as follows:

“No doubt in law, the fact that the process of execution has been put in motion or its 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 *Civil Procedure Rules*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution has created 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 would render the appeal nugatory.”

It is a fact that the respondent has already commenced execution of the decree and has attached the applicants’ goods. Even though the Applicants being the legal representatives of the estate of the deceased will have to recoup or recover their expenses from the estate later on, there is a likelihood that the execution will affect then somewhat and hence my finding that they have shown that substantial loss will occur if an order of stay is not granted. In any event, the purpose of an order of stay of execution is to preserve the status quo and eventually the pending appeal so as not to render it nugatory. I am satisfied that the applicants have met this threshold. Suffice here to add that the respondent’s replying affidavit is not on record and thus there is a possibility that he did not oppose the application herein.

8. On whether the application has been filed without unreasonable delay, it is noted that the trial court’s ruling was delivered on September 19, 2022 while the present application was filed on October 12, 2022. I find that there was no delay in lodging the application. Again, I must point out that a party has a right to approach the High Court even if he or she has filed a similar application in the lower court as long as there is a substantive appeal already lodged as is the case herein.
9. On whether the applicants have furnished security for the due performance of the decree, it is noted that the applicants vide paragraph 8 of their supporting affidavit have indicated that they are unable to meet the conditions imposed by the trial court on the grounds that they ought not to suffer personally on behalf of the estate of the deceased wherein they are the legal representatives. I must point out that the claims raised by the applicants appear strange in that as the administrators of the estate of the deceased, they must be prepared to be sued and sue on behalf of the estate since they have the requisite capacity. It is common knowledge that administrators of estates are allowed to incur expenditure on behalf of the estate which are provided for during the confirmation of the grant whereby the administrators are reimbursed their expenses from the estate. The applicants claim that they ought not to be touched yet they are the ones in charge of the estate sounds feeble and an indication of dereliction of duty as administrators of the estate of the deceased. The applicants are bound to satisfy the condition of furnishing security for the due performance of the decree which will be binding upon them. They are under obligation to protect and defend the estate in the suit unless and until they are discharged as administrators. The applicants cannot circumvent this condition. I find that the applicants have not satisfied the third condition on furnishing security.
10. Going by the above observations, it is clear that the applicants’ appeal merits to be determined while the respondent is also entitled to enjoy the fruits of his judgement. There is need to balance the interests of the parties so as to enable them have a win win situation. This can be achieved by way of an order that the decretal sums be deposited into a joint interest earning account in names of the parties Advocates pending determination of the appeal. That arrangement would suit the circumstances of the parties herein.
11. In the result, the applicants’ application dated October 12, 2022 is allowed in the following terms:
 - (a). An order of stay of execution of the decree in Bungoma CMCC. No. 277 OF 2019 is hereby granted upon the applicants depositing the entire decretal sums into a joint interest earning



account in the names of the Advocates for the parties within thirty (30) days from the date of this ruling failing which the stay shall lapse.

(b). The cost of the application shall abide in the appeal.

Dated and delivered at Bungoma this 20th day of January, 2023

D. K. Kemei

Judge

In the presence of:

Maloba for Applicants

No appearance for Wekesa for Respondent

Kizito Court Assistant

