



**Al-Riaz International Ltd & another v Munini (Civil Appeal  
E058 of 2023) [2023] KEHC 22221 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 22221 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E058 OF 2023**

**F WANGARI, J  
APRIL 27, 2023**

**BETWEEN**

**AL-RIAZ INTERNATIONAL LTD ..... 1<sup>ST</sup> APPELLANT**

**REHAN RIAZ MALIK ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MUEMA MUNINI ..... RESPONDENT**

**RULING**

1. This ruling relates to an application dated March 14, 2023 which sought for the following orders: -
  - a. Spent;
  - b. Spent;
  - c. That pending the hearing and determination of the appeal in the High Court, an order of stay of execution be issued to stay the execution of the Judgement/decree delivered on November 18, 2021 by Hon. C.N. Ndegwa in Mombasa Chief Magistrate's Court Civil Case No. 1746 of 2016;
  - d. That costs of this application be provided for.
2. The application was opposed through a replying affidavit dated March 23, 2023 and sworn by the respondent's Counsel.
3. The application was disposed off by way of written submissions wherein both parties complied by filing detailed submissions together with various authorities in support of the parties' rival positions.



## Analysis and Determination

4. I have considered the said submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, there is only one issue for determination which is whether the appellants have made out a case for grant of orders of stay pending hearing and determination of appeal they have preferred. Corollary to this finding is the issue of costs.
5. The principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the [Civil Procedure Rules](#), 2010 which provides as follows: -

- “(1) 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.
- (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

6. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute. In [RRW v EKW](#) [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent...”



7. Having settled on the principles, an interrogation of whether the applicants have met the tests above is imperative. On substantial loss, the applicants submit that the respondent has not illustrated or given any material as to his ability to refund the decretal sum in case the appeal succeeds. The case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR was cited for this proposition. At paragraph 5 of the Applicants' affidavit in support of the application, the deponent therein avers that the Respondent has commenced the process of execution and he stood the risk of being arrested. A notice to show cause dated September 30, 2022 has been annexed. In response to the application, the respondent has confirmed that indeed they have proceeded to obtain warrants of arrest and that all that awaits is the arrest of the 2<sup>nd</sup> applicant.
8. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, the court while considering a similar application as the current one had the following to say; - "...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... This is so because execution is a lawful process..." Therefore, the fact that the Respondent has set in motion the process of execution does not of itself amount to substantial loss. As was held in the above case, 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.
9. In the same decision above, the court held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. As stated elsewhere in this ruling, I have no doubt that the 2<sup>nd</sup> applicant's liberty is at risk as evidenced by the annexures submitted by the parties. The Applicant states that if he is committed to civil jail, he will lose her liberty thereby resulting to a substantial loss were stay not to be granted. On the other hand, the respondent would have been kept away from the fruits of his judgement for more than one (1) year. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR while enunciating this principle stated as follows: -

"...The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation..."
10. It is my considered view that were this court to deny the applicants an order for stay of execution, it would place them at a more prejudicial position than the respondent. While it is unfortunate that the Respondent will have to wait a little bit longer to enjoy the fruits of his judgement, the applicants have adequately demonstrated that they are likely to suffer loss were the 2<sup>nd</sup> Applicant's liberty be taken away and I so hold.
11. On the issue of delay, I note that both parties agree that the application was filed timeously and I need not say more on this limb.
12. Lastly, the Applicant is required to furnish security to the court as security for the performance of the judgment debt should the appeal fail. The purpose of security was clearly enunciated in *Arun C.*



Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others [2014] eKLR, where the court stated: -

“...The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose...”

13. I agree with the respondent that the applicants have not offered or proposed any security for the due performance of the decree of the lower court. This should be done as a sign of good faith that the applicants are ready and willing to commit to giving security. But my reading of order 42 rule 6(2) (b) of the CPR reveals that, it is the court that orders the kind of security the Applicants should give as may ultimately be binding on the applicants. This modeling of the law is to ensure the discretion of the court is not fettered. I shall thus make orders accordingly on the issue of security.
14. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The application dated March 14, 2023 is hereby allowed on the following conditions: -
    - i. The applicants/appellants shall deposit a sum equivalent to 50% of the decretal sum in a joint interest earning account in the names of Counsel on record for the parties herein within a period of thirty (30) days from the date hereof;
    - ii. The applicant to compile, file and serve a Record of Appeal within sixty (60) days from the date hereof;
    - iii. In default of either (i) or (ii) above, the application dated March 14, 2023 shall stand dismissed;
    - iv. Costs to be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

.....

**F. WANGARI**

**JUDGE**

**In the presence of;**

Miss Gatimu Advocate h/b for Mr. Mwanzia Advocate for the Appellants

N/A for the Respondent

Guyo, Court Assistant

