



**Muchemi & 2 others v Simiyu & 2 others (Civil Appeal  
E073 of 2022) [2023] KEHC 18111 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18111 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E073 OF 2022**

**PM MULWA, J**

**MAY 30, 2023**

**BETWEEN**

**JAMES KIHARA MUCHEMI ..... 1<sup>ST</sup> APPELLANT**

**PURITY WAKIURU WAITHAKA ..... 2<sup>ND</sup> APPELLANT**

**JAMPUR GENERAL AGENCIES ..... 3<sup>RD</sup> APPELLANT**

**AND**

**RUTH WANJIRU SIMIYU ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN MWANGI GITHINJI ..... 2<sup>ND</sup> RESPONDENT**

**MAVUNO SMART ENTERPRISES ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before the court for determination is the Notice of Motion application dated April 20, 2022, brought under a certificate of urgency and under Sections 1A, 1B, 3B and 63 of the *Civil Procedure Act* and Order 42 of Rule 6 of the *Civil Procedure Rules 2010*. It seeks a stay of execution of the judgment and decree made in Thika Chief Magistrate's Court Case No 601 of 2020, on May 26, 2021.
2. The grounds of the application are that the decree emanates from an interlocutory judgment entered on May 26, 2021, the proceedings were ex-parte, the applicant was never served with the proceedings of the lower court and only came to know of the existence of the suit on February 2, 2022. An application made in the lower court to set aside the judgement was dismissed. The appellants were aggrieved by the judgment and intend to appeal and contend that the appeal has a high chance of success.
3. The application is supported by the affidavit of James Kihara Muchemi sworn on April 20, 2022, in which he deposes that he has the authority of the co-applicants/appellants to swear on their behalf. The deponent further avers that the interlocutory judgment was against the appellants for the sum of Kshs 3,416,425/= and was obtained fraudulently for no service was done. That he was forcefully taken



to the respondent's offices on February 2, 2022 and coerced to pay Kshs 45,000/= in the execution of the decree and writing a settlement proposal. It is averred that the appellants are ready and willing to comply with the conditions set by this court if the orders are granted. Unless the orders are issued the respondents will proceed and execute the judgment which will prejudice the appellants.

4. Opposing the application, the respondents filed a Replying Affidavit sworn by Stephen Mwangi Githinji sworn on June 20, 2022 in his capacity as the director of the 3<sup>rd</sup> respondent. He depones that the 1<sup>st</sup> respondent is his wife. He states the applicants were duly served but failed to honour the summons and instead called the 2<sup>nd</sup> respondent to have the matter settled out of court. The applicants have had money belonging to the 2<sup>nd</sup> Respondent for 4 years and failed to honour their promises to pay the same. The Kshs 45,000/= paid by the 1<sup>st</sup> appellant was the payment of the bailiff's fees. The respondent will suffer irreparable loss if the orders are granted whereas the applicants will suffer no prejudice. He urged the court to dismiss the application.
5. The application was canvassed by way of written submissions.

### **Appellants submissions**

6. Counsel for the applicants submits that the conditions for granting stay of execution under Order 42 Rule 6(2) of the Civil Procedure Rules have been satisfied. He further submits that the applicants will suffer irreparable loss if the orders are not granted as the respondent will proceed to execute yet the judgment was obtained irregularly.
7. In compliance with the condition for security, counsel submits the applicants have offered Motor Vehicle xxxx Toyota Corolla as security for the condition of stay. He urged the court to allow the application as prayed.

### **Respondent's submissions**

8. By the submissions filed on September 26, 2022, counsel submits that the applicants are undeserving of the orders of stay. The applicants were properly served in the lower court and were well aware of the existence of the matter but failed to enter an appearance or defend the suit thus prompting the interlocutory judgment.
9. That the applicants have not demonstrated the loss to be suffered if the orders are not granted. According to counsel, the applicants have not met the threshold of granting stay orders as enshrined under Order 42 Rule 6(2) of the Civil Procedure Rules.
10. It was also submitted that the appeal is fatally defective in the form of substances, it lacks merit and is a sham and thus an abuse of the court process. He urged the court to dismiss the application.

### **Analysis and determination**

11. I have given due consideration to the application at hand and the issue for determination is whether the court should grant the applicant stay of execution pending appeal.
12. Order 42 rule 6 (1) of the Civil Procedure Rules 2010 provides for jurisdiction to stay execution pending appeal to both the trial court and the appellate court 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 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 an application being made, to consider such application and to make such order thereon as may to it seems 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.'

13. Further Order 42 Rule 6 (2) thereof provides the threshold upon which the court may grant a stay of execution.

(2) No order for stay of execution shall be made under sub-rule (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.

14. For the court to grant stay orders it must be satisfied that the applicant meets the above conditions to wit, (a) the applicant will suffer substantial loss, (b) the application is brought without unreasonable delay and (c) the applicant must furnish security.

15. On the issue of whether the application is brought without unreasonable delay, the impugned judgement was entered on May 26, 2021, the applicants filed an application for a stay of execution in the lower court on February 23, 2022, which was dismissed on April 12, 2022, the current application was filed on April 20, 2022 close to 10 months from the time when the impugned judgment was delivered.

16. I find the delay of 10 months has not been sufficiently addressed and thus the delay is unreasonable.

17. On the issue of substantial loss, I have perused the court file and I note the matter came under a certificate of urgency and on April 25, 2022. Lady Justice Ngetich issued stay orders on the condition that the applicants deposit half the decretal amount in court within 30 days from the date thereof. By further notice of motion seeking an extension of time to comply with the conditions for stay, the period for compliance was extended for a further 7 days on May 23, 2022. The applicants did not comply with the conditions for stay. No further extension of time to comply was sought and instead the applicants raised the issue of variation of the orders in their submissions.

18. The applicants have only stated they will be prejudiced if the orders of stay of execution are not issued but they have demonstrated to the court the prejudice to be suffered if the orders are issued.

19. On the issue of security. the applicants have not demonstrated to the court the challenges faced in complying with the court orders of April 25, 2022, further the applicants have not demonstrated that the order to deposit half the decretal amount was unreasonable by the court in order to call for an alternative security.

20. The applicants in their submissions have urged this court to vary the conditions for stay and in place be allowed them to deposit in court the logbook of motor vehicle xxxx Toyota Corolla as security. This prayer was not made timely. The applicants were aware of the orders of the court and their financial situation at the time, the timing of the application shows the application was not made in good faith and only made to delay the respondents from enjoying the fruits of the judgment.

21. The alleged supplementary affidavit wherein the motor vehicle logbook has been attached is not in the court file. The court has not had the opportunity to evaluate the same. I also note that no valuation report has been furnished to the court, and therefore, I cannot ascertain the exact value and current state of the motor vehicle. It is hence difficult for the court to determine the exact value of the motor vehicle and whether it would be sufficient security for the satisfaction of the decree.



22. I am not satisfied that at the time of the conclusion of the appeal, the motor vehicle intended to be offered as security will be worth the same amount as now. In the case of *Lochab Brothers Ltd -vs- Lilian Munabi Nganga & 2 Others [2007] eKLR*, the court held: 'There is no guarantee that by the time the appeal will be heard and determined the vehicle will be worth the same money or it be there at all. The vehicle is still under the control and use of the applicant. Many things can happen to it before the appeal is heard. It can be wasted and its value diminished or it can even be involved in an accident and be completely damaged. I am not saying that this is going to happen but it can happen. If that happens then there will be no security for the respondent to fall back on if the appeal is not successful. Deposit of motor vehicle log book is therefore not a satisfactory security'.
23. Further in the case of *Esri Star Ltd & Another -vs- Sila Oweshiwani [2018] eKLR* the court held that: 'A motor vehicle or a trailer, as in this matter, is the worst form of security that an applicant can offer with the aim of obtaining orders for a stay of execution in a case involving a money decree.'
24. In this case, by the conduct of the applicants in failing to comply with the court orders of April 25, 2022 upon the grant of the conditional stay of execution, I find them undeserving of the court's jurisdiction to exercise its discretion and allow a stay of execution.
25. Consequently, I find the applicants have not satisfied the conditions set for a stay of execution. Accordingly, the Notice of Motion application dated April 20, 2022 lacks merit and the same is dismissed with costs.

Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU**

**THIS 30TH DAY OF MAY, 2023.**

.....

**P.M. MULWA**

**JUDGE**

**In the Presence of:**

**Kinyua/Duale – Court Assistants**

N/A - for appellants/applicants

Ms. Waithera - for respondents

