



**Gichohi & 2 others v Mary (Civil Appeal E014 of 2022)
[2023] KEHC 17648 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E014 OF 2022**

GMA DULU, J

MAY 25, 2023

BETWEEN

JOYCE MURINGO GICHOHI 1ST APPLICANT

PETER GICHOBI NJIRU 2ND APPLICANT

ISAAC MAINA 3RD APPLICANT

AND

ESTHER WANJIKU MARY RESPONDENT

RULING

1. Before me is an application dated March 5, 2022 by way of notice of motion filed by the three (3) appellants/applicants through Counsel Kimondo Gachoka & Company under order 21 rule 1(b), order 22, order 42 rule 6, order 50 rule 6 and order 51 rule 1 and 3 as well as sections 317, 79G of the Civil Procedure Act (cap 21) and article 159 (2)(a) and (d) of the Constitution of Kenya 2010. The prayers in the application are as follows:-
 1. (Spent)
 2. (Spent)
 3. That the court be pleased to grant stay of execution of the judgment and decree issued on January 24, 2022 by the Hon E. M Muiru Principal Magistrate pending full hearing and determination of the appeal.
 4. That the court allow the appellant to furnish the court with security in the forms of a bank guarantee from the Diamond Trust Bank or Family Bank.
 5. (Spent)
 6. That the costs abide the outcome of the appeal.



7. That the court do issue any other order or direction it deems fit to grant in the circumstances.
2. The application has grounds on the face of the notice of motion that the initial stay of 30 days granted by the trial court had lapsed, that the respondent is likely to execute if stay orders are not granted, that the appeal has good chances of success, that the amount of award is substantial and that the appellants are apprehensive that if the amount is paid and the appeal succeeds the respondent might not be in a position to repay thus the appellants stand to suffer substantial loss. The application was filed with an affidavit sworn on March 5, 2022 by Joyce Musingo Gichohi one of the appellants, which amplifies the grounds of the application.
3. The application is opposed through a replying affidavit sworn by Esther Wanjiku Mary on June 24, 2022.
4. The application was canvassed through written submissions. I have perused and considered the submissions filed by Kimondo Gachoka & Company Advocates for the applicants and those filed by Waiganjo Wachira Advocates for the respondents.
5. This being an application for stay of execution of judgment or decree pending hearing of appeal, it is governed by order 42 rule 6(2) of the [Civil Procedure Rules](#), which provides as follows:-
 - 6 (2) No order of 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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
6. In my view, this application has been made without inordinate delay, as the application was filed on March 5, 2022, while judgment was delivered on January 24, 2022.
7. With regard to whether the applicants are likely to suffer substantial loss if the stay orders sought are not granted, I note that the subject matter is a money decree and the appeal filed is principally on quantum of damages awarded. I have not had the advantage of seeing the trial court judgment but in my view the appeal is arguable, having seen and perused the grounds of appeal.
8. Though I am of the view that the applicants might suffer substantial loss if the whole decretal amount is paid to the respondent and not recovered, as the appeal is principally on quantum of damages, in my view stay of decree orders can only be justified if the applicants pay part of the decretal sum to the respondent. I will thus grant stay of execution orders subject to the applicants paying part of the decretal sum to the respondent.
9. With regard to provision of security by the applicants, the applicants have offered to provide a bank guarantee. However, in my view, the part of the decretal amount to be paid herein is adequate security in the circumstances of this case.
10. Consequently, and for the above reasons I order as follows:-
 - i. I grant stay of execution of judgment or decree herein; pending appeal.
 - ii. The above stay of execution is granted subject to the applicants paying the respondent through counsel part of the decretal amount Kshs 100,000/= within 45 days from today.
 - iii. In default of (ii) above, the stay orders herein granted will automatically lapse and have no effect.



iv. Costs of the application will abide the outcome of the appeal.

Dated, signed and delivered this 25th day of May, 2023 at Voi virtually.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Ochoki for the appellants/applicant

No appearance for the respondent

Mr. Otolu – court assistant

