



**Muema & another v Muthiani (Civil Appeal E60 of 2023)  
[2023] KEHC 18127 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18127 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E60 OF 2023**

**FR OLEL, J  
MAY 25, 2023**

**BETWEEN**

**PETER JAMES MUEMA ..... 1<sup>ST</sup> APPELLANT**

**EVANS MUSYOKA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RICHARD MULI MUTHIANI ..... RESPONDENT**

**RULING**

1. The application before this court is the Notice of Motion application dated 16<sup>th</sup> March 2023 brought pursuant to provisions of Section 1A, 1(B) and 3A of the *Civil Procedure Act*, Order 42 Rule 6(2) of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is prayer (3) & (4) that;
  - a. That this Honourable court be pleased to stay the execution of the judgment/decreed delivered on 7<sup>th</sup> March 2023 by Honourable M. Opanga (P.M) sitting at Kangundo in civil suit no E5 of 2020 pending the hearing and determination of the Appellants Appeal filed at the High court of Kenya at Machakos.
  - b. That this Honourable court allow the applicant to furnish the court with security in the form of a bank guarantee from a reputable bank pending the full hearing a determination of this appeal.
2. This application is supported by an affidavit of the 2<sup>nd</sup> appellant/applicant one Peter James Muema dated 16<sup>th</sup> March 2023 This application is opposed by the respondent Richard Muli Muthiani who filed a replying affidavit dated 17<sup>th</sup> April 2023 and written submissions filed in court on 5<sup>th</sup> May 2023.
3. The Appellant averred that they are aggrieved by the judgment delivered in Kangundo CMCC no E5 of 2022 by Hon. M.Opanga(P.M) dated 7<sup>th</sup> March 2020 and had subsequently filed an appeal against



the said judgment. They state that they have an arguable appeal which has high chances of success and further that the said appeal is meritorious and stands a good chance of success as demonstrated in the Memorandum of Appeal filed.

4. The appellants stated in their supporting affidavit that they are apprehensive that the decree holder advocate may proceed to levy execution to enforce payment of the decretal sum and unless stay is granted their appeal would be rendered nugatory. Further if the decretal sum is paid out, they will be unable to recover the same as the respondent's source of income is unknown, he has no means of refunding the contested decretal sum and he has no known assets or abode and thus he may be out of reach and/or unable to refund the same.
5. Finally, the Applicants stated that they are ready and willing to furnish security for due performance of the decree in the form of a bank guarantee from Family Bank and that the Respondent will not be prejudiced if orders sought are granted.
6. The Respondent did oppose this application by his Replying Affidavit dated 17<sup>th</sup> April 2023. He states that the Appellants' appeal has no chance of success, it is frivolous and is an abuse of the court process and should be dismissed suo moto as the applicants have failed to meet the threshold and requirements of granting such an application under Order 42 Rule 6 of the [civil procedure rules](#) and further had not demonstrated the substantial loss they will suffer.
7. After the accident, the appellant was charged with breaching the [traffic Act](#) and pleaded guilty. He paid a fine of ksh 10,000/=, no issue of a third party arose at the lower court proceedings and there was no basis of bringing new evidence at the appeal stage. It was the respondent's position that the award was proper and merited and he should be allowed to enjoy the fruits of his judgement.
8. Final issue raised by the respondent was that there was no evidence advanced to show that he was a man of straw and there was no justification for him to show his financial statement as they were his private property. The respondent also took issue with the security offered and stated that there was no nexus between the appellant and direct line which was offering the security. The appellant should forward the decretal amount into his advocates account in full as the appeal perused was flimsy and filed with the intention of delaying the matter for no apparent reason.

### Submission

9. The Appellants did not file any submissions but the respondent filed their submissions dated 25<sup>th</sup> April 2023. In their submissions the respondent stated that under Order 42 Rule 6{1} and {2} of the [civil procedure rules](#) there were three conditions to be met. These were;
  - a. Firstly, the applicant must establish a sufficient cause.
  - b. Secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay
  - c. Thirdly the applicant must furnish security.
  - d. Finally, the application must, of course, be made without unreasonable delay.
10. The respondent urged the court to look at the consequence of granting stay and the intended outcome. They submitted that no special circumstances exist that warrant granting of the orders sought and that the respondent was entitled to Justice and to enjoy the fruits of his judgement. Further the appellant had not satisfied court by way of documentary evidence that they will suffer any substantial loss and urged the court to do a balancing Act. The respondent relied on [Samvir Trustee Ltd v Guardian Bank Limited Nairobi](#) {Millimani HCCC 795 of 1997 }



11. The respondent also did state that that there is no genuine reason why the respondent should be kept away from enjoying the decretal sum and the appellants had not demonstrated what loss they would suffer and or incur if the decretal sum is released. It was not enough to just suggest that the respondent was a man of straw and that was not good enough ground to deny him access to the decretal sum. The said sum was not colossal and the respondent would be able to repay the same if the appeal was successful. They relied on the case of *Stephen Wanjobi v Central Glass Industries Ltd* Nairobi HCC no 6726 of 1991
12. The Respondent also urged this court to find that the applicants had not meet the threshold for granting stay and urged this court to dismiss the said application with costs.

### **Analysis & Determination**

13. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and the respondent's submissions and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
14. Stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant.
15. As stated in the case of *Amal Hauliers Limited v Abdulnasi Abukar Hassan* (2017) eKLR which quoted with approval *Butt v Rent Tribunal* (1982) KLR 417 the guiding principles which the court should consider while determining an application of this nature. These were;
  - a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  - b. 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 to be rendered nugatory should that appeal court reverse the judge's discretion.
  - c. A judge should not refuse 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. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the Appellant had an undoubted right of appeal.
  - e. 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 for costs as ordered will cause the order for stay of execution to lapse.
  - f. The Appellants finally averred that this court is clothed with very wide discretion to grant the orders sought under Section 3A as read together with Section 63(c) of the *Civil Procedure Act*.
16. The judgment appealed against was delivered on 7<sup>th</sup> March, 2023. The Appeal herein and this application was also filed on 24<sup>th</sup> March 2023. This was within a period of 30 days from the date of judgment and thus it can be said that this appeal and this application has been file timeously.



17. On the likelihood of suffering substantial loss, it is evidence that the decretal sum of ksh 271,000/ = together with costs is a tidy sum of money. The Appellant raises reasonable grounds that the Respondent will not be able to refund the said sum without hardship if paid out to the respondent. The Respondent on the other hand states that the appellant has not established by documentary evidence that he is a man of straw and that the decretal sum is not a lot of money, thus he could repay it back if the appeal was successful. Further it was his contention that the applicant has not demonstrated what substantial loss, if any, they would suffer if the decretal sum was paid out.
18. In the case of *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another* (2010) eKLR the court stated as follows;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* (2006) eKLR the Court of Appeal held thus;

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

19. Guided by the above authorities and in the absence of the requisite proof from the Respondent that he is a person of means, I find that the Appellants have satisfied this court that they would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition. I do note from the Memorandum of Appeal that the Appellant is vigorously contesting liability and how it was arrived at. These are no doubt grounds for an arguable appeal.
20. On the security, the Appellants have indicated that they are ready and willing to provide bank guarantee from Family Bank Ltd. The Respondent on the other hand pleads with the court to order that the Appellant pay out the decretal sum, which can be refunded should the appeal succeed.
21. The court has to balance the interest of the Appellant who seeks to preserve the *status quo* pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application no Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another* (Supreme); *Mukuma v Abuoga* (1988) KLR 645.
22. The law is that where the Applicant succeeds, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.



23. This issue of adequacy of security was dealt with in the Court of Appeal in *Ndubiu Gitabi v Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal expressed itself as follows;

“The process of giving security is one which arises constantly so long as the opposite party can be adequately protected. It is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even handedly without prejudicing the issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There are absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even-handed manner, that there would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant so as to tempt him into settling the appeal or will any party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”

24. Taking all relevant factors into consideration and noting that the main issue on appeal is on both liability and quantum and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;

- a. The Appellant/Applicant do deposit the entire decretal sum in a joint interest earning account in the joint names of advocate for the appellant and advocates for the respondent at a reputable financial bank for the whole duration of this appeal.
- b. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.

25. The costs of this Application are awarded to the Respondent.

26. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF MAY 2023.**

**RAYOLA FRANCIS**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 25<sup>TH</sup> DAY OF MAY, 2023.**

**In the presence of;**

.....for Appellant

.....for Respondent

.....Court Assistant

