



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mutiso & another v Riungu (Civil Appeal E71 of 2023)
[2023] KEHC 18123 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18123 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E71 OF 2023**

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

BETWEEN

RHODA REDEMPTOR MANDUU MUTISO 1ST APPELLANT

SIMON MWALAVU 2ND APPELLANT

AND

HUMPHREY RIUNGU ALIAS HUMPHREY RIUNGU

MUKIRA RESPONDENT

RULING

1. The application before this court is the notice of motion application dated April 19, 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) that;
 - (a) That this Honourable court be pleased to order stay the execution of the decree and any subsequent proceedings Machakos Civil SuitNo 331 of 2022 pending the hearing and determination of this Appeal
2. This application is supported by the grounds on the face of the said application and the affidavit of the 2nd appellant/applicant one Simon Mwalava dated April 19, 2023, while the respondent opposed this application through the replying affidavit filed by Humphrey Riungu Mukira dated May 4, 2023.
3. The Appellant averred that vide their application dated December 21, 2022, they sought to set aside the ex-parte judgment dated November 18, 2022 and he be granted leave to enter appearance and defend the suit. Vide a ruling dated March 28, 2023 by Honourable M.A Otindo their application was dismissed giving rise to this appeal. 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 there is strong likelihood that the respondent will apply for reissuance of warrants of execution consequent of which they are likely to attach three of the appellants motor vehicles previously proclaimed, namely Motor vehicle registration Number KBB 334N , KCU 117W and KBH 961Q valued at Kshs 1,000,000/= , Kshs 700,000/= and Kshs 1,200,000/= respectively to recover the decretal sum of Kshs 306,420/= and if attached and sold that would cause them substantial loss and render the appeal filed to be rendered nugatory.
5. Finally, the Applicants stated that they are ready and willing to furnish security for due performance of the decree 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 May 4, 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 forthwith. The appellants had applied to set aside the judgment dated November 18, 2022 and the trial court did find as a fact that the appellants were indolent and did not raise any trial able issue. Further the court was not convinced by their rhetoric that they were never served with summons to enter appearance.
7. The respondent also averred that the court should not exercise its discretion to benefit a litigant who has acted on bad faith and merely aims to prolong litigation or otherwise delay resolution of matters by filing many applications, as was the case herein. The appellants had uttered inexcusable lies and thus their application dated 21st December was rightly dismissed as they did not show the court that they had trial able issues. The respondent prayed that this application be dismissed with costs.

Analysis & Determination

8. I have carefully considered the Application, its Supporting Affidavit, the Respondent's Replying Affidavit and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
9. 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.
10. 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.
11. The ruling appealed against was delivered on 28th March, 2023. The Appeal herein was filed on 6th April 2023. This was within a period of 10 days from the date of judgment and thus it can be said that this appeal and this application has been file timeously.
12. On the likelihood of suffering substantial loss, it is evidence that the decretal sum of Ksh.306,420/= together with costs is a tidy sum of money. In the case of *G. N. Muema P/A (516) Mt View Maternity & Nursing Home Vs Miriam Maalim Bisbar & 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.”
13. 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 serve of process and failure of the trial magistrate to recognize the right to fair hearing as enshrined in the constitution of Kenya 2010. These are no doubt grounds for an arguable appeal.
14. On the security, the Appellants have indicated that they are ready and willing to abide by this courts orders as to security for due performance of the decree.
15. 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 Vs Abuoga* [1988] KLR 645.
16. 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.

17. This issue of adequacy of security was dealt with in the Court of Appeal in *Ndubiu Gitahi 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.”

Disposition

18. Taking all relevant factors into consideration 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 of Ksh.306,420/- 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.
19. The costs of this application are awarded to the respondent.
20. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 25th day of May 2023.

In the presence of;

.....for Appellant

.....for Respondent



.....**Court Assistant**

