



**Mpinda v Eunice Mpinda M' rinyiru t/a Milestones Supplies (Civil Appeal E023 of 2023) [2023] KEHC 19637 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19637 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E023 OF 2023  
EM MURIITHI, J  
JUNE 30, 2023**

**BETWEEN**

**JUDITH MPINDA ..... APPELLANT**

**AND**

**EUNICE MPINDA M' RINYIRU T/A MILESTONES SUPPLIES . RESPONDENT**

**RULING**

1. By a Notice of Motion under certificate of urgency dated May 23, 2023 brought under Order 9 Rule 9 of the *Civil Procedure Rules*, Sections 3, 3A, 79G and 95 of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules and any other enabling provisions of the law, the applicant seeks stay of execution of the judgment and orders given in Meru Chief Magistrate Civil Case No E428 of 2021 on December 16, 2022 pending the hearing and determination of this application and the appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Judith Mpinda, the applicant herein, sworn on even date. She was dissatisfied with the findings of the trial court that she did not safely deliver the 8000 litres of petroleum oil handed over to her for transportation, and she seeks stay of execution pending the determination of her appeal. She avers that the respondent is threatening to execute the decree and Bill of Costs, which will render her appeal, ineffectual and nugatory. According to her, the respondent will not suffer irreparable loss and damage if the application is allowed, as she will have an opportunity to oppose the appeal.
3. The respondent has opposed the application vide her replying affidavit sworn on June 5, 2023. She avers that she was the successful party in Meru CMCC No E428/2021 where the total decretal sum is Kshs 1,202,807. She accuses the applicant of failing to either demonstrate what loss she would suffer if the said amount is paid or furnish security for the due performance of the decree. She continues to lose immensely on account of loss that the applicant occasioned to her business for failing to safely deliver the petroleum oil as a bailee. She urges the court to balance the applicant's right of appeal against her



right as the successful litigant by ordering her to pay her half of the decretal amount and deposit the other half in court or in a joint interest earning account.

### **Determination**

4. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, as follows: - '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.

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.
  - 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.'
5. This court respectfully agrees with the Court of Appeal in *Butt v Rent Restriction Tribunal [1982] KLR 417* that the power to grant stay is discretionary and such discretion should be exercised in such a way as to prevent an appeal, if successful, being rendered nugatory.
  6. This court notes that there has been undue delay in filing this application on May 23, 2023 while the decision sought to be appealed against was made on December 16, 2022.
  7. Whereas the applicant contends that her appeal will be rendered ineffectual and nugatory if execution is allowed to proceed, the respondent faults the applicant for failing to demonstrate what substantial loss she will suffer if stay is denied. Despite the respondent's opposition to the application, the court appreciates her willingness to grant of conditional stay of execution pending appeal.
  8. The court notes from the grounds of appeal as raised in the applicant's memorandum of appeal, that the appeal is indeed arguable, which is not one which must necessarily succeed and the court need not go into the full merits of the intended appeal.

### **Orders**

9. Accordingly, for the reasons set out above, the court allows the applicant's application dated May 23, 2023 in the following terms:
  1. An order for stay of execution of the Judgment and Decree in Meru CMCC No E428 of 2021 is hereby issued pending the hearing and determination of this appeal.
  2. The applicant shall within thirty days (30) days from the date hereof deposit the entire decretal sum of Kshs 1,202,807/- in an interest earning account in the joint names of the advocates for the parties.
  3. The Record of Appeal to be filed within sixty (60) days from the date hereof.



4. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
5. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

**DATED AND DELIVERED THIS 30TH DAY OF JUNE, 2023**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

M/S Gichunge Muthuri & Co. Advocates for Appellants.

M/S Mithega & Kariuki Advocates for the Respondents.

