



**Muendo v Kilonzi (Suing as the Legal Representative of the Estate of Job Mbithi Kilonzo)
(Civil Appeal E128 of 2022) [2023] KEHC 21047 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 21047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E128 OF 2022**

**FR OLEL, J
JUNE 27, 2023**

BETWEEN

SAMWEL KALOKI MUENDO APPELLANT

AND

**MBITHI KILONZI (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF JOB MBITHI KILONZO) RESPONDENT**

RULING

1. The application before this court is the notice of motion application dated August 30, 2022 brought pursuant to provisions of section 1A, 1(B) and 3A of the *Civil Procedure Act*, order 42 rule 6(2), order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1, 2 and 3 of the said application are basically spent and the main prayer sought is prayer (4) and (5) that;
 - a. That this Honorable court be pleased to grant a stay of execution of the judgment and/or decree issued by Honorable M.A.Otindo in Machakos CMCC NO 254 OF 2020 delivered on August 17, 2022 pending full hearing and determination of this appeal.
 - b. That this Honourable court allow the applicant to furnish the court with security in the form of Bank guarantee from the family Bank.
2. The application is supported by an affidavit of the appellant/applicant one Samwel Kaloki Muendo dated August 30, 2022 and submissions filed by the appellants counsel dated October 19, 2022 and file in court on October 26, 2022.
3. This application is opposed by the respondent Mbithi Kilonzi who filed a replying affidavit dated September 28, 2022 and written submissions filed in court on November 4, 2022.
4. The Appellant averred that they are aggrieved by the judgment delivered in Machakos CMCC No. E254 of 2020 by Hon. M.A Otindo (PM) and dated August 17, 2022 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.
5. The appellant aver that they are particularly aggrieved by the finding of the trial court, where she used a wrong dependency ration of 2/3 (two, third's) and arrived at a wrong award yet the deceased did not have a family hence the judgment was high.
 6. The appellant further stated that if the decretal sum is paid out, they will be unable to recover the same as the respondent's source of income was unknown, and he has no means of refunding the contested decretal sum nor has he any known assets or abode and thus he may be out of reach and/or unable to refund the same.
 7. Finally, the appellant stated that they are ready and willing to furnish security for due performance of the decree in the form of bank guarantee from Family Bank and that the Respondent will not be prejudiced if orders sought are granted.
 8. The Respondent did oppose this application by his Replying Affidavit dated September 28, 2022. He states that the Appellants' appeal has no chance of success, it is incompetent, unmeritorious and is only meant to delay and deny the respondent his right to reap the fruits of his judgment. The appeal was premised on misapprehension of the law on dependency ration and the trial court was right in her assessment as the deceased had left a family.
 9. The Respondent also averred that if the court were inclined to grant the order of stay of execution pending hearing of the appeal, the appellant should be ordered to pay half the decretal sum to him and deposit the other half in court. The respondent also averred that the supporting affidavit was not signed by the appellant, and the signature thereon was a forgery and intimated that they would require/seek to have the appellant attend court to be cross examined on the signature, which is materially different from the one in the other pleadings filed.

Submission

10. The Appellant in his submissions restated what they had deponed in the application and further stated that, they had an arguable appeal, which raises serious point of law. The appellant relied on the case of *Bake 'N' Bite (nrb) Limited v Daniel Mutisya Mwalonzi*{2015} eKLR, *Elizabeth Wamitha Njibia & 2 others v Safaricom Limited* (2014) eKLR & *Tabro Transporters Ltd v Absalom Dova Lumbasi* (2021) eKLR where it was stated that that discretionary power of the court is not unfettered . it is fettered by 3 conditions 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.
11. On substantial loss the appellant stated that the court must be satisfy itself with what would ensue if stay of execution was not granted and relied on the authority of *Edward Kamau & another v Hannah Mukui Gichuki & another* (2015) eKLR , *National Industrial credit Bank ltd v Aquinas Francis Wasike & another* (2006)eKLR and & *Tabro Transporters Ltd v Absalom Dova Lumbasi* (2021) eKLR, where it was stated that once the appellant demonstrates apprehension that the respondent would



- not refund the decretal sum, the burden to show otherwise shifts to the respondent/decreet holder to demonstrate that he has capacity to refund the decretal amount in the event the appeal succeeds.
12. The appellant also did state that he had shown sufficient cause and the main point of consideration was that the appeal would be rendered nugatory if execution were to proceed despite the pending appeal.
 13. The final issues raised in the applicant's submissions was that they were willing to offer security and his insurer was willing to offer a bank guarantee as security for stay pending appeal. The appellant was opposed to paying half the decretal amount as the pandemic had affected the cash flow of the insurer leading to depleted funds. The applicant prayed that this appeal be allowed.
 14. The Respondent urged this court to note that the appellant had not appeal as against liability and only challenged the dependency ration adopted. He further stated that stay of execution could not be granted in cases of money decree, where the same could be repaid. The appellant relied on the case of *Kenya shell Ltd v Kibiru* (1986) eKLR 410.
 15. The respondent further submitted that the appellant would not be prejudiced, if no order of stay was granted as he had not proved that he will suffer any substantial loss. The appellant had also not rebutted, his contention that the appeal was merely a delaying tactic intended to deny the respondent, his right to reap the benefits of the judgment delivered in his favour. Reliance was placed on *Patani v Patani* (2003) KLR 518, *Diamond Trust (K) Ltd v Peter Mailanyi* HCC 177 (2002) & Civil case No 41 of 1995 *United Builders & contractors Africa ltd v Standard chartered Bank ltd*. The respondent thus prayed that this application be dismissed with costs.

Analysis & Determination

16. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and party's respective submissions and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
17. 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.
18. 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.
19. The judgment appealed against was delivered on August 17, 2022. The Appeal herein was filed on August 30, 2022. This application was also filed on September 13, 2022. 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 have been filed timeously.
 20. On the likelihood of suffering substantial loss, it is evident that the decretal sum of Kshs 3,208,078/ = 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 in his Replying Affidavit states that he will be able to pay back the decretal sum, but does not show his source of income.
 21. In the case of G. N. Muema P/A (516) Mt View Maternity & Nursing Home v 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.”
 22. 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.”
 23. 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 dependency ration and how it was arrived at. That ground alone raises a triable issue and is a genuine ground the basis upon which an arguable appeal can be made.
 24. On the security, the Appellants have indicated that they are ready and willing to provide a bank guarantee for the decretal sum, while the Respondent on the other hand pleads with the court to order that the Appellant pays half the decretal sum and the other half deposited in court pending hearing and determination of this appeal.
 25. 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 1st 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.

26. The law is that where the Appellant succeeds, he should not be faced with a situation in which he would find himself unable to get back his 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.
27. 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 is 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.”

28. Taking all relevant factors into consideration and noting that the main issue on appeal is on 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 to pay the respondent half the decretal sum within 30 days of the date of this ruling.
 - b. The Appellant/Applicant do deposit the other half of the 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 specified to this appeal for the whole duration of the appeal.
 - c. 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.
29. The costs of this application are awarded to the Respondent.



30. It is so ordered.

Ruling written, dated and signed at Machakos this

27th day of June 2023.

RAYOLA FRANCIS OLEL

JUDGE

Ruling delivered on the virtual platform, Teams this 27th day of June, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

