



REPUBLIC OF KENYA



KENYA LAW
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**Mutuku v Mutisya, Josphat Munyao alias Josphat Munyao (Civil Appeal
154 of 2022) [2023] KEHC 21614 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21614 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 154 OF 2022**

**MW MUIGAI, J
JULY 31, 2023**

BETWEEN

DENIS KITONYI MUTUKU APPLICANT

AND

**JOSPHAT MUNYAO MUTISYA, JOSPHAT MUNYAO ALIAS JOSPHAT
MUNYAO RESPONDENT**

RULING

Background

1. Vide a Notice of Motion dated November 8, 2022, the Applicant sought the following orders
 1. The Applicant be allowed to furnish the court with bank guarantee as security pending the hearing and determination of the intended appeal and the instant application
 2. The cost of this application abide the outcome of the Appeal.

Supporting Affidavit

2. The application is supported by the affidavit sworn by Denis Kitonyi Mutuku, who deposed that judgment was delivered by the Trial Court on October 19, 2022 in the following terms Liability 100% General damages Kshs 200,000/= and Special Damages Kshs 6,670/= cost and interest.
3. He deposed that judgment on quantum is excessive and has a high chance of success if the appeal is upheld and that the Appeal has high chances of success (annexed and marked copy of the draft Memorandum of Appeal).
4. He lamented that further that he is apprehensive the Respondents are likely to commence executing at the lapse of 30 days hence render the appeal nugatory; deposing that the appeal has been presented without inordinate delay and that his underwriter is ready, willing and able to give bank guarantee as



security for the entire judgment award pending hearing and determination of this application and the intended appeal herein.

5. It was his position that the Respondent is a person of unknown means hence he is apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise since he will not be in a position to refund the amount.
6. He deposed that the appeal raises pertinent issues and has high chances of success and that unless he is granted stay of execution as prayed he stands to suffer irreparable loss and damage; he averred that his underwriter, Directline Assurance Company Limited is ready, willing and able to furnish the court with reasonable Bank Guarantee as security to the (annexed and marked copy of a bank guarantee); deposing that in the interest of justice the application be granted as prayed.

Respondent's Replying Affidavit

7. The Respondent vide his replying affidavit dated and filed on December 1, 2022 opposed the application and deposed that the Applicant's application is frivolous, vexatious, bad in law, untenable and gross abuse of this Honorable Court's process.
8. The cause of action herein arose out of a road traffic accident on or about 21/9/2020 where he sustained serious life threatening injuries (annexed and marked copies of the police abstract and medical report respectively) and that the judgment was delivered on October 19, 2022 in which the Applicant was granted 30 days stay which lapsed on the November 19, 2022; he deposed further that the Applicant neither called a witness nor filed documents to counter the Respondent's evidence and as such this appeal has no chances of success and that the current application offends Order 42 Rules 4 and 6 CPR 2010;
9. Further that the current application is pre-mature as no execution has issued and that the applicant has not demonstrated what loss he stands to suffer if the instant application is dismissed and has not provided any security as a bank guarantee is not security.
10. He further deposed that the application is an afterthought only meant to delay/ impede the realization of the fruits of his lawfully and legally obtained judgment and prayed it be dismissed with cost to him.
11. He averred that if the Court is minded to allow the application, the same be conditional that the applicant releases half of the decretal sum and costs to his advocate on record and half deposited in a joint interest earning account in the names of both advocates.
12. The matter was canvassed by way written submissions.

Submissions

The Applicant's Written Submissions

13. The Applicant in his submissions dated February 17, 2023 and filed on February 20, 2023, submitted on an issue of whether the Applicant is entitled to the orders sought and urged that the principles guiding the grant of a stay of execution pending appeal are provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules which provides:

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; and



- (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.

14. It was the submission of the Applicant that having been aggrieved by the decision of the Court in Machakos CMCC No E197 of 2021 delivered on the October 19, 2022 he has since lodged an Appeal challenging the judgment and decree. Urging that the appeal raises triable issues with high chances of success and that failure to stay the execution proceedings herein the appeal stands to be rendered nugatory.
15. It was the position of the Applicant the judgment subject matter herein being substantial, should the execution proceed, the applicant stands to suffer irreparable loss and prejudice and further the ability of the Respondent to refund the decretal amount is unknown.
16. Contending that should execution of the judgment proceed, the applicant's appeal will be rendered nugatory and expose the Applicant's to irreparable loss and damage as the Respondent being a man of straw would be incapable of effecting a refund thereof.
17. Submitting that the Respondent has not filed any affidavit of means to confirm his financial means or status thus there is a risk of failure to compensate the Applicant should the appeal Succeed. Reliance was placed in the case of *G.N Muema P/A (sic) Mt View Maternity & Nursing Home v Miriam Bisbar & Another* (2018) eKLR, where the court also considered the Respondent's ability to repay the decretal sum in case the appeal succeeded as there was no affidavit evidence by the respondent on record on the means.
18. It was the Applicant's case that there is no inordinate delay by the Appellant in bringing the instant appeal as it was filed vide Memorandum of Appeal on the November 10, 2022 whereas the judgment being appeal was delivered on the October 19, 2022. Urging that the Bank Guarantee is an acceptable way of furnishing security as was held in the case of *Justin Mutinga David v China Road & Bridge Corporation (k) Limited* (2019) eKLR.
19. Averring that he is ready and willing to provide a bank guarantee from family bank as security for stay of execution pending the determination of the appeal.

Respondent's Submissions

20. Vide the submissions Dated and filed March 6, 2023, in which the Respondent submitted that under Order 42 Rule 6 is couched in mandatory terms that the Applicant must satisfy the court before he be granted the orders sought. Firstly, the Applicant must demonstrate that there was no inordinate delay in filing the application; secondly he opined that the Applicant must demonstrate no prejudice will be suffered by the Respondent if the application is allowed which he urged the Applicant failed to fulfill. Contending that the cause of action arose out of a Road Traffic Accident on or about 21/9/2020 where the Respondent suffered a life threatening injuries. Opining that the Respondent, stands to suffer great loss if this application is allowed as it will deny him enjoyment of his lawfully and legally obtained Judgment.
21. Thirdly, it was submitted that the Applicant must demonstrate that he will suffer substantial loss, if this application is disallowed. Urging that the Applicant in any way demonstrated what loss he stands to suffer, if the Application herein is dismissed.
22. It was the position of the Respondent the Applicant must prove security. Contending that the Applicant has not demonstrated what security he intends to put up in this matter and that a bank guarantee is not security. Further, it was his contention that the current intended appeal and



Application herein are an afterthought whose sole intent is to deny the Respondent the fruits of his legally obtained judgment.

23. It was the Respondent's averment that the proposed bank guarantee was issued on 18/2/2022 for a duration of 12 months as per paragraph 2 of the said document meaning it ceased to be in effect on 18/2/2023 and as such null and void. Urging that this is a money decree and it is only reasonable, just and fair that security be in the form of money.
24. Contending that the application is not merited as all the conditions set out by Order 42 Rule 6 have not been satisfied and should be dismissed with costs and that the current Application is a gross abuse of the court's process as it serves to unnecessarily delay the matter herein to waste precious judicial time and to aggravate the Respondent further who is only out to seek justice and enjoy the fruits of his judgment hence the same be dismissed with costs to the Respondent.

Determination

25. The issue for determination is grant of stay of execution pending appeal and on security the Court to accept a bank guarantee.

Arguable Appeal

26. As to the issue of an arguable appeal, the Court of Appeal in *Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others* (2010) eKLR Hon. RSC Omolo JA (as he then was) stated that:

“For my part, I would hold that the applicant has satisfied me that it has an arguable and not a frivolous appeal and I would repeat the caution that an arguable appeal does not mean an appeal that will or must succeed.”

27. The Court upholds the legal right to appeal as provided by Section 79 of *CPA*. Having perused Memorandum of Appeal filed on November 10, 2022 and without going into the merits thereof, I find that the Appeal raises arguable issues that will be determined by the Appellate Court.

Undue Delay

28. The Trial Court's judgment was delivered on October 19, 2022 and appeal/Memorandum of appeal filed on November 10, 2022; the appeal is filed within the mandatory period.

Substantial Loss

29. The Applicant deposed that he is apprehensive 1st Respondent as a Decree Holder may proceed and levy execution and may render the Appeal nugatory and cause them suffer irreparable loss and damage since the Respondent has not furnished the court with any evidence as to his financial standing. I have perused the records and found that the Appellants failed to demonstrate in particular the substantial loss that they would suffer if the decretal amount is paid to the Respondent.

Security

30. As regards the issue of deposit of security, the Applicants have offered to give a bank guarantee of Kshs 50,000,000 from Family Bank with additional Kshs 50,000,000/- Bank Guarantee. The duration is 12 months with an option to renew. That the Respondent contends that the Applicant has failed to provide security as the said Bank Guarantee does not meet the necessary legal requirement under the law of Contract being that it was not signed by the Guarantor or Bank.



31. This Court in *Focin Motorcycle Co v Ann Wambui Wangui & Another* Civil Appeal No 22 of 2017, observed that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

32. From the record, the Family Bank Guarantee at Clause 2, “its duration is for twelve (12) months with an option to renew”. However, the same will be expiring at the time the matter will be proceeding to Appeal I have considered the same and find that the court is clothed with discretion to determine security.

33. The Court, in In *Arun C Sharma v Ashana Raikundalia T/A Rairundalia & Co Advocates* Justice Gikonyo held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

Disposition

34. In the end, I issue the following orders;

1. There be a stay of execution pending hearing and determination of this Appeal.
2. The Appellants will provide security by Bank Guarantee of ½ the decretal amount. ½ decretal sum be deposited in a joint earning interest account in the name of the advocates for the respective parties on record within Ninety (90) days from the date of this Ruling.
3. The Appeal is filed Record of Appeal to be prepared and the L.C.F.be availed before Dr MHC.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 31/7/2023.
(VIRTUAL/PHYSICAL CONFERENCE).**

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MISS WAWERU H/B MR. KIMONDO FOR THE APPELLANT

NO APPEARANCE - FOR THE RESPONDENT

