



**Kasiva v Muthiani (Civil Appeal E097 of 2022)
[2023] KEHC 22810 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E097 OF 2022**

**FR OLEL, J
SEPTEMBER 26, 2023**

BETWEEN

MOSES KASIVA APPELLANT

AND

JOYCE MUTHIANI RESPONDENT

RULING

Introduction

1. The respondent filed a Preliminary Objection dated November 14, 2022 and prayed that both Applications dated October 31, 2022 and this appeal be struck out with costs as they are both incompetent and offend provisions of section 6 of the [Civil Procedure Code](#) and section 38 of the [Small Claims Court Act](#) on the following grounds;
 - a) That there is a similar pending application dated August 30, 2022 before the high court in Machakos which is yet to be determined, filed by the Applicant herein and seeks similar orders as the instant application which has a mention date of November 15, 2022 and therefore the instant application is sub judice.
 - b) That the appeals from the small claims court ought to be strictly on matters of law and yet the appeal as filed by the appellant is on matters of fact as they are contesting the judgment only on the amount awarded as quantum of damage's, and thus the high court does not have any jurisdiction to entertain the appeal.
 - c) That therefore, both the application and the appeal ought to be dismissed with costs in the first instance for contravention of the above-named sections of the law.
2. I have considered the said Preliminary Objection as filed, both set of submissions filed by both parties and also gone through the proceedings and find that the said Preliminary Objection is frivolous and



misplaced. The appellant did not file a new Notice of Motion application, seeking stay of execution. What the appellant counsel did was to file a certificate of urgency dated October 30, 2022 together with a Supporting Affidavit and therein the appellants counsel did state that they had filed an earlier application seeking stay of execution pending appeal dated July 26, 2022. The said application came up for mention before the honourable Deputy Registrar on September 22, 2022, when he gave a mention date before the Honourable Judge on November 15, 2022 and no interim orders were granted.

3. The respondent proceeded to instruct Upstate Kenya Auctioneers to attach and sell the appellants goods and thus they sought that the application dated July 26, 2022, be heard on priority and interim order be granted. On the basis of this certificate of urgency the court record shows that on November 1, 2022 the appellant's application was placed before the honourable Judge and interim orders were granted until November 17, 2022. The respondent allegation that a second application was filed dated October 31, 2022 is thus misplaced and the issue of *sub judice* does not arise.
4. Secondly the respondent did submit that the appeal is against quantum and that was an issue of fact, which the appellate court had no jurisdiction to look at pursuant to provisions of section 38 of the [Small Claims Act](#), which only allowed appeals strictly based on law. This proposition too does not hold true as the basis of challenging an award of quantum can be made on the basis of law.
5. The appellate court can justifiably interfere with quantum of damage's awarded by the trial court if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.
6. The upshot is that the preliminary objection dated November 14, 2022 is wholly unmerited and the same is dismissed with costs to the Appellant.

B. Application for Stay of Execution

7. The other applications pending before this court are the appellant's application dated July 25, 2022 and a similar chamber summons application dated August 30, 2022 file under vacation rules. Both applications seek stay of Execution of the decree issued in Machakos Small claims court SCCC Claim No E152 of 2022. Though the respondent has not filed any Replying affidavit thereto I do exercise my discretion under order 1A,1B, 3 & 3A of the [Civil procedure Act](#), article 159(2),(b) of the [Constitution of Kenya](#) and will consider the same to avoid unnecessary delay in determining such straight forward applications. This ruling will be made based on the application dated August 30, 2023.

C. Determination

8. 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

(see [Butt v Rent Restriction Tribunal](#) [1982] KLR 417 and [James Wangalwa & Another v Agnes Nalika Chereto](#) [2012] eKLR)
9. In the case of [Masis Mwita v Damris Wanjiku Njeri](#) [2016] eKLR 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 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.
10. The Judgment appeal against was passed on 27th June 202 and the Memorandum of Appeal filed on July 13, 2022. The appeal was thus filed on time. The decree challenged is for Ksh.240,000/= and from the memorandum of Appeal filed the appellant is majorly aggrieved by the award of quantum, which they state was inordinately high given the circumstances of the case. The respondent had instructed upstate Kenya Auctioneers, who had proclaimed and obviously if stay is not granted, the appellants motor vehicle will be sold and the appeal as filed will be rendered nugatory.
 11. 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 her 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 her 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.
 12. 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.
 13. 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 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 nor 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.”

D. Disposition

14. Taking all relevant factors into consideration. I do grant stay of execution of the decree herein on condition that;
- (a) The appellant do pay part of the decretal sum being Ksh.150,000/= to the respondent within the next 30 days from the date of this ruling.
 - (b) The Appellant to provide a bank guarantee for the balance of the decretal sum being Ksh.90,000/= ,which Bank guarantee must be specific to this appeal and a copy shall be filed herein.
 - (c) The terms as provided in (b) above is to be met within 30 days from the date of this ruling and in default to meet either of the terms of stay as directed above, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
 - (d) The costs of this Application are awarded to the respondent.
 - (e) The application dated July 25, 2022 is deemed to have been over taken by events as is marked as withdrawn with no orders as to costs.
 - (f) It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 26TH DAY OF SEPTEMBER, 2023.

In the presence of:

.....for Appellant

.....for Respondent

.....Court Assistant

