



**Mulei v Mutua & another (Suing as Legal Representatives of the Estate of Joseph Kivindo Kavete Deceased) (Civil Appeal E161 of 2022) [2023] KEHC 23056 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23056 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E161 OF 2022  
MW MUIGAI, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**ALBANUS NDIVO MULEI ..... APPELLANT**

**AND**

**ANN KAVETE MUTUA ..... 1<sup>ST</sup> RESPONDENT**

**JOSPHAT NGILA KAVETE ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JOSEPH  
KIVINDO KAVETE DECEASED**

*(An appeal from the Judgment and Decree of Honorable E.M. Analo Senior Resident  
Magistrate in Machakos CMCC No. 211 of 2017 delivered on 26th October, 2022)*

**RULING**

1. Vide a Notice of Motion dated and filed 18<sup>th</sup> November, 2022, brought under Sections 79G, 95 and 3A of the *Civil Procedure Act*, Order 22 rule 22, Order 50 Rule 5 and Order 51 of the *Civil Procedure Rules* 2010, the Applicant/ Appellant sought Orders that:
  1. There be a stay of execution of the judgment delivered on 2<sup>nd</sup> August, 2022 in Machakos CMCC No. 211 of 2021 pending hearing and determination of this appeal.
  2. The cost of this application be provided for.
2. The application is supported by affidavit dated and filed on 18<sup>th</sup> November, 2022 sworn by Christopher Chengecha advocate for the Appellant/ Applicant.
3. It was deposed that the judgment in Machakos CMCC No. 211 of 2021 was delivered on 26<sup>th</sup> October, 2022 and they immediately notified their client of the judgment for further instructions and



the instructing client gave them instructions to appeal against the whole of the said judgment on quantum which they duly filed.

4. It was the Appellant/ Applicant case that he has a very good arguable appeal with high chances of success and that the Respondents are likely to execute the decree any time after the 26<sup>th</sup> November,2022.
5. The Appellant/Applicant stated that should the decretal sum paid out to the Respondents the Appellant shall suffer substantial loss as the cost of recovering the same, if the appeal succeeds may be higher than the decretal sum itself as the Respondents cannot refund the decretal at ago since the Respondents' financial status is unknown.
6. It is deposed that the Appellant is ready and willing to provide such reasonable security as may be ordered by this Honorable Court for the performance of the decree in the unlikely event of the appeal failing.
7. it was finally deposed that it is only fair and just that the Appellant be granted a stay of execution pending the hearing and determination of this application and thereafter pending the hearing and determination of this Appeal.

### **Replying affidavit**

8. In reply to the application, Respondents herein filed a replying affidavit dated 2<sup>nd</sup> December,2022 sworn by Ann Kavete Mutua in which she stated that:
9. the application is nothing but an abuse of the court process intended to prolong litigation and that the claim Appealed against is amongst the series of three claims where her son the deceased herein and two other persons were involved in a road accident (annexed and marked copies of the plaints arising from the same cause of action and against the Appellant);
10. It was her case that liability was determined at 70:30 in favor of the Respondents and no appeal was lodged by the Appellant disputing liability and in fact the other two matters involving other two plaintiffs were settled by the Appellant's insurer.
11. Lamenting that since liability is not in dispute, it is only just and fair that half the decretal amount awarded being Kshs 1,233,260 is released to them and the rest deposited in the joint interest earning account to await the determination of the Appeal
12. She stated that the Appeal has no chance of success as the trial court strictly relied on the law and evidence adduced in its determination and the appeal is filed in bad faith.
13. She averred that the Applicant has not shown by way of proof her inability to repay the decretal sum if the appeal succeeds, urging the court to find merit in her plea for release of the half of the decretal sum to them in order to balance for the rights of both parties.
14. The matter was canvassed by written submissions.

### **Submissions**

#### **Respondents' Submissions**

15. The Respondents in their submissions dated 10<sup>th</sup> May,2023 and filed on 11<sup>th</sup> May,2023 submitted that the only issue for determination is what form of security is fair as a condition for stay of execution



pending the determination of the Appeal. Urging that the Honorable Court ought to balance justice and fairness for both parties since the case herein has no dispute on liability.

16. It is submitted by the Respondents that they were the successful litigants and justice will not be served if they are condemned to a wait for the determination of the appeal to enjoy some of the fruits of their success or are condemned to the release of a very minimal amount, making a mockery of the justice system. Opining further that the awarded damages by the Trial Court was Kshs 2,446,520/, in a fatal claim involving a 21 years old young healthy man who earned a living as farmer supporting his ailing mother. They relied on the case of *Paul Nderitu Mwangi & Another v Jacinta Mbete Mutisya & Aaron Wambua Musonzo suing as the legal representative of the Estate of William Musonzo (Deceased)*, where the court opined as follows:

“ 23. While in this case, it is not contended that the applicant’s insurers are likely to fold up, the amount herein was awarded to an estate of the deceased. However, the applicants’ appeal intends to challenge only the quantum of damages as opposed to liability, a realization that at the end of the day some amount is likely to be awarded to the Respondents.

24. In the premises, there will be a stay of execution pending this appeal on condition that the Applicants remit to the Respondent half of the decretal sum and deposits the other half in a joint interest earning account in Kenya Commercial Bank, Machakos, in the names of the advocates for the parties herein within 30 days from the date hereof. The said period will however exclude the vacation period.”

17. They contended finally that court do order that half of the decretal being Kshs 1,223,260/- awarded be released to the respondents’ advocates and the other half with costs is deposited in a joint earning interest account in the names of the advocates representing the parties.

### **Analysis/determination**

18. The issue is on grant of stay of execution as provided by law so as to allow the party pursue the legal right to appeal.
19. In *Butt v Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
- a. The power of the Court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, 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 the appeal court reverse the judge’s discretion.
  - c. Thirdly, a judge should not refuse a 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. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.



## Undue Delay

20. The Judgment was delivered on 26/10/ 2022 and Memorandum of Appeal filed on 18/11/2022 clearly within the statutory timelines for filing an appeal.

## Arguable Appeal

21. In *KRA v Sidney Keitany Changole & 3 others* [2015] eKLR where the Court held;
- “This court has further held that the applicant need only prove or establish one arguable point nothing that an arguable appeal is not necessarily one that will succeed but one that is not frivolous.”
22. The Appellant’s right of Appeal is protected by Section 79 *CPA* and is appealing on quantum. It is for the process and outcome of the appeal to determine an arguable appeal. For now the right to appeal is upheld.

## Security

23. On the deposit of security, The court observed in the case of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that:-

“The Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

## Disposition

24. In balancing the rights of the parties and in exercise of the court’s discretion, I direct as follows;
- a. Stay of execution pending Appeal is granted on condition that the Appellant remit half of the decretal sum to the Respondent and the other half be deposited in a joint interest earning



account in the names of advocates on record for the Appellant & Respondent within 60 days of this Ruling or secured by the bank Guarantee.

- b. The Lower Court file shall be availed within the stated period (60) days
- c. The Record of Appeal shall be prepared, filed and served within 90 days.
- d. Thereafter, matter be placed before Court for directions on disposal of appeal

Orders accordingly.

**RULING READ, SIGNED AND DELIVERED AT MACHAKOS THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2023 (PHYSICAL/VIRTUAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

In the presence of:

Ms Nyuthi - for the Appellant

Ms Mutua H/b For Thiongo - for the Respondents

Geoffrey/Patrick - Court Assistant (s)

