



**Moruri (Suing for and on Behalf of the Estate of Truphena Abisa Moruri) v Nyangena Hospital & another (Civil Appeal 13 of 2020) [2023] KEHC 24859 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24859 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 13 OF 2020  
PN GICHOHI, J  
OCTOBER 31, 2023**

**BETWEEN**

**DENNIS OSOE MORURI (SUING FOR AND ON BEHALF OF THE ESTATE OF TRUPHENA ABISA MORURI) ..... APPELLANT**

**AND**

**NYANGENA HOSPITAL ..... 1<sup>ST</sup> RESPONDENT**

**DAVID MOMANYI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Nyangena Hospital and David Momanyi (therein referred to as the Applicants), file before this Court a Notice of Motion dated 22<sup>nd</sup> April, 2022 through the firm of Samba & Co. Advocates . It is brought under Order 42 Rule 6 and Order 51 (1) of the Civil Procedure Rules 2010, Section 1A, 1B, 3A and Section 63 (e) of the *Civil Procedure Act* and they seek orders that:
  1. Spent
  2. Spent
  3. This Court be pleased to grant a stay of execution of the judgment/decree herein pending the hearing and determination of the Applicant's appeal to the Court of Appeal.
  4. That costs of this application be provided for.
2. The main grounds on the face of the application are that the Applicants have since lodged a Notice of Appeal to the Court of Appeal against this Court's judgment delivered in 10<sup>th</sup> February 2022. That the Respondent had commenced the process of execution and there is therefore a looming danger of execution. Further, the Respondent serves in the United States of America, Navy and it is not known if he owns any tangible property in Kenya. That the application has been brought without delay. Lastly,



the Applicants are ready to deposit the entire decretal sum in a joint interest earning account in the names of the respective advocates on record.

3. In support of the Application, is the affidavit sworn 22nd April 2022 by Dr. Ezekiel Archimedes Orwenyo on his behalf and on behalf of the 2<sup>nd</sup> Applicant. He depones that the Respondent has served a draft decree and hence there is a looming risk of an execution. That the Respondent is a man of straw and incapable of refunding the decretal sum in the event of the appeal succeeding. He further states that the Respondent works for the United States of America, Navy, is a citizen of the said country and is not known to own any property in Kenya.
4. He further depones that the intended appeal raises issues of law including whether a party can appeal against an *ex-parte* order granting leave to file suit out of time under Section 27 of the Limitation of Actions Act and whether there is a provision in the Civil Procedure Act and Rules for filing a cross-appeal in an appeal to the High Court.
5. The Applicant also deponed that it raises a question whether there was a failure to observe vital signs during the period when the patient's pressure had dropped to zero and the patient was being resuscitated and whether that would justify a finding of liability in medical negligence.
6. In reply and through the firm of Nyamweya Mamboleo Advocates, the Respondent filed grounds of opposition dated 31<sup>st</sup> March 2023 where he states that :-
  1. The Applicants' application is incompetent and does not raise any serious issue for consideration by this Court since the decision by the appellate Court was well reasoned and no evidence was adduced by the Applicants to state otherwise.
  2. The Applicants have not raised any arguable appeal to warrant this Court to exercise its discretion in their favour.
  3. The basis for contention by the Applicants is that the Respondent is not capable of refunding the decretal sum and is not known to have any property in Kenya is just a mere assumption.
  4. The mere fact that execution has commenced, which in any event was not the case, does not mount to substantial loss since it is a lawful process.

### **Applicants' Submissions**

7. In their Submissions dated 24<sup>th</sup> April 2023, the Applicants highlighted the three conditions they should meet in this application and submitted that the Respondent's grounds of opposition dated 31<sup>st</sup> March 2023 did not rebut the factual and evidential averments that the Respondent is a man of straw, has no known investment in Kenya and is an American Citizen who may be outside the jurisdiction of the court at the point of seeking a refund if the appeal succeed.
8. They further submitted that it was upon the Respondent to provide evidence that he has assets in Kenya and therefore able to refund the money, should the need arise. They rehashed that contrary to the directions of this Court, the Respondent did not file any Replying Affidavit but instead filed Grounds of Opposition dated 31<sup>st</sup> March 2023.

### **Respondent's Submissions**

9. On their part, the Respondents filed their submissions dated 19<sup>th</sup> May 2023 and submitted that just because the Respondent resides in the United States of America does not mean the decretal sum would be unrecoverable in the intended appeal succeeds. He submitted that the Respondent has already established that he is a man of means since he provided security when he filed the concluded appeal.



10. Further, the Respondent submitted that the Applicants failed to substantiate the particulars of the substantial loss they were likely to suffer. He further submitted that the Applicants have not met the conditions for stay of execution.
11. Terming the Application as defective, vexatious and waste of the Court's time, the Respondent urged that the costs of the Application be borne by the Applicants.

### **Determination**

12. This Court has considered the application herein, the grounds of opposition and the submissions by parties and the authorities cited therein. Parties have aptly captured three conditions that the Applicant must meet in an application for stay of execution pending appeal as provided for under Order 42 Rule 6 (2) of the *Civil Procedure Rules*, that is:-
  - i. The application must be brought without unreasonable delay.
  - ii. The applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
  - iii. The applicant must furnish 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.
13. There is no doubt or dispute that the application herein was brought timeously and therefore this Court will not belabour that point. On the second issue, that is, whether the Applicant will suffer substantial loss, the Applicants swear that the Respondent is a man of straw and incapable of refunding the decretal sum in the likely event of the appeal succeeding. On the same breath, they swear that the Respondent works in the US Navy.
14. Being in the US Navy, the Respondent cannot be classified as a man of straw. By calling a person in employment a man of straw is stretching meaning of the term too far. The Applicant must have reasonable grounds to support that conclusion.
15. The Applicants' other averment is that the Respondent is not known to own any property in Kenya and they may not recover the decretal sum from the Diaspora. From these averments, the burden shifted to the Respondent to show that he would be in a position to refund the decretal sum even in the circumstances. Indeed, this was the holding by the Court of Appeal in *Superior Homes (Kenya) Limited vs Musango Kithome* [2018] eKLR thus:-

“... the issue of substantial loss is the cornerstone of both jurisdictions ...The law, however appreciates that it may not be possible for the applicant to know the Respondent's financial means. The law is therefore that all an Applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”



16. The Court record shows that by 6<sup>th</sup> of March 2023, Counsel for the Respondent had not filed any response to this application. The reason for delay, as per Ms Nyanchera Advocate who was holding brief for Mr. Nyamweya for the Respondent, was that:-

“Counsel was unable to file a response as his client resides out of the country and he could not reach him to seek instructions on how to proceed. We humbly request for Seven (7) days to put in our response.”

17. Indeed, what counsel filed were grounds of opposition in the circumstances and not a replying affidavit. In their submissions, counsel for the Respondent states:-

In this case, just because the Respondent serves in the United States of America doesn't mean that in case of the intended appeal succeeds, the decretal sum would be unrecoverable. The Applicants allege that they shall suffer substantial loss but they do not substantiate the particulars of the alleged loss. The Respondent demonstrated in the High Court that he is a man of means. While appealing to High Court, one of the conditions required to grant stay was that the Respondent provide security which he provided. The Applicants cannot purport that the Respondent is incapable of refunding the decretal sum.”

18. This line of submissions is best suited as material for an affidavit on oath filed by the Respondent. What is apparent is that counsel is purporting to convert submissions into an affidavit which does not suffice. The spirited submissions do not discharge the burden bestowed on the Respondent at this stage to demonstrate that he has known properties in Kenya and that he can be reached should the appeal succeed.

19. It is already demonstrated that even his own Counsel was not able to reach him for instructions in this Application. The fact that the Respondent was able to deposit the decretal sum as security in his Application for stay does not aid him. Circumstances may change or may have changed as at the time of filing this Application and the Notice of Appeal to the Court of Appeal. In the circumstances, the scale of balance between the rights of the Respondent to enjoy the fruits of his judgment, and the Applicant's rights to be cushioned against substantial loss, tilts in favor of the Applicants.

20. Further, the Applicants have already deposited security by way of a deposit of the decretal sum in an interest earning account in the joint names of the Advocates of parties herein as directed by the Court at ex-parte stage.

21. This Court is therefore satisfied that the Applicant's Notice of Motion is merited and allowed in the following terms: -

1. An order be and is hereby issued for stay of execution of the judgment/decreet herein pending the hearing and determination of the Applicant's Appeal to the Court of Appeal.
2. The security already deposited by the Applicants to remain deposited to await the outcome of the Appeal or further orders.
3. The costs of this Application to abide the outcome of the Appeal in the Court of Appeal.

**DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 31<sup>ST</sup> DAY OF OCTOBER,2023.**

**PATRICIA GICHOHI**

**JUDGE**



**In the presence of:**

N/A for Applicants

N/A for Respondent

Aphline, Court Assistant

