



**Muhzin Express Limited v Richard (Civil Appeal E016 of 2023)
[2023] KEHC 25812 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25812 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E016 OF 2023
SM GITHINJI, J
NOVEMBER 22, 2023**

BETWEEN

MUHZIN EXPRESS LIMITED APPELLANT

AND

ALBERT TUMAINI RICHARD RESPONDENT

*(Being an Appeal of the Judgment of the Hon. E. Usui – Chief Magistrate in
Malindi Magistrate’s Civil Suit No.263 of 2021 delivered on 16th January, 2023)*

RULING

Hon. Justice S. M. Githinji

Kimondo Gachoka & Co. Advocates for the Appellant/ Applicant

Wambua Kilonzo & Co. Advocates for the Respondent.

1. For determination is the application dated 22nd February, 2023 by the Appellant/ Applicant seeking the following orders;
 1. Spent.
 2. That this Honourable Court be pleased to grant a stay of execution of the Judgment of Honourable E. Usui given on 16th January, 2023 in CMCC 263 of 2021 through warrants of execution dated 24.01.2023 pending the hearing and determination of this application.
 3. That this Honourable Court be pleased to grant a stay of execution of the Judgment of Honourable E. Usui given on 16th January, 2023 pending the full hearing and determination of this Appeal in Malindi HCCA E016 of 2023.



4. That this Honourable Court allow the Applicant to furnish the Court with security in the form of a Bank Guarantee from Family Bank for the entire judgment sum.
 5. Spent.
 6. That the costs of this application abide the outcome of the Appeal.
2. The following are the grounds in support of the application; that the respondents have since extracted a decree with the intention to execute and if stay is not granted the respondent may proceed to execute and the appeal will be rendered nugatory; that the Judgment is of a substantial amount and the appellants are apprehensive that if the Respondent is paid he may deal with the same in a manner prejudicial to the appellants and if the appeal succeeds, he might not be able to recover the same from the Respondent.
 3. The Respondent in response filed a Replying Affidavit sworn by Geoffrey Kilonzo on the 7th day of March, 2023. He deposed that the applicant has not proved that it may suffer substantial loss or even demonstrated how it will suffer any loss, and as such the applicant has not met the condition for stay.
The application was canvassed via written submissions but surprisingly the applicant did not file submissions in their own application; the respondent on the other hand filed their submissions on the 21st day of June, 2023. This court has considered those submissions.

Disposition

4. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the advocate for the respondent. In my view, the issue for determination is whether this court ought to grant stay of execution pending appeal.
The principles upon which the court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the Civil Procedure Rules which requires an applicant seeking a stay of execution pending appeal to demonstrate that; -
 - a. Substantial loss may result to the applicant unless the order is made;
 - b. The application was made without unreasonable delay; and
 - c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.
5. A stay of execution should only be granted where sufficient cause is shown. In *Antoine Ndiaye v African Virtual University* (2015) eKLR Gikonyo J opined that -

“...stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the *Civil Procedure Rules*...”
6. It has to be noted that the purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In *RWW v. EKW* [2019] eKLR, it was observed that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who



should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

7. The above are the principles to bear in mind in determining the application. The first consideration is whether the application was filed timeously. The judgment of the trial Court in this matter was delivered on the 16th January, 2023. The memorandum of appeal was filed in this court on the 17th February, 2023. Though there was delay in filing the appeal the delay is, in my view, not inordinate.

As to what substantial loss is, the court observed in *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR, the Court;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

8. The other consideration is security. In the case of *Arun C. Sharma v. Ashana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR the court 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.”

9. Having considered the grounds in support of the application, I am not persuaded that the applicant has demonstrated the substantial loss they are likely to suffer if stay is not granted. In my view the applicant has failed to convince this court that they deserve the stay orders sought on the grounds of substantial loss and security. The upshot is that there is no merit in the application. The same is hereby dismissed with costs to the respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 22ND DAY OF NOVEMBER, 2023.

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. Mr Kilonzo for the Respondent
2. Mr Murembe for the Applicant

