



**Makhatsa v Mutuku (Civil Appeal 28 of 2023)
[2023] KEHC 26490 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26490 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 28 OF 2023
FR OLEL, J
DECEMBER 18, 2023**

BETWEEN

BRANTON MAKHATSA APPELLANT

AND

RUTH SYOMBUA MUTUKU RESPONDENT

RULING

A. Introduction

1. Before court for determination is the application dated 1st February 2023 filed by the Appellant/ applicant, who seeks for stay of execution of the judgment/decree issued in Machakos SCC No. E510 of 2022 by Honourable B.A. Luova Adjudicator dated 23rd January 2023 pending hearing and determination of the appeal filed. The said application is supported by the supporting affidavit of the appellant where he does state that he is aggrieved by the said judgment of the trial court and had filed an appeal as against it. The appeal was meritorious and had high chances of success and thus there was need to grant stay to avoid the said appeal being rendered nugatory.
2. The appellant further stated that his insurer was ready and willing to provide a bank guarantee from Family Bank Ltd as security to secure the decretal amount pending determination of the said appeal. That if the respondent was allowed to execute, she would not be in a position to refund the sums utilized and thus it would be in the interest of justice to allow the prayers as sought.
3. This application was opposed by the respondent through her replying affidavit dated 17th February 2023. She did aver that the application filed was misconceived, an afterthought, and an abuse of the process of court. The appellant had not called any witness nor did they produce any documentation before the trial court to controvert the respondent's evidence. The appeal therefore did not raise any triable issue worth considering.



4. The Respondent further averred that they had not commenced the execution process, but even if they did, the said motion by itself does not amount to substantial loss. There had to be empirical evidence or documentary evidence to support the said contention. The court was urged to balance the interest of both parties to ensure that the respondent was not deprived of the fruits of her judgment. Finally the respondent did submit that should the court be inclined to allow the said application for stay of execution, it should be on the condition that the appellant is directed to pay half of the decretal sum and deposit the other half in a joint interest earning account in the joint names of both advocates herein.

B. Analysis & Determination

5. I have carefully considered the Application, Supporting Affidavit, the Respondent’s Replying Affidavit and submissions filed by both parties. The only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
6. Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (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.”
7. In [Visbram Ravji Halai vs. Thornton & Turpin](#) Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions namely, establishment that the application has been made without unreasonable delay, satisfaction of substantial loss and the furnishing of security. The Court, in exercising its discretion, should also further opt for the lower rather than the higher risk of injustice and finally the court will also consider the overriding objective as stipulated in sections 1A and 1B of the [Civil Procedure Act](#), which the courts are now enjoined to give effect to. See [Suleiman vs. Amboseli Resort Limited](#) [2004] 2 KLR 589, [Samvir Trustee Limited vs. Guardian Bank Limited Nairobi](#) (Milimani) HCCC 795 of 1997 & [Machira T/A Machira & Co Advocates vs. East African Standard \(No 2\)](#) [2002] KLR 63:
8. The appellant is obviously aggrieved, by the judgment delivered and did file this appeal promptly. The grounds of appeal do disclose arguable grounds to challenge the judgment appealed against even



though the appeal is challenging quantum awarded only. Secondly, the decretal amount is a tidy sum and no affidavit of means has been filed by the respondent to show that indeed if the said sum is released to her, she will be in a position to refund the same should the appeal succeed.

9. In the case of *G. N. Muema P/A (516) Mt View Maternity & Nursing Home Vs Miriam Maalim Bisbar & Another* (2010) eKLR the court states as follows;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

10. In the case of *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another* (2006) eKLR the Court of Appeal held thus;

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

11. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person of means, I find that the Appellant has satisfied this court that he will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.

12. On the security, the Appellant has indicated that his insurer is ready and willing to provide a bank guarantee. The Respondent on the other hand opposes the same. In determining what appropriate security should be offered, 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 Vs Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd Vs Kibiru & another* (Supreme); *Mukuma Vs Abuoga* (1988) KLR 645.

13. 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.

14. This issue of adequacy of security was dealt with in the Court of Appeal in *Nduhiu Gitahi Vs 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.”

Disposition

15. Taking all relevant factors into account especially the fact that the appeal is only challenging the quantum as awarded and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff I grant a stay of execution of the decree herein on condition that the Applicant pay to the Respondent half of the decretal sum and gives a bankers guarantee to pay the remaining half together with costs from a reputable financial institution specific to this appeal for the whole duration of the appeal.
16. The said conditions are to be met within 30 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.
17. The costs of the application are awarded to the Respondent in any event.
18. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF DECEMBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 18th day of December, 2023.

In the presence of;

No appearance for Appellant

Mr. Munyao for Respondent

