



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mulee v Daud & another (Suing as Next of kin and as the Legal Representatives of the Estate of Musyoki Daudi - Deceased) (Civil Appeal E93 of 2022) [2022] KEHC 12275 (KLR) (3 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12275 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E93 OF 2022  
MW MUIGAI, J  
AUGUST 3, 2022**

**BETWEEN**

**MATHEW MBITHI MULEE ..... APPLICANT**

**AND**

**JOYCE NDULU DAUD ..... 1<sup>ST</sup> RESPONDENT**

**PATRICK MUSYOKA KANYASYA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS NEXT OF KIN AND AS THE LEGAL REPRESENTATIVES OF THE  
ESTATE OF MUSYOKI DAUDI - DECEASED**

*(Being an Appeal against the Ruling of Hon. M. A. Otindo (PM) in the Chief Magistrates Court at Machakos delivered on 29th June, 2022 in CMCC No. 419 of 2018)*

**RULING**

1. The Appellant/Applicant filed an Application under certificate of urgency dated 21<sup>st</sup> July, 2022 and stated the following:
  - a. That the Applicant has filed a Memorandum of Appeal seeking to Appeal against the Ruling of the Court in Machakos CMCC No. 419 of 2018 Joyce Ndulu Daudi & another (suing as legal representative of the estate of Musyoki Daud (deceased) –vs- Mathew Mbithi Mulee delivered on the 29/06/2022.
  - b. That the Exparte judgment in the subject matter therein is colossal amount of Kshs.3,182,754/- and the execution of the decree is in motion as the Auctioneers have served the Applicant with a proclamation of attachment and an Auctioneer’s invoice of Kshs. 3,995,526/-.



The application was grounded on the facts that the appeal raises triable issues, the decretal amount is substantial and the Respondent has not established that he may refund the amount in case the appeal successful.

2. The Court granted interim /temporary stay of execution orders on 7/7/2022 pending hearing and determination of the instant application.

### **Respondent's Replying Affidavit**

3. The Respondent filed Replying Affidavit sworn on 12<sup>th</sup> July, 2022 in which she deposed as follows:
  - a. That the application herein is defective as it does not comply with the provisions of the Orders under which it is brought and must therefore fail.
  - b. That the Application is improperly before the Court as the Applicant never sought leave at the Trial Court in order for them to file this Appeal.
  - c. That the Applicant's Application fails to meet threshold of the laws under which it is brought as they have failed to provide security for the money decree.

### **Appellants/applicant Submissions Dated 25th July, 2022**

4. That this Court order for stay of execution of the final exparte judgment and/or decree made on 21<sup>st</sup> July, 2020 where the Court held the appellant 100% liable for Kshs.3,015, 670/- as General damages and special damages and also costs and interest, pending the hearing and determination of this Appeal; Machakos High Court Civil Appeal No. E093 of 2022.
5. In this case, the Respondents have not given any material as to their ability to repay the decretal sum in case the Appeal succeeds. This fact is buttressed by the decision made by this Court in *Focin Motorcycle Co. Limited -vs- Ann Wambui Wangui & Another* [2018] eKLR (supra) further stated that:-

“The Respondent bears the evidential burden to prove that he is not a man of straw as alleged. The 1<sup>st</sup> Respondent Anne Wambui has not made any attempt to discharge this burden. It is expected that a Respondent would depose and show the means she has to refund the decretal sum. It is enough for the Applicant to depone that she is not able to refund. He cannot be expected to dig deep into the financial standing of the Respondent that is for the Respondent to produce and prove.”
6. Whereas the ruling subject of the Appeal was delivered on 29/06/2022; this application was filed on 7/07/2022. There has not been inordinate delay which will prejudice on the Respondents if the orders sought are granted. The Applicant has satisfied this element.
7. The Respondent deposed that the full decretal amount be deposited in Court within 30 days. The Appellant is willing to give such security as the Court may order in due performance of the decree and in furtherance of issuance of orders of granting stay of execution.
8. However, the Appellant/Applicant seeks the indulgence of this Court to exercise its discretion and order an amount which is affordable by the Applicant. The Applicant is an Area Chief who earns a net pay of Kshs.26,786.65/-



9. In the case of *Focin Motorcycle Co. Limited –vs- Ann Wambui & another* [2018] eKLR (supra) it was stated that:-

“Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

### **Respondent’s Submissions Dated 25th July, 2022**

10. It was submitted that the judgment that the Appellant wishes to stay was delivered on 9/12/2019 and not 21/07/2020 as stated in their application herein.
11. The Appellant herein subsequently filed an application seeking to set aside the said judgment on 9/05/2022 which was approximately 3 years after judgment was pronounced.
12. The dismissal of the aforesaid Application on the 29/06/2022 gave rise to the Appeal herein. The Applicants application offends Order 42 Rule 6 *CPR* as firstly he has failed to offer any tangible security for money decree of Kshs.3,995,526/- which in itself is mandatory.
13. Secondly the Applicant/Appellant ought to demonstrate that the Application has been brought timeously and without unreasonable delay. The Applicant awoke from slumber on execution 3 years after judgment was pronounced, despite being aware of the pendency of the suit since inception and no tangible reason has been advanced to explain the apparent delay.
14. Thirdly the Applicant must demonstrate what loss he stands to suffer if the orders he seeks are not granted, which he has failed to do.
15. The Court grants the application that it should be on condition that the Applicant deposits the full decretal sum plus costs in Court in 30 days.
16. Alternatively, Kshs.1,000,000/- of the decretal sum be released, to the Respondent’s Advocates and the balance of Kshs. 2,995,526/- to be held in a joint interest earning account in the names of both advocates on record, in 30 days and in default execution to proceed from where it had reached.
17. Reliance is made on the case of *Paul Nderitu Mwangi & Another –vs- Jacintar Mbete Mutisya & Anor (suing as the legal representatives of the Estate of William Mbithi Musonzo (deceased))* and *Benson Mwangi Kilonzo & Another –vs- EWW (minor suing thro’ his father and next friend BS)*- where the Court held that half the decretal amount be released to the Respondents.
18. *Bemuta Agencies Limited –vs- Jatomy Enterprises limited & Anor* [2020] eKLR where the Court dismissed the Application for Stay Pending Appeal.

### **Determination**

19. The Court has considered the application for stay of execution, Replying Affidavit and submissions by parties through their respective advocates on record.
20. The issue of determination is whether stay of execution pending appeal ought to be granted or not.



21. Each party aggrieved by the Trial Court’s judgment, ruling, order or decree is entitled in law to exercise its right to appeal. However, the appeal must be lodged in accordance with the prescribed law as outlined in Order 42 Rule 6 *CPR* 2010.

### **Arguable Appeal**

22. Appellants/Applicants deposed that they have an arguable Appeal that raises triable issues. As to what constitutes an arguable appeal, the Court of Appeal in *Nairobi Women’s Hospital vs. Purity Kemunto* [2018] eKLR:-

“To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues.”

23. The Court of Appeal in *Kenya Revenue Authority –vs- Sidney Keitany Changole & 3 Others* [2015] eKLR held that;

“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.”

### **Unreasonable Delay**

24. The Applicant/ Appellant filed Memorandum of Appeal on 6/7/2022. The Ruling the subject of the appeal was delivered on 29/7/2021.
25. The Respondent raised the issue of filing appeal out of time as the Appeal is against the Interlocutory judgment entered against the Defendant/Applicant of 9/12/2019 and the Ruling dismissing the application to set aside the said judgment was on 29/7/2021. Clearly both Judgment and Ruling were in 2019 and 2021 respectively. The instant appeal filed on 7/7/2022 is without leave of this Court to file the appeal out of time as it is filed outside the statutory timelines of 30 days.

### **Substantial Loss**

26. The Applicant/Appellant contends that the exparte judgment in the subject matter therein is a colossal amount of Kshs.3,182,754/- and the execution of the decree is in motion as the Auctioneers have served the Applicant with a proclamation of attachment and an Auctioneer’s invoice of Kshs. 3,995,526/-.
27. The Applicant deposed that if stay of execution is not granted, he is apprehensive that unless the Respondent is stayed by orders of this Court the Respondent will swiftly move for execution of the judgment. The Applicant is apprehensive that execution will render the Appeal nugatory. The execution will cause substantial loss. The Respondent/Decree holder is a natural person whose means is unknown and not sure the amount maybe refunded in the event of successful appeal and hence he will suffer irreparable loss.
28. In *National Industrial Credit Bank limited –vs- Aquinas Francis Wasike*, Court of Appeal Civil Application No.238 of 2005 ,the Court of Appeal held as follows: -

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them.



Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

29. The Respondent has not disclosed means that the amount if released a refund would be possible after the appeal is heard and determined and the Appellant is successful. In the absence of provision of such financial ability confirmation there would be substantial loss.

### **Furnish Security**

30. The Appellant is willing to give such security as the Court may order in due performance of the decree and in furtherance of issuance of orders of granting stay of execution. The Applicant has pleaded that he is willing to offer any security as may be ordered by court. The Applicant attached a copy of Payslip and proposed payment of Ksh 100,000/- to be paid within 30 days.

31. The principles governing exercise of the judicial discretion are; there are no limits or restriction on the judge’s discretion, the discretion is intended so to be exercised to avoid injustice. In the case of *Selestical limited -vs- Global Development* [2015] eKLR the Court stated that;

“In my view, the rules give the court unfettered discretion to issue any orders as to preserve the subject matter pending the hearing of the Appeal. There is no doubt therefore that the court has powers to order such security for the due performance of decree or order, and that the Appellant did not have to furnish such security upfront before arguing the application for stay pending appeal.”

32. This Court has considered the rival submissions on the conditions of granting stay of execution pending appeal. The record confirms that the appeal was filed out of statutory period and leave to extend the time was not sought. However, in order not to adversely affect the Appellant/Applicant’s right of appeal, the Record of Appeal will be deemed filed with leave from court to file appeal out of time.

33. With regard to furnishing security in compliance with Order 42 Rule 6 *CPR*, this Court considers the fact that the matter has been in Court for 3 years now since 2019, the Respondent has been denied fruits of the judgment, in the circumstances to ensure justice between parties, the Applicant shall pursue the appeal and stay of execution to remain in force on condition that the Applicant furnishes security to safeguard the Respondent’s interest by payment of Ksh 500,000/- to the Respondent through the respondent’s advocate on record within 90 days from delivery of this Ruling, and the balance be protected by a specific and personal bank guarantee for the period the appeal shall be heard and determined.

for furnishing of security.

### **Disposition**

1. The decretal amount is Ksh 3,995,526/- so as not to render the appeal nugatory or occasion substantial loss the court orders security of Ksh 500,000/- to be paid to the Respondent within 90 days from delivery of this Ruling through Respondents advocate on record.
2. Thereafter, stay of execution shall remain in force pending appeal.
3. The Appellant to file Record of appeal
4. Deputy Registrar Machakos High Court to obtain original Lower Court File.



5. Further Mention for Directions shall be on 7/10/2022.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 3RD AUGUST  
2022(VIRTUAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

