



Joseph & another (suing as the legal representatives of the Estate of Robert Ndemange Muite, deceased) v Eric & another (Civil Appeal 21 of 2022) [2022] KEHC 15133 (KLR) (2 August 2022) (Ruling)

Neutral citation: [2022] KEHC 15133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL 21 OF 2022
SN MUTUKU, J
AUGUST 2, 2022**

BETWEEN

MILDRED MAWIA JOSEPH 1ST APPLICANT

MUITE IRUI KYONGO 2ND APPLICANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ROBERT
NDEMANGE MUITE, DECEASED**

AND

NGUGI MBURU ERIC 1ST RESPONDENT

WAULA DANIEL SITONIK 2ND RESPONDENT

RULING

Notice of Moton

1. The Applicants brought a Notice of Motion (the Application) dated March 15, 2022 under Article 159 of the *Constitution* of Kenya 2010, sections 1A 1B and 3B of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 of the *Civil Procedure Rules, 2010*, as well as all other enabling provisions of the law seeking the following orders:
 - i. Spent.
 - ii. That pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to order stay of execution of the Judgment delivered by the B Honourable Cheloti on February 22, 2022 and any Decree arising therefrom, as against the Appellant/Applicant.



- iii. That pending the hearing and determination of this Applicant's Appeal herein, this Honourable Court be pleased to order stay of execution of the Judgment delivered by the B. Honourable Cheloti on February 22, 2022 and any Decree arising therefrom, as against the Appellant/Applicant.
- iv. That costs of this Application be provided for.
2. The grounds in support of the Application are found on the face of it and in the supporting affidavit sworn on March 16, 2022 by Regina Ileri.
3. The Applicant has stated that the lower court delivered judgment on February 22, 2022 and awarded the 2nd Respondent Kshs 4,518,382 in damages together with costs and interest; that the Applicant has preferred to appeal against that judgment; that the Applicant has an arguable appeal as shown in the memorandum of appeal and that unless stay of execution is granted, the appeal shall be rendered nugatory.
4. The Applicant has stated, further, that the Appellant stands to suffer substantial loss because the Appellant will not be able to recover the money once it is paid to the Respondent in the event the Appellant is successful in the appeal and that the balance of convenience tilts in favour of the Appellant.
5. The Application is opposed through a Replying Affidavit of Mutie Iriu Kyongo, the 2nd Respondent. The Respondents claim that the Applicant has not provided security; that the Respondents have a lawful judgment in their favour and should be allowed to enjoy the fruits of that judgment and that the Respondents are capable of refunding the money should the appeal succeed.
6. The Respondent urged that half of the decretal sum, being Kshs 2,259,416 be released to the Respondents' advocates for further transmission to the Respondents and the balance be deposited in a joint interest earning account in the names of both advocates pending hearing and determination of the Appeal.

Oral arguments

7. Mr Oloo made submissions on behalf of the Applicant. He told the court that he places reliance on Order 42 on the conditions to be met for stay to be granted. He argued that the financial position of the parties has to be taken into consideration. He submitted that the judgment is for Kshs 4,518,382 and that the ability of the Respondents to refund this money should the appeal succeed is not demonstrated; that the 2nd Respondent stated that he had 10 acres of land and that he is able to refund the money; that the Respondents brought suit as next friend and that they have failed to rebut the evidence by the Applicant that they are not in a position to refund the money should the appeal succeed. Mr Oloo cited *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR* to support his arguments.
8. It is further submitted that the Applicant's client is an insurance company guided by *Insurance (Motor Vehicles Third Party Risks) Cap 405* which legislation caps liability at 3 million. It was submitted that the judgment amount is way over the statutory limit and that this will cause irreparable loss.
9. It was submitted that judgment was delivered on February 22, 2022 and the application was filed on March 15, 2022 which is within 30 days and therefore the application was filed without unreasonable delay.
10. On security for costs, Mr Oloo submitted that court has discretion to strike a balance between judgment debtor and decree holder. He told the court that the Applicant is willing and ready to deposit security in a joint interest earning account in the names of both counsel. He asked the court to cap the



costs at 3 million. He submitted that the Applicant has satisfied the conditions for stay and urged that the application be allowed.

11. Ms Kavita for the Respondents submitted that this is a money decree and that the Applicant ought to demonstrate that they can provide security and that the discretion of this court be exercised judicially. She submitted that half of the money be deposited to the Respondents.

Determination

12. I have considered the application and the affidavit in support as well as the Replying Affidavit in opposition. I have also considered the oral submissions made in court. Stay of execution pending an appeal is provided for under Order 42 of the Civil Procedure Rules. Order 42 Rule 6 (2) provides that:

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.
13. The Applicant pleads substantial loss because the Respondents have not demonstrated that they have the capacity to refund the money paid to them should the appeal succeed. To this the 2nd Respondent claims that he is a man of means owning 10 acres of land and therefore he is in a position to refund the money. The law is that the Respondent is required to rebut the evidence by the Applicant that he is not able to refund the money.
 14. I have considered this issue. Other than the word of mouth that the Respondents are able to refund the money and that the 2nd Respondent has 10 acres of land; this court has not been provided with tangible evidence to the capability of the Respondents to refund the money.
 15. On the same issue of substantial loss, I have considered the provisions of section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risks) that liability is capped at Kshs 3 million and I agree with counsel for the Applicant that paying an amount higher than the capped amount will prejudice the Applicant.
 16. I have noted that both parties, through their counsel, are not opposed to provision for security. The only issue is the amount. This court is clothed with jurisdiction to determine the amount to be paid as security. In so determining, I am alive to the fact that the Respondents have the judgment in their favour.
 17. To strike a balance in this matter I make the following orders, while aware that the amount awarded is disputed and that liability is capped at Kshs 3 million and given that this is the subject of the appeal:
 - i. That stay of execution of the judgment of B Cheloti delivered on February 22, 2022 is hereby granted pending the hearing and determination of the Appeal herein.
 - ii. That half the amount awarded, being Kshs 2,259,191 shall be released to the advocates on record for the Respondents for onward transmission to the Respondents pending the hearing and determination of the appeal.



- iii. That the balance of the amount awarded, being Kshs 2,259,191 shall be deposited in a joint interest earning account in the names of both counsel pending the hearing and determination of the appeal.
- iv. That both remittances be done within 45 days from today, in default stay granted herein shall lapse.
- v. The Applicant shall prepare, file and serve the record of appeal within 60 days from this day.
- vi. This matter shall be mentioned on November 15, 2022 to confirm compliance with filing of the record of appeal and further directions.

18. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF AUGUST 2022.

S. N. MUTUKU

JUDGE

