



REPUBLIC OF KENYA



**Kool v Kinyanjui & another (Suing as the administrator of the estate of James Muniu (Deceased)); Wainaina (Third party) (Civil Appeal E005 of 2022) [2022] KEHC 14307 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14307 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E005 OF 2022  
F GIKONYO, J  
OCTOBER 27, 2022**

**BETWEEN**

**DANIEL KILESI KOOL ..... APPELLANT**

**AND**

**MARY NJERI KINYANJUI ..... 1<sup>ST</sup> RESPONDENT**

**ZACHARIA MUNYOROKU ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF JAMES MUNIU  
(DECEASED)**

**AND**

**DAVID WAINAINA ..... THIRD PARTY**

*(Being an appeal from the Judgement of Hon. S. Mungai (C. M)  
Delivered on 17th May 2022 in Narok CMCC No. 134B of 2020)*

**RULING**

1. Before me is the appellant's application dated June 22, 2022. The application is brought under sections 1A, 1B, and 3A, of the [Civil Procedure Act](#), order 45 rule 6(1) and (2) of The [Civil Procedure Rules 2010](#). The applicant has sought the following orders;
  - i. Spent
  - ii. That this honourable court be pleased to stay execution of the decree in Narok CMCC No 134B of 2020 delivered on May 17, 2022 pending hearing and determination of this application inter partes.



- iii. That there be stay of execution of the decree in Narok CMCC 134B of 2020 pending hearing and determination of the applicant's appeal.
  - iv. That costs of this application be provided for.
2. The application is based on the grounds that; the execution may issue any time now. The applicant has lodged an appeal from the judgment /decree in Narok CMCC No 134B of 2020 delivered on May 17, 2022. Unless stay is granted the applicant stands to suffer irreparable loss and damage. From the respondent's testimony the respondent is in no position to refund the decretal sum which is colossal. The appeal has high chances of success. The applicants are amenable to furnishing security pending appeal as may be directed by the honourable court. It would only be fair and in the interests of justice if the orders sought by the instant application are granted.
  3. The application is supported by an affidavit sworn by Edinah Masanya on June 22, 2022 reiterating the grounds set out of the face of the application
  4. On June 22, 2022, this court granted stay of execution for 14 days.
  5. The respondents did not file any response to the application herein. However, on October 11, 2022, Mr Gikenye stated that as the applicant was willing to deposit security, this court should so order preferably, deposit of the decretal sum in a joint interest earning account pending hearing of the appeal.

### **Analysis and Determination**

6. Upon consideration of the application, the supporting affidavit and the respondents' oral submissions, the issues arising for my determination in this application are;
  - i. Whether the orders of stay of execution pending appeal should issue; and
  - ii. If so, on what terms or conditions?

### **Stay of execution pending appeal**

7. Is there a sufficient reason to order stay of execution?
8. In determining this question, the court is guided by order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:

“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.
9. In [Halai v Thornton & Turpin Civil Application 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 of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.



### **Timeous application**

10. I am satisfied that there has been no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on the May 17, 2022 and the memorandum of appeal was filed on the May 23, 2022 and this application on June 22, 2022.

### **Of substantial loss**

11. As to substantial loss; is there loss of value not merely notional or nominal- that will attach upon the applicant unless stay is granted?
12. In the instant case, the applicant aver that he stands to suffer irreparable loss and damage if stay of execution is not granted. He further avers that the respondents are not in a position to refund the decretal sum if the appeal succeeds.
13. These averments were not controverted. Accordingly, I find that substantial loss would occur upon the applicant unless stay of execution is ordered.

### **Of security**

14. The appellant has stated that he is amenable to and will comply with any order as to security as may be ordered by the court.
15. Based on this undertaking, Mr Gikenye legal counsel for the respondents- was agreeable to stay of execution being granted on condition that the decretal sum is deposited in a joint interest earning account.
16. In the circumstances of this case, the proposal by Mr Gikenye is reasonable. I should also state that the practice which was incubated in the anti-money laundering regime serves useful purpose; it not only prevents dissipation of the fund, but also gives the ultimate beneficiary the benefit of interest income.

### **Conclusions and orders**

17. Taking all the above factors into account and in order not to render the appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find the following orders to be appropriate: -
  1. I allow the applicant/appellants' application dated February 2, 2022 in the following specific terms
    - a. I order a stay of execution of decree in Narok CMCC No 134B of 2022 pending the hearing and determination of this appeal on the conditions that:
      - i) The applicant/ appellant shall deposit the entire decretal sum into an interest earning account in a reputable commercial bank, to be held in the names of both firms of advocates for the parties in this appeal, within 30 days of this ruling;
      - ii) The appellant shall file and serve a record of appeal within thirty (30) days of this ruling;
    - b. Costs shall be in the cause;

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS  
27<sup>TH</sup> DAY OF OCTOBER, 2022**

**F Gikonyo M.**

**Judge**

**In the presence of:**

1. Mr Kasaso – CA
2. M/s Matiri Mburu for applicant – absent
3. Gikenye for respondent - absent

