



REPUBLIC OF KENYA



**M'Ambutu v Zacharia (Civil Appeal E471 of 2022)
[2022] KEHC 14119 (KLR) (Civ) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E471 OF 2022**

**JK SERGON, J
OCTOBER 21, 2022**

BETWEEN

MURIUNGI PIUS M'AMBUTU APPELLANT

AND

ELLY OGWENO ZACHARIA RESPONDENT

RULING

1. This ruling is predicated on the Notice of Motion dated 18th July, 2022 taken out by the appellant/ applicant and supported by the grounds set out on its body and the facts stated in the affidavit of advocate Martha Mugo. The applicant sought for an order for a stay of execution of the judgment delivered by the subordinate court in Milimani CMCC no. E967 of 2021 on 31st May, 2022 pending the hearing and determination of the appeal. The applicant also sought for an order to the effect that he be allowed to provide a bank guarantee from a reputable bank as security for the decretal sum.
2. In retort to the said Motion, the respondent swore a replying affidavit on 18th August, 2022.
3. The instant Motion was canvassed through brief oral arguments whereby the parties' respective advocates chose to rely on the relevant documents filed.
4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the supporting and replying affidavits respectively; and the reiterating oral submissions.
5. The order sought is for a stay of execution of the decree pending appeal, for which the guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules and which sets out the conditions to be satisfied for such an order to be granted.
6. The first condition is that the application must have been brought without unreasonable delay. I note that none of the parties addressed me on this particular condition.



7. Suffice it to say that going by the averments made by the parties, it is apparent that the impugned judgment was delivered on 31st May, 2022 whereas the Motion was brought less than two (2) months thereafter. In my view, the Motion has been brought within a reasonable time.
8. The second condition touches on substantial loss to be suffered by an applicant.
9. The applicant on his part states that unless an order for a stay of execution is granted, the respondent will proceed to execute the decree, thereby causing him to suffer irreparable loss.
10. Advocate Magero further conveyed the applicant's apprehension that if the decretal amount is paid to the respondent, the likelihood of recovering the amount from the respondent should the appeal succeed is slim.
11. On his part, the respondent is of the view that the order sought is premature since execution is yet to commence and that the applicant has not demonstrated by way of evidence the substantial loss he stands to suffer if the decretal sum is paid.
12. It is the ordinary course of principle for a successful party to be granted the privilege of enjoying the fruits of his or her judgment.
13. That notwithstanding, the question on who has the burden of proof on the issue of refund of the decretal sum was discussed by the Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR thus:

“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...”
14. In the absence of anything to ascertain the respondent's financial capacity to refund the decretal sum, I am satisfied that the applicant has reasonably demonstrated that he stands to suffer substantial loss if the order for a stay of execution is not granted.
15. Under the final condition which is the provision of security for the due performance of the decree or order, the applicant states that he is ready and willing to provide security by way of a bank guarantee. In retort, the respondent proposes that half the decretal sum be paid to him while the remaining half be deposited in a joint interest earning account.
16. In making an order for the provision of security, this court must balance the interest of the parties. In the present instance, it is noteworthy that the respondent has not shown any pressing need that would require payment of part of the decretal amount to him at this stage. It is also noteworthy that the respondent is not amenable to the provision of a bank guarantee and the decretal sum in question does not appear to constitute a colossal amount.
17. In the end therefore, the Notice of Motion dated 18th July, 2022 is found to be meritorious and hence it is allowed on the following terms:
 - i. There shall be an order for stay of execution of the judgment and decree issued on 31st May, 2022 in Milimani CMCC No. E967 of 2021 pending the hearing and determination of the intended appeal on the condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocates or firms of advocates within 45 days from the date of this ruling in default of which the stay order shall lapse.
 - ii. Costs of the Motion shall abide the outcome of the appeal.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
21ST DAY OF OCTOBER, 2022.**

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant/Applicant

..... for the Respondent

