



**Chezlut Freight Limited v Nthuku & another (Suing as the Administrators  
to the Estate of Patrick Mutie Misi) (Civil Appeal E386 of 2020)  
[2022] KEHC 15713 (KLR) (Civ) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15713 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL E386 OF 2020  
JN MULWA, J  
NOVEMBER 28, 2022**

**BETWEEN**

**CHEZLUT FREIGHT LIMITED ..... APPELLANT**

**AND**

**CHRISTINE WAVINYA NTHUKU & MUTHOKA MISI (SUING AS  
THE ADMINISTRATORS TO THE ESTATE OF PATRICK MUTIE  
MISI) ..... RESPONDENT**

**RULING**

1. The application for consideration is the appellant’s notice of motion application dated November 22, 2021 seeking a stay of execution of the judgment and decree delivered on December 4, 2020 in Milimani CMCC No E11427 of 2018 pending hearing and determination of the appeal filed herein.
2. The application is supported by the affidavit of the appellant’s manager Yuvenalis Kipkoech Langat.
3. It is opposed *vide* a joint replying affidavit sworn on January 14, 2022 by the respondents herein.
4. The court has considered the parties’ respective affidavits as well as the written submissions put in support and in opposition of the application. The only issue is whether the appellant has satisfied the conditions for the grant of stay of execution pending appeal.
5. The conditions necessary for the grant of stay of execution pending appeal are laid out in order 42 rule 6(1) & (2) of the [Civil Procedure Rules](#) which provides that:
  - “ 6. No appeal or second appeal shall operate as a stay of execution or proceedings 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 sub-rule (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."

6. From the said provisions, it is clear that in order to succeed in an application for stay of execution, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the application has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant.
7. As regards substantial loss, the appellant contended that should execution proceed and the decretal sum of Kshs 2,326,267.80 is paid to the respondents, there is no guarantee that they will refund the decretal sum in the event that the appeal succeeds since their means are unknown. It is well settled that where an appellant expresses such reasonable fears, the evidential burden of proof shifts to the respondent to controvert the same by way of affidavit evidence as that is a matter which is peculiarly within his or her knowledge, see *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR.
8. In the instant case, the respondents have not controverted this assertion by demonstrating their ability to refund the decretal sum in case the appeal is successful. I am therefore satisfied that the appellant has demonstrated that it stands to suffer substantial loss if stay of execution is not granted.
9. On the question of whether the application has been made without unreasonable delay, I note that the appellant had earlier made a similar application for stay but the same was struck out in a ruling delivered by Meoli J on September 30, 2021. The appellant then brought the instant application about six weeks later. in the circumstances, I find that the appellant satisfied this condition.
10. On security, the appellant has indicated that it is ready and willing to comply with any condition that this court may be impose in that regard but did not suggest the form of security. The respondent on the other hand has urged that they be paid two thirds of the decretal sum, being the sum of Kshs 1,725,593/- and the balance be deposited in a fixed deposit account in the joint names of the parties advocates. A perusal of the memorandum of appeal shows that the appellant is appealing against both liability and the quantum of damages assessed by the lower court. The deceased was a pedestrian who was allegedly knocked down while walking on the road. In the premises the respondents proposal that they be paid two thirds of decretal sum at this point is not acceptable as liability cannot be predicted at this point. The appellant must however provide security for the performance of any decree that may eventually be found to be binding on it.



11. For the foregoing, the appellant's notice of motion dated November 22, 2021 is allowed in the following terms:

1. There shall be a stay of execution of the judgment delivered on December 4, 2020 in Milimani CMCC No E11427 of 2018 pending appeal on condition that the appellant deposits the decretal sum of Kshs 2,326,267.80 into a joint interest earning account in the names of the advocates for the parties within 45 days from the date of this ruling failing which the stay order shall automatically lapse.
2. The costs of the application shall abide in the appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER 2022.**

**J. N. MULWA**

**JUDGE.**

