



**Muriungi & another v Mwirichia (Suing as the Administrator of the estate of Duncan Mwirigi (Deceased)) (Civil Appeal E002 of 2022) [2022] KEHC 15859 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15859 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E002 OF 2022  
EM MURIITHI, J  
NOVEMBER 28, 2022**

**BETWEEN**

**JOHN MURIUNGI ..... 1<sup>ST</sup> APPELLANT**

**GEORGE MUNGATIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ISAIAH MWIRICHIA ..... RESPONDENT**

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF DUNCAN MWIRIGI  
(DECEASED)**

**RULING**

1. Before this court is a notice of motion under certificate of urgency dated January 25, 2022 by the appellants, brought under section 1A & 1B, 3A of the *Civil Procedure Act*, order 21 rule 1b, order 22 rule 22, order 42 rule 6, order 51 rule 1 of the *Civil Procedure Rules*, article 159 (2) (a) & (d) of the *Constitution* and all other enabling provisions of the law, seeking:
  1. Spent
  2. Spent
  3. That this honorable court be pleased to grant a stay of execution of the judgment and/or decree issued by Honorable Magistrate Ndegwa EA (Ms) Resident Magistrate dated and delivered on December 8, 2021 in Githongo SRMCC No 5 of 2020 pending the hearing and determination of this appeal in Meru HCCA No E002 of 2022.
  4. That this honorable court allow the applicant to furnish the court with security in the form of a bank guarantee from the DTB Bank.
  5. Spent



6. That the costs of this application abide the outcome of the appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of John Muriungi, the 1<sup>st</sup> appellant herein, sworn on even date. He avers that vide the judgment sought to be appealed against, the respondent was awarded Kshs 4,374,000 as general damages for loss of dependency, Kshs 150,000 for loss of expectation of life, Kshs 20,000 for pain and suffering and special damages of Ksh 70,500 bringing the total to Kshs 4,614,500 with costs and interest. He verily believes that their appeal has a high chance of success as the respondent did not either prove liability against the appellants or deserve the quantum awarded. He avers that the respondent may levy execution against them which will render the appeal nugatory and cause them irreparable loss and damage. He avers that if the decretal sum is paid to the respondent, who has not disclosed proof of his financial standing, he will be in no position to refund the same if the appeal is successful. He avers that his insurer is ready, willing and able to furnish the court with a bank guarantee from DTB Bank as security to the court. He is certain that unless stay of execution is granted, they are likely to suffer injustice and irreparable loss. He avers that the application is made in good faith and the same will not occasion any prejudice to the respondent. He urges the court to allow the application in the interest of justice.
3. The respondent has opposed the application vide his replying affidavit sworn March 7, 2022. He accuses the appellants of misleading the court as the figures awarded in the impugned judgment total to a sum of Kshs 3,036,000 rather than Kshs 4,615,500. According to him, the application is speculative, not supported by any tangible evidence and the memorandum of appeal reflects absolutely different figures from what was awarded in the impugned judgment. He accuses the appellants of failing to demonstrate his financial inability, and squandering their opportunity to present their defence in opposition to his case. He avers that the bank guarantee from DTB Bank which the appellants seek to present as security is not only incompetent but also spent and inapplicable. He refutes the appellants' allegation that their submissions were not considered by the trial court, yet they filed none. He contends that since the application has been made in bad faith, is malicious and an abuse of the court process, it ought to be dismissed with costs. He avers that the deceased estate will suffer irreparable loss if the application is allowed and he is denied the fruits of his judgment.
4. On May 31, 2022, the court directed each party to file their submissions, but it appears only the respondent filed on June 29, 2022.
5. He urges that no security has been provided, as the purported bank guarantee that is presented in form of an agreement is already spent, having been executed on November 16, 2020. Although he does not see any chances of the intended appeal succeeding, he is open to a conditional stay being granted upon payment of at least half of the decretal sum (Kshs 1,518,000) to him and the balance be deposited in an interest earning account in the joint names of the counsel for the parties herein. He urges the court not to legitimize the appellants' inaction and lethargy by allowing their application, and relies on [\*Motex Knitwear Limited v Gopitex Knitwear Mills Limited\* \[2009\] eKLR](#).

### **Analysis and Determination**

6. After critical consideration of the application, the replying affidavit and the submissions on record, the issue for determination is whether stay of execution should issue.
7. Order 42 rule 6 (2) of the [\*Civil Procedure Rules\*](#), provides as follows:

“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.”
8. This court respectfully agrees with the Court of Appeal in *Butt v Rent Restriction Tribunal* [1979] eKLR that:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459.”
9. The application herein was filed on January 25, 2022 without inordinate delay as the judgment sought to be appealed against was delivered on December 8, 2021.
10. The court agrees with the respondent that the decretal sum is indeed Kshs 3,036,000 and not Kshs 4,615,500 referred to by the appellants. The court notes the contents of the document dubbed establishment of bank guarantee facility of Kshs 30,000,000 (Kenya shillings thirty million only) and specifically at clause 3 on validity where it is expressed that, “The tenor of any bank guarantees, bonds tender/performance issued under the limit shall not exceed one year from the date of issuance or until such time that the said guarantee/s is cancelled or becomes void, whichever comes first and shall be renewed thereafter at our discretion.” It is evident that the said bank guarantee, having been made on November 6, 2020 has since expired.
11. There can be no doubt that the appellants’ undisputed right to appeal must be carefully balanced with the corresponding right of the respondent to enjoy the fruits of his judgment. I respectfully agree with *Machira t/a Machira & Co Advocates v East African Standard* (2002) eKLR where Kuloba J held that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal.”
12. Whilst the appellants contend that they will suffer irreparably if the decretal sum is paid to the respondent, whose financial ability is unknown, in the event the intended appeal succeeds, the respondent insists that he is entitled to enjoy the fruits of his judgment. This court wishes to state that, the mere fact that a decree holder is not a man of means does not necessarily justify keeping him away from his money, and poverty is not a ground for denial of a person’s right to enjoy the fruits of his success. As observed by Odunga, J (as he then was) in *Patrick Mutua & another v Mutua Nyamai* [2018] eKLR it “was held in *Stephen Wanjohi vs Central Glass Industries Ltd Nairobi HCCC No 6726 of 1991*, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.” The



court cannot overlook the fact that the respondent has not shown his financial ability to refund the decretal sum if the intended appeal were to succeed. The evidential burden on this, as a fact within the special knowledge of the respondent in terms of section 112 of the *Evidence Act*, should be discharged by the respondent upon prima facie evidence or reasonable allegation of his inability. This court, therefore, finds that the appellants will suffer substantially if stay of execution is not granted, and the full decretal sum is paid to the respondent in the meantime. The court, however, accepts that the successful respondent is entitled to enjoyment of the fruits of his judgment and, in balancing these interests, shall order for the payment for his immediate needs of a small portion of the decretal sum in the sum of Kshs 500,000/-, so as to minimize any risk of loss on successful appeal.

### **Order**

13. Accordingly, for the reasons set out above, the court allows the application dated January 25, 2022 in the following terms:

1. An order of stay of execution is granted on condition that the appellants pay the respondent Kshs 500,000/= and deposit the balance of the decretal sum into an escrow account in the joint names of the advocates for the parties within 30 days from today.
2. The record of appeal shall be filed within sixty (60) days from the date hereof.
3. In the event of default of any of the aforementioned conditions, the stay hereby granted shall stand as discharged, and the respondent shall be at liberty to execute.

14 Order accordingly.

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

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances**

M/s Kimondo Gachoka & Co. Advocates for the Appellant/Applicant.

M/s Basilio Gitonga, Muriithi & CO. Advocates for the Respondent.

