



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Malele & another v Kanyere (Civil Appeal 54 of 2018)
[2022] KEHC 15583 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 54 OF 2018
HK CHEMITEI, J
NOVEMBER 24, 2022**

BETWEEN

ALEX KIPRUTO MALELE 1ST APPLICANT

CHERANGANI HILLS LTD 2ND APPLICANT

AND

EVERLYNE KAVUKA KANYERE RESPONDENT

RULING

1. The applicants Notice of Motion dated April 11, 2022 prays for orders that;
 - (a) The firm of Sheth and Wathigo advocates be allowed to come on record in place of m/s Wangari Muchemi & co advocates.
 - (b) There be stay of execution of the judgement dated 17.4.2018 delivered in Molo CMCCC No.76 of 2017 and Nakuru HCCA No.54 OF 2018 pending the hearing and determination of this application and the appeal in the Court of Appeal.
 - (c) There be stay of release of the sum of kshs 3000,000 deposited by the applicant in court as well as the title deed for land parcel number Eldoret Municipality Block 2/31/1 pending the hearing and the determination of the appeal to the Court of Appeal.
2. The application is supported by the grounds thereof and the affidavit of Vipul Dodhia sworn on the even date.
3. The issues herein are clear and straight forward. The applicants were dissatisfied with the judgement of the lower court and they file their appeal to this court. On February 3, 2022 this court delivered its judgement which dismissed the appeal and agreed with the lower court's decision.



4. The applicants aggrieved by the said decision have filed Notice of Appeal to the Court of Appeal hence this application. Apparently, the parties had deposited the decretal amount and the title deed as a condition to the appeal to this court.
5. The respondent had since applied that the said amount totalling kshs3,000,000 be released to her so as to support her children's school fees and other necessities noting that she is now a widow and her deceased husband was the sole bread winner.
6. As a matter of fact, in her replying affidavit dated 16th May 2022, she has hammered home this issue and further stated that it has been the habit of the applicant to change counsels and she was not amused that this was the third counsel they were appointing.
7. She further prayed that if the court is inclined to allow the application then half of the decretal amount ought to be released to her.
8. The court has perused the application, the supporting and opposing affidavits and the submissions by the parties which essentially are reiterating the issues raised in the said rival affidavits.
9. The rights of a party to appeal are unfettered but must come under the provisions of Order 42 rule 6 of the *Civil Procedure Rules*. In summary the court must be satisfied that substantial loss shall be suffered if stay is not granted, the application has been made without undue delay, and the court may order security pending the appeal.
10. In this matter I find that the application has been made without much delay. Secondly, there is already a security in place and the only issue is whether this court should release the same to the respondent.
11. More importantly is whether any party may suffer loss should stay not granted. It is apparent that the parties have been litigating for over 5 years. The security, namely the cash and the title deed have been lying in this court all through. What then is the net effect if the same is released or not released to the respondent.
12. The respondent obviously has been patient for that period. Her replying affidavit clearly demonstrates the difficulty she has been going through since her husband died. I think the court must balance between the interest of both parties. In this case there ought to be some cushion to the appellants while pursuing their appeal at the same time the respondent ought to enjoy the fruits of the judgement.
13. While at this it is worthy to note that the respondent's application dated March 22, 2022 seeking to have the security released to her is as good as answered by this ruling. I do not think it shall be necessary to deal with it for the reasons already stated.
14. Taking the totality of the factors herein, and so as not to render the intended appeal nugatory should it succeed the application herein is allowed as hereunder;
 - (a) The firm of Sheth & Wathigo advocates are hereby allowed to come on record for and on behalf of the applicants.
 - (b) Out of the sum of kshs. 3,000,000 deposited in court as security pending appeal the sum of Ksh 2,000,000 be and is hereby released to the respondent's advocates on record namely m/s Omonywa Mamwacha & co. forthwith.
 - (c) The balance of kshs, 1,000,000 be retained by the court pending the hearing and determination of the intended appeal to the Court of Appeal.



- (d) Title deed for land parcel number Eldoret Municipality Block 2/3/1 held by this court be and is hereby released to the applicants forthwith.
- (d) costs of the application shall be in the cause.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 24TH DAY OF NOVEMBER 2022.

H. K. CHEMITEL.

JUDGE

