



**Mulima & 3 others v Kipkorir & another (Civil Appeal 17 of 2023)  
[2023] KEELC 20063 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20063 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
CIVIL APPEAL 17 OF 2023  
A OMBWAYO, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**CHARLES ANGUBASU MULIMA ..... 1<sup>ST</sup> APPELLANT  
NAOMI WAMBUI CHEGE ..... 2<sup>ND</sup> APPELLANT  
DAVID OSINDE SITALI ..... 3<sup>RD</sup> APPELLANT  
ELIKA MBONE JAIRO ..... 4<sup>TH</sup> APPELLANT**

**AND**

**WILLIAM KIPKORIR ..... 1<sup>ST</sup> RESPONDENT  
MARGARET NJERI NGIGI (SUING AS THE PERSONAL REPRESENTATIVE  
OF THE LATE CHERUIYOT ARAP BII ALIAS CHERUIYOT A. BII -  
DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**BRIEF FACTS**

1. The Applicant filed the instant application dated July 6, 2023 seeking the following orders:
  1. Spent.
  2. Spent.
  3. That the honourable court be pleased to issue an order of stay of execution of the judgment, decree and order herein dated May 19, 2023 pending the hearing and determination of Nakuru ELC Appeal No. 17 of 2023.
  4. That cost of this Application be provided for.



2. The Application was based on grounds set out and supported by the Affidavit of Charles A. Mulima sworn on July 6, 2023.
3. It was stated that the respondents filed the present suit and on 1May 9, 2023 the honourable court issued judgment, decree and order against the appellants. That being aggrieved by the said judgment, they have since appealed against it.
4. That unless this court orders a stay of execution against the said judgment, the appellants stand to suffer substantial loss as they would be evicted from their homes.
5. It was further stated that the appellants did file an application for stay of execution pending hearing and determination of the appeal in the lower court and that the same was allowed with conditions that they are unable to fulfill. That the application for stay was allowed on condition that they deposit Kshs. 300,000 as security for the appeal.
6. The appellants contend that they are not in a financial position to raise the said sum.
7. In conclusion, the appellants request this court to waive the deposit of security in the circumstance.

### **Response**

8. The respondents herein filed their replying affidavit dated July 21, 2023 in opposition to the appellants' notice of motion application dated July 6, 2023. They averred that the application is incompetent as there is already a valid order of stay. They further averred that the appellants had filed a similar application in Nakuru CMELC No. 16 of 2019 and an interim stay of execution of the judgment granted in their favour despite being an existing stay of 30 days. They contend that the Appellants if dissatisfied with the orders and the ruling of the trial court, they ought to pursue their appeal.
9. The respondent seeks that the application be dismissed with costs.

### **Submissions**

10. Parties did not file their respective submissions to the application.

### **Analysis and Determination**

11. This court has looked perused the application and the Replying Affidavit filed by the parties and is of the view that the main issue for determination is whether the application is merited.
12. It is not in dispute that there is a judgment in favour of the respondents'. It is also not in dispute that stay orders pending appeal had been granted to the appellants on July 5, 2023 by the lower court with a condition that they deposit a sum of Kshs. 300,000 as security for due performance of the decree. The instant application seeks for similar orders and this court finds that the same as an abuse of the court process. Order 42 Rule 6 (2) (b) of the *Civil Procedure Rules* clearly provides that no order for stay of execution shall be granted unless such security as the court orders for due performance is given by the Appellant.
13. I have carefully perused the application dated May 30, 2023 filed by the Appellants in the lower court and from their Replying Affidavit paragraph 7, they clearly stated that they were ready to deposit reasonable security for the costs of the appeal. The Respondents in this case have a judgment in their favor against the Appellants. If the court was to stop the Respondents from enjoying fruits of their successful litigation then it was important that the Appellants give good and proper security which for this reason the court in its wisdom found it fit to order the Appellant to deposit Ksh 300,000 as security.



It is therefore unfathomable and quite absurd that the Appellants now come before this court with a similar application stating that they are not in a financial position to pay the security. Unfortunately, the Appellants cannot “have their cake and eat it”. They clearly sought for stay of execution pending appeal and they were granted the same with the condition of depositing Kshs. 300,000 as security. It is this court’s view that by them alleging that they are not in a financial position to pay the said amount is rather an afterthought.

14. This court finds that Ksh 300,000 ordered by the court to be deposited as security is a reasonable amount in the circumstances. If the Appellants cannot afford the said sum then they ought not to even have appealed in the first instance. In the upshot the Appellants’ application dated July 6, 2023 lacks merit and the same is dismissed with costs to the Respondents.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND, DAY OF SEPTEMBER 2023.**

**A O OMBWAYO**

**JUDGE**

