



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mputhia v M'Miriti (Civil Appeal E088 of 2024)  
[2025] KEHC 756 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 756 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E088 OF 2024  
HM NYAGA, J  
JANUARY 23, 2025**

**BETWEEN**

**SALOME KAGWIRIA MPUThIA ..... APPELLANT**

**AND**

**ANDREW MURIUNGI M'MIRITI ..... RESPONDENT**

**RULING**

1. The application coming for determination is the Notice of motion dated 2<sup>nd</sup> July 2024, which seeks the following orders:-
  - a. Spent
  - b. Spent
  - c. That the Honourable Court be pleased to issue an order for stay of execution of judgment delivered on 29<sup>th</sup> November 2023 in Nkubu PMCC No. E079 of 2022; decree and all consequential orders pending the hearing and determination of this appeal.
  - d. That the Honourable Court be pleased to issue any other relief as shall meet the ends of justice.
  - e. That the costs of this application be provided for.
2. The Application is supported by the grounds set out on its face and the affidavit of the Applicant
3. In a nutshell, the Applicant states that judgement was delivered in Nkubu SPM's court case No. E079 of 2022 on 29<sup>th</sup> November 2023, in which the court found the applicant in breach of a sale agreement for land dated 2<sup>nd</sup> March 2022 and awarded the respondent liquidated damages of Ksh 2,400,000/-. That the Applicant filed an application for review dated 8<sup>th</sup> December 2023. Upon obtaining new and key evidence showing that the parcel of land she had purchased from the respondent fell inside an



earlier portion sold to one Paul Marete, which rendered the agreement between her and the respondent void.

4. The Applicant further avers that vide a ruling delivered on 19<sup>th</sup> June 2023 (sic), the trial court dismissed the application for review with costs. That aggrieved by the said ruling, the applicant has preferred the appeal herein.
5. The Applicant further avers that as an innocent purchaser for value, she shall suffer prejudice if the orders sought are not granted, as the respondent has threatened to commence execution. That this application has been brought timely and without inordinate delay. That the Respondent shall not suffer any prejudice if the orders are granted.
6. The Respondent opposed application vide grounds of opposition dated 8<sup>th</sup> July 2024.
7. In summary, the Respondent argues that the application is defective and dead on arrival. That the application is an abuse of the court process and is contradictory and self-defeating. That it is merely academic and a falsehood meant to mislead the court to deny the respondent the fruits of his judgement. That it is uncalled for and fails to meet the threshold set out under order 42 Rule 6 of the Civil Procedure Rules.
8. Parties appeared in court for directions and they agreed to canvass the application by way of written submissions.

#### **Applicant's submissions.**

9. The applicant submitted she has met the requirements for the grant of the orders sought. She argues that vide her affidavit she has shown that the Respondent is intent of executing the decree of the lower court, hence render the appeal nugatory. That the Respondent has no means of refunding the decretal sum if the appeal succeeds. That the application has been made without delay on 2<sup>nd</sup> July 2024, just days after delivery of the ruling.
10. On security, applicant has submitted that she is willing to tender security as maybe imposed by the court. To buttress her case, the Applicant cited the cases of :-
  - a. Focyn Motor Cycle Co. Ltd vs Ann Wambui Wangui & another [2018]eKLR
  - b. Stanley Karanja Wainaina and another vs Riden Anyangu Mutubwa HCCA 427/2015 (Nairobi)
  - c. National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Anor (NR) [CA 238/2005](#).

#### **Respondent's submissions**

11. The respondent submits that the orders sought can only stem from the pending appeal itself. That the Applicant has not appealed against the Judgement herein but against the Ruling which dismissed her application for review; yet she has sought stay pending appeal against the judgment of the lower court.
12. It is argued that it would be absurd to grant a stay when there is no appeal against the Judgment itself and there is no application for stay pending an appeal against the ruling delivered on 19<sup>th</sup> June 2024. That the application is thus inherently defective and misplaced.

#### **Analysis and determination**

13. The issues for determination, in my view, are the following:-



- a. Whether the application is inherently defective as submitted by the respondent.
  - b. If the answer to (a) above is in the negative, whether the applicant has laid sufficient grounds to warrant a grant of the orders sought.
14. The applicant has sought an order of stay of execution of the Judgement in lower court pending the hearing and determination of the appeal herein. The appeal herein is against the ruling that dismissed the application to review the said judgment
15. When the Judgement was delivered by the lower court, the Applicant had two options, either to appeal and if there were grounds laid out, to seek a review. Section 80 of the [Civil Procedure Act](#) is quite clear on this. It provides as follows:-
- Review
- Any person who considers himself aggrieved—
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
16. Further order 45 Rule 1 of the Civil Procedure rules is to the effect that:-
- (1) Any person considering himself aggrieved—
    - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
    - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
  - (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
17. It follows that the Applicant was entitled to have approached the court for review, instead of appealing against the judgment. However the applicant could not pursue both appeal and review on the same judgment. This position was affirmed in the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR where it was held that:

“In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order.



18. Being an order dismissing the application, the Applicant had nothing to stay in that application since the order was negative. Therefore, the applicant was right to seek a stay of the 'positive' order which was contained in the judgment.
19. An order allowing or dismissing an application for review is appealable by right as provided for under order 43 Rule 1 which states as follows
  1. An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—
 

.....

(x) Order 45, rule 3 (application for review);
20. Since there is a right to appeal against an order made on application for review, then the applicant is right seek a stay of the order which she had sought reviewed. If the court agrees with her appeal, then that judgment will be reviewed.
21. The next question is whether the applicant has met the threshold set out under order 42 Rules 6 of the Civil Procedure Rules (CPR). The said Rule states as follows:-
  - “ 1. 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 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 of stay 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 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”
22. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
  - a. Substantial loss may result to him/her unless the order is made;
  - b. That the application has been made without unreasonable delay; and
  - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
23. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] eKLR where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -



- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
24. On the first issue, I have noted that the averment that the respondent intends to execute the judgment has not been rebutted. The Applicant was purchasing land, and paid a considerable amount of money for it. The Respondent sued that Applicant for breach of contract and the court agreed with him, awarding him liquidated damages of Ksh 2,400,000/-
- As matters stand, the Respondent still has his land and the funds received from the Applicant.
- As to what amounts to substantial loss, this has been the subject of consideration by courts. In *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR, the court stated;
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.... The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”
25. It is my view that it is the Applicant who stands to suffer substantial loss if execution proceeds. There is really no prejudice to the respondent, who can be compensated by costs and interest if the appeal is unsuccessful.
26. I have looked at the memorandum of appeal vis-à-vis the ruling and the judgment of the lower court. The Applicant's argument is that the respondent had already sold the land which contained the portion that she was to purchase. That the discovery of the sale agreement between the Respondent and the other party was a new discovery that would have warranted a review of the judgment. The question is whether the applicant has an arguable appeal.
27. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same.



28. An arguable appeal is not that which must succeed. In *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR the Court described an arguable appeal in the following terms:

“An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.

In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

29. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are arguable, and not frivolous.

30. On the question of delay, I note that the Ruling was delivered on 19<sup>th</sup> June 2024. The Appeal was filed on 2<sup>nd</sup> July 2024, just 13 days later. I find that there was no delay in filing the appeal and the application.

31. On Security the applicant has stated that she is willing to abide by conditions that the court may impose. That in my view is sufficient to meet the threshold under order 42 Rule 6 of the CPR.

32. To succeed, an applicant in the circumstances of the applicant herein must satisfy all the three conditions for grant of stay. The court in *Trust Bank Limited vs Ajay Shah & 3 Others*, [2012] eKLR at page 23 stated that: -

“The conditions set out in Order 42 Rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 24<sup>th</sup> April, 2012 it without merit.”

33. I am satisfied that the applicant has satisfied all the three requirements for the grant of a stay of execution.

34. After considering all the factors, I grant the following orders:-

- a. There shall be a stay of execution of the decree of the Lower court pending hearing and determination of the appeal.
- b. The Applicant is to file her record of appeal and serve it within 60 days from the date of these ruling.
- c. The Lower court record to be availed forthwith.
- d. Costs of the application shall be in the cause.

**DATED, SIGNED & DELIVERED AT MERU THIS 23<sup>RD</sup> DAY OF JANUARY, 2025.**

**H.M. NYAGA**

**JUDGE**

