



Kaimuri v Ncheruri (Suing as the Legal Representatives of The Estate of Desideal Kathunkumi M'muna - Deceased) (Civil Appeal E120 of 2024) [2025] KEHC 2485 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2485 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E120 OF 2024
HM NYAGA, J
MARCH 6, 2025**

BETWEEN

HARRIET KAIMURI APPLICANT

AND

ANN NCHERURI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF DESIDEAL KATHUNKUMI M'MUNA - DECEASED) RESPONDENT

RULING

1. The matter for determination is the notice of motion dated 13th September 2024 in which the Appellant/Applicant seeks the following orders: -
 - a. The Instant Application be Certified Urgent and same be heard Ex-parte in the first instance.
 - b. Pending the hearing and determination of this Application, the Honourable Court be pleased to grant an interim order of stay of Execution of the judgement and Decree rendered and/or delivered by the subordinate court on the 26th day of July, 2024 vide Githongo CMCC No. E001 of 2023 including warrants of sale and attachments together with all consequential orders arising there from and/or attendant thereto.
 - c. The Honourable Court be pleased to grant an order of stay of Execution of the judgment and Decree rendered and/or delivered by the subordinate court on the 26th day of July, 2024 vide Githongo CMCC No. E001 of 2023, including the warrants of sale and attachments together with all consequential orders arising therefrom and/or attendant thereto, pending the hearing and determination of the instant appeal.



- d. That as a condition for stay of execution pending the hearing and determination of the instant Appeal, the Applicants/Appellants be ordered to provide/issue security for the entire Decretal sum in the form of a Bank Guarantee to be issued by Family Bank Limited.
 - e. Costs of this Application do abide the Appeal.
 - f. Such other and/or further orders as this Honorable court may deem just and expedient be granted.
2. The application is propped by the grounds set out on its face and is supported by the affidavit of the applicant sworn on even data.
 3. In a nutshell, the Applicant avers that judgment in the lower court was entered on 26th July 2024 in favor of the Respondents against her for a total of Ksh 2,980,300/- together with cash and interest. That she is aggrieved by the said judgement. She has preferred an appeal herein. That the decretal sum is for a substantial amount and if paid to the Respondents and the Appeal is successful, the Applicant will not be able to recover the same, hence render the appeal nugatory.
 4. It is further averred that the appeal has a high chance of success. That the applicant is ready to provide security in the form of a Bank guarantee issued by Family Bank Limited which is a reputable bank in Kenya. That the application has been brought without undue delay.
 5. The Applicant implores the court to afford it the opportunity to pursue the appeal herein. No response was filed but when the parties appeared in court on 14/10/2025, counsel for the Respondent pointed out that this court had already issued direction that the decretal sum be deposited in 30 days and for which did not raise.
 6. Parties were directed to file submissions but none had done so at the time of writing this ruling.
 7. The only issue for determination is whether the applicants have met the requirements to warrant the orders sought.
 8. The Applicant has come under order 42 Rule 6 of the Civil Procedure Rules. The Rule provides 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”
9. 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.
10. These principles were enunciated in *Butt v 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.
11. I have looked at the judgment of the lower court and the memorandum of appeal filed. The appeal is substantially on quantum, which may have been the reason that the court granted the orders it did on 24th September 2024.
12. As has been stated by the Respondent, the Applicant was given timelines within which she was to pay the decretal sum. That time has passed. There is no application to extend time for such compliance.
13. A cursory look at the orders of my brother, Justice L. Kassan were to the effect that ...

“That prayers 2 and 4 are granted on condition that the decretal sum is deposited within 30 days from today.”
14. The said orders were exhaustive in that prayer 4 granted a stay pending hearing and determination of this appeal. As such there is nothing also left to determine.
15. What this application is seeking is to regurgitate an issue already dealt with by Justice Kassan, albeit at an ex parte stage. This court is barred from doing so by the doctrine of res-judicata which is provided for under section 6 of *Civil Procedure Act*.



16. Given the circumstances of the case I find that this application is spent and there is nothing else to litigate upon.
17. Having not complied with the orders of the court, the stay orders are deemed to have lapsed on expiry of the 30 days.
18. I find that this application has been overtaken by events and there is nothing left to determine, save for costs.
19. Costs shall abide by the outcome of the appeal.

SIGNED, DATED AND DELIVERED AT MERU THIS 6TH DAY OF MARCH 2025.

H.M. NYAGA

JUDGE

