



REPUBLIC OF KENYA



**Kabiru & another v Mwaura (Civil Appeal E041 of 2022)  
[2024] KEHC 11 (KLR) (11 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 11 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E041 OF 2022  
GMA DULU, J  
JANUARY 11, 2024**

**BETWEEN**

**JOHNSTONE GITONGA KABIRU ..... 1<sup>ST</sup> APPELLANT**

**JOHN NDERITU GICHUKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GEOFFREY MBUGUA MWAURA ..... RESPONDENT**

**RULING**

1. Before me is an application dated 15<sup>th</sup> August 2022 filed by the appellants/applicants through counsel Manthi Masika & Company Advocates under Section 1A and 1B of the *Civil Procedure Act* (Cap.21), and Order 50 Rule 6 & 7, Order 42 Rule 6 & 7, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*.
2. The application seeks the following orders:-
  1. (Spent).
  2. (Spent).
  3. That the court do make an order of stay of execution of the Ruling delivered in Kilungu PMCC No. 059 of 2022 on 20<sup>th</sup> July 2022 and stay of all proceedings relating to Kilungu PMCC No. 046 of 2022 pending hearing and determination of the appeal.
  4. That the costs of this application be bound by the outcome of the intended appeal.
3. The application has grounds on the face of the Notice of Motion that the Magistrate on 20<sup>th</sup> July 2022 dismissed an application for setting aside the ex-parte judgment and substitution of the plaintiff/respondent who is since deceased with the legal administrator of his estate, that the applicant has appealed against that ruling, that the case in the Magistrate's court was coming for pre-trials on 30<sup>th</sup>



- August 2022, that the respondents will not suffer any irreparable harm or prejudice if the application is allowed.
4. The application was filed with a supporting affidavit sworn by Mercy Muthoni Kaloki Advocate for the applicant on 15<sup>th</sup> August 2022, which amplifies the grounds of the application.
  5. The application is opposed through a replying affidavit sworn on 15<sup>th</sup> September 2022 by John Mwaura Njambi in which it was deponed that the application is not premised on breach of principles of natural justice, that the applicant was served with process but chose to hide and hoped to avoid the resultant decree, and that the basis of the applicant's application in the Magistrate's court was that the applicant's insurer was duly served with papers and instructed counsel on 5<sup>th</sup> July 2021.
  6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Manthi Masika & Company Advocates for the applicants, as well as the submissions filed by Amutallah Robert & Company Advocates for the respondents.
  7. It is not disputed that the application of the applicants dated 4<sup>th</sup> April 2022 in Kilungu PMCC No. 46 of 2022 a declaratory suit to set aside a judgment in a primary suit, was dismissed by the Magistrate's court at Kilungu. It is also not in dispute that an appeal has been lodged against the above decision of the Kilungu Magistrate's court.
  8. The present application is an application for stay of execution of the ruling of the Magistrate's court as well as stay of further proceedings in the Magistrate's court pending determination of this pending appeal.
  9. The request for stay of execution of the ruling is governed by the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#). It is also a common occurrence for appellants to seek orders for stay of execution or judgment pending appeal.
  10. In the present case, in my view the applicant have satisfied the three requirements for grant of stay of execution of orders, as the application was filed without unreasonable delay, the applicant stands to suffer substantial prejudice if stay sought is not granted as he was not heard at the trial through evidence. As for providing security, I do not think that the circumstances of this case call for provision of security by the applicant.
  11. With regard to the request for stay of proceedings, the requirements are different or slightly different. The requirements were correctly stated in the case of [Watu Credit v Geoffrey Mokaya Aboki & Karen Chepkurui](#) (2022) eKLR.
  12. As was stated in the case of *Global Tours & Travels Ltd – Nairobi HC W/U Cause No. 43 of 2000*, such application for stay of proceedings is a request to court to exercise its judicial discretion and the sole question is whether it is in the interest of justice to order a stay of proceedings, and if it is, on what terms stay should be granted.
  13. In the present case, the judgment in the trial court was rendered ex-parte. Thus the position of the applicant was not canvassed or considered by the trial court. In addition, an application by the appellant/applicant to set aside the exparte judgment, and be allowed to participate in the primary proceedings was dismissed by the Magistrate's court, thus precipitating the filing of the present appeal and application.
  14. As such, in view of the provisions guaranteeing litigants fair trial contained under Article 25 and 50 of the [Constitution](#), in my view, it would be wrong for this court to deny the appellants the orders of stay of proceedings sought pending determination of appeal. If this court declines to grant stay of the



proceedings before the trial court, in my view the pending appeal herein will be rendered nugatory. Thus I will grant the stay of proceedings orders requested.

15. As for costs of the application, the same will follow the determination of the pending appeal herein.

16. Consequently and for the above reasons, I allow the application and order as follows:-

i. This court hereby orders a stay of execution of the Ruling delivered in Kilungu PMCC No. 059 of 2022 on 20<sup>th</sup> July 2022 and stay of all proceedings relating to Kilungu PMC No. 046 of 2022 pending the hearing and determination of appeal herein.

ii. The costs of this application will abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED THIS 11<sup>TH</sup> DAY OF JANUARY 2024 VIRTUALLY AT VOI.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Ms. Nusura – Court Assistant

Ms. Njambini holding brief for appellants

