



REPUBLIC OF KENYA



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Munde v Julius Kiambati M’mbura t/a Jupex Limited (Civil Appeal E015 of 2023) [2024] KEHC 437 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEHC 437 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E015 OF 2023
SN MUTUKU, J
JANUARY 17, 2024**

BETWEEN

ALI ABDI MUNDE APPELLANT

AND

JULIUS KIAMBATI M’MBURA T/A JUPEX LIMITED RESPONDENT

RULING

The Application

1. This Ruling relates to a Notice of Motion dated 10th March 2023 brought by the Appellant herein under various provisions of the law as shown on the face of the application. It seeks the following reliefs:
 - i. Spent
 - ii. Spent
 - iii. That there be a temporary stay of execution of the judgment and decree in Kajiado Civil Case No. E006 of 2022 *Julius Kiambati M’Mburu t/a Jupex Limited v. Ali Abdi Munde* pending the hearing and determination of the appeal herein.
 - iv. That costs of this application be in the cause.
2. The grounds in support of the application found on the face of it and in the supporting affidavit sworn by the applicant on 10th March 2022. The Applicant has stated that default judgment was entered against him on 10th November 2022 for failure to file defence within time; that he had entered appearance but his advocate on record at the time failed to file the defence; that he sought to set aside the default judgment but his application was dismissed; that he has a good defence that raises triable issues; that he stands to suffer substantial loss if this application is not allowed and the judgment in the sum of Kshs 1,704,900 is executed and that this application was made without delay.



3. The Applicant further states that he came to know of the judgment against him after the Respondent commenced garnishee proceedings against him, which prompted him to instruct another advocate to file an application to set the default judgment aside but that application was dismissed and that his appeal shall be rendered nugatory if orders staying execution are not granted.

Grounds of opposition

4. The Respondent filed grounds of opposition that the Applicant has not satisfied the threshold and/or the principles set out in Order 42 Rule 6 of the [Civil Procedure Rules](#) and that the Application lacks merit.

Submissions

5. The application was canvassed through written submissions as directed by this court. Both parties have filed their submissions. The Applicants submissions are dated 20th September 2023. The Applicant has submitted on the applicable principles for grant of stay pending an appeal as provided under Order 42 Rule 6 of the [Civil Procedure Rules](#) and identified the following as the issues for determination:

- i. Whether the Applicant stands to suffer substantial loss.
- ii. Whether there was unreasonable delay.
- iii. Security for costs.

6. On substantial loss, he submitted that he risks losing Kshs 1,704,900 held at his Equity Bank account given that the Respondent has already extracted a decree and is in the process of obtaining Garnishee absolute orders so as to execute the decretal sum. He submitted that the Respondent has not demonstrated that he is able to refund the decretal sum should the appeal succeed. He relied on [Nicholas Stephen Okaka & another v. Alfred Waga Wesonga](#) [2022] eKLR where the court stated that:

“In this case, the Respondent has not given any material as to his ability to repay the decretal sum in case the appeal succeeds and in light of the depositions by the applicants’ counsel that they shall suffer substantial loss if stay is not granted. Accordingly, I am persuaded that substantial loss has been proved.”

7. He further submitted that his appeal shall be rendered nugatory if the orders sought in this application are not granted. He cited [RWW v. EKW](#) (2019) eKLR where the court stated that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory.”

8. On the issue of delay, he submitted that judgment was delivered on 3rd March 2023 and the Applicant filed this application of 10th March 2023 thereby complying with Order 42 Rule 6(2)(a) of the [Civil Procedure Rules](#) which requires an applicant to move to court to seek stay without unreasonable delay.



9. On security for costs, he submitted that he is willing to deposit reasonable security as the court may direct as a way of guaranteeing due performance of the decree if the appeal fails. He cited *Focin Motorcycle Co. Limited v. Ann Wambui Wangui & another* (2018) eKLR where the court stated that:

“Security is a guarantee that stay of execution application is not a mere exercise to deny the Respondent the fruits of the judgment, but it is a ground that satisfies stay and assures the due performance of a decree or an order as it may ultimately be binding on the applicant.”
10. He submitted that he has satisfied the conditions set out in Order 42 Rule 6 (2) of the *Civil Procedure Rules* to warrant granting of the orders he is seeking and urged the court to exercise its unfettered discretion in the interest of justice and allow this application.
11. The Respondent’s submissions are dated 4th October 2023. On substantial loss, he has submitted, while citing *Jessikay Enterprises Ltd v. George Kaboto Muiruri* (2021) eKLR, he submitted that there is no evidence that the Applicant has not demonstrated that he has satisfied the requirements of Order 42 Rule 6(2) of the *Civil Procedure Rules*.
12. On the issue of payment of security, it was submitted that if the court is inclined to exercise its discretion and grant stay of execution pending the appeal, then the Applicant should be ordered to deposit Kshs 1,704,900 as security in an interest earning account in joint names of the advocates for the parties within 14 days.

Determination

13. I have considered the application and the grounds in support of it as well as the grounds in opposition and submissions. proceedings for stay of execution pending an appeal are governed by Order 42 Rule 6 (1) & (2) of the *Civil Procedure Rules*. This Order provides that:
 6. Stay in case of appeal
 - (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 to 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 for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that 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.
14. The conditions to be met for the grant of stay are that the Applicant has satisfied the court that he stands to suffer substantial loss of stay is not granted; that the application seeking stay has been filed without unreasonable delay and that he has provided security for the due performance of the decree or order as may be binding on him.



15. In this matter the applicant states that he stands to suffer substantial loss if stay is not granted because he will lose his money given that the Respondent has not shown that he is capable of repaying the decretal sum. He also claims that he filed this application within reasonable time. He argues that he has an arguable defence because he was just an intermediary in the transaction between the Respondent and another party. He has argued that his advocate at the time let him down in not filing a defence in the lower court matter leading to default judgment. He has stated that he is ready and willing to provide security for costs.
16. I have considered this matter. The Applicant is invoking the discretion of this court to grant him the orders he is seeking. I have considered that every person has a right to be heard in court as provided under Article 50 of the Constitution. I am alive to the fact that discretion of the court must be exercised fairly and judiciously. I am also alive to the position that litigation belongs to a party and not to his counsel, but every case must be determined on its own circumstances because no two cases are similar in circumstances. There are various authorities on the issue of negligence by counsel. In *Belinda Muras & 6 Others v Amos Wainaina* [1978] KLR, Madan JA (as he then was) had the following to say on the issue of mistake by counsel:
- “A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.”
17. In determining this matter, I must weigh the rights of a Respondent who has judgment in his favour and the Applicant who’s right to be heard by the court is a constitutional right and strike a balance that does not prejudice any party.
18. I am satisfied that the Applicant has met the threshold for grant of stay. He deserves a day in court to ventilate his appeal but this court must consider the rights of the Respondent who has obtained judgment in his favour. To strike this balance, this court allows the Notice of Motion dated 10th Marc 2023 in the following terms:
- i. That a temporary stay of execution of the judgment and decree in Kajjado Civil Case No. E006 of 2022 *Julius Kiambati M’Mbura t/a Jupex Limited v. Ali Abdi Munde* is hereby granted pending the hearing and determination of this appeal.
 - ii. The Applicant shall, within 30 days of today’s date, deposit Kshs 1,704,900 in a joint interest earning account in the names of the current advocates for the Applicant and the Respondent as security for the due performance of the decree.
 - iii. That the Applicant shall within 30 days file and serve a Record of Appeal.
 - iv. This matter shall be mentioned on 6th June 2024 to give directions on the Appeal.
 - v. Costs shall be in the cause.
19. Orders shall issue accordingly.

DATED, SIGNED, AND DELIVERED THIS 17TH DAY OF JANUARY 2024.

S. N. MUTUKU

JUDGE

