



Musyoka & another v Kimanthi & another (Suing as the Legal and Personal Representatives of the Estate of Alphonse Kimanthi Bernard - Deceased) (Civil Appeal E045 of 2022) [2024] KEHC 310 (KLR) (12 January 2024) (Ruling)

Neutral citation: [2024] KEHC 310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E045 OF 2022
GMA DULU, J
JANUARY 12, 2024**

BETWEEN

JAMES MULI MUSYOKA 1ST APPELLANT

FRANCIS MUGANE MWANGI 2ND APPELLANT

AND

BENARD LUVAI KIMANTHI AND SALOME MWIKALI BERNARD (SUING AS THE LEGAL AND PERSONAL REPRESENTATIVES OF THE ESTATE OF ALPHONCE KIMANTHI BERNARD - DECEASED) RESPONDENT

RULING

1. In this matter where an appeal and a cross appeal have been filed, the appellants James Musyoka and Francis Mwangi filed the present application by Notice of Motion dated 26th September 2022 through counsel Kimondo Gachoka Advocates.
2. The application has been brought under Section 3A and 79G and 95 of the *Civil Procedure Act* (Cap.21), and Order 22 Rule 22, Order 42 Rules 4, 6 and 7 and Order 50 Rule 6 as well as Order 51 Rule 1 and 3 of the *Civil Procedure Rules 2010*.
3. The application seeks the following orders:-
 1. (Spent).
 2. (Spent).
 3. This court be pleased to order stay of execution of judgment in Makueni Civil Suit No. 121 of 2021 delivered by Hon. George Sagero SRM on 3rd August 2022 pending hearing and determination of this appeal.



4. That the appellants/applicants be allowed to furnish the court with bank guarantee as security from a reputable bank pending the hearing and determination of this appeal and the instant application.
5. That the costs of this application abide the outcome of the appeal.
4. The application has grounds on the face of the Notice of Motion that judgment had been entered against the appellants, that the Magistrate erred in finding dependency of 2/3 instead of 1/3, that the appeal already filed has high chances of success and that if the stay orders sought are not granted, the appeal will be rendered nugatory and the applicants/appellants will suffer irreparable loss and damage.
5. The application was filed with a supporting affidavit sworn on 21st September 2022 amplifying the grounds of the application.
6. The application is opposed through a replying affidavit sworn on 11th October 2022 by Faith Mutio Mutuku Advocate for the respondents/cross-appellants in which it was deponed that the appellants/applicants had not come to court with clean hands and had not shown to court how they will suffer substantial loss.
7. The respondent/cross-appellants also filed a further affidavit sworn on 10th December 2023 by Faith Mutio Mutuku in which it was deponed that the respondents had already obtained a decree in Civil Case No. E121 of 2021.
8. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka Advocates for the applicants, as well as the submissions filed by Mutuku Wambua & Associates Advocates for the respondents/cross-appellants. Both sides relied on decided court cases.
9. This is an application for stay of execution of decree or judgment pending appeal. That being so, it is governed by the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, especially Rule 6(2).
10. It is not in dispute that judgment in the trial court was delivered on 23rd July 2022. This application was filed on 27th September 2022, a period of more than two (2) months later.
11. In my view, that delay of two months cannot be said to be inordinate delay.
12. With regard to the second requirement that the court has to be satisfied that the applicant will suffer substantial loss if the application is not granted, I note that the decree is a money decree.
13. The applicant has now appealed, and the financial standing of the respondents has not been explained.
14. In those circumstances, and since the appeal is an arguable appeal, I find that the applicants stand to suffer substantial loss if stay is not granted.
15. However, as the contest herein is on quantum of damages, in my view stay orders can be justified only if the applicants pay part of the decretal amount to the respondent. I will thus grant stay subject to payment of part of the decretal amount.
16. With regard to the provision of security by the applicant, they have offered to provide a bank guarantee. However, in my view, the part payment of the decretal amount satisfies the requirement of providing security.
17. I thus allow the application on the following terms:-



- i. I grant stay of execution of decree or judgment in Makueni Civil Suit No. 121 of 2021 pending hearing and determination of the appeal herein.
- ii. The stay of execution granted in (i) above is subject to the applicants/appellants paying the respondent part of the decretal amount Kshs. 700,000/= through counsel within 45 days from the date of this ruling.
- iii. In default of (ii) above, the stay orders herein granted will automatically lapse and be of no effect.
- iv. The costs of this application will abide the decision of the appeal herein.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JANUARY 2024 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

