



Muthuri v Kirimi (Suing as the Legal Representative of the Estate of Nicholas Mwenda Kirimi - Deceased) (Civil Appeal E157 of 2023) [2024] KEHC 74 (KLR) (11 January 2024) (Ruling)

Neutral citation: [2024] KEHC 74 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E157 OF 2023
EM MURIITHI, J
JANUARY 11, 2024**

BETWEEN

JULIUS KIRIMI MUTHURI APPELLANT

AND

STEPHEN KIRIMI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NICHOLAS MWENDA KIRIMI - DECEASED) RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 1/11/2023 brought under Article 159 (2d) of the Constitution, Order 40 Rule 1, 2, Order 50 Rule 6,7, Order 42 Rule 6, Order 51 Rule of the Civil Procedure Rules, Section 1A & 1B, 3, 3A and 95 of the Civil Procedure Act and all the enabling provisions of the law, the applicant seeks that:
 1. Spent
 2. The Honourable Court be pleased to stay the execution of the judgment and decree of Hon. D.W. Nyambu delivered on 5th April 2023 including any application for execution against the Appellant/Applicant pending the inter-partes hearing of the instant Application.
 3. The Honourable Court be pleased to stay the execution of the judgment and decree of Hon. D.W. Nyambu delivered on 5th April 2023 including any application for execution against the Appellant/Applicant pending the determination of the instant Application.
 4. This Honourable Court be pleased to enlarge the time within which the Appellant/Applicant was required to pay the Respondent Kshs. 500,000/- and to secure payment of the balance of the decretal sum being Kshs. 1,175,525/- by a bank guarantee for a further 4 days.



5. The payment of Kshs. 500,000/- to the Respondent on 23rd October 2023 and the issuance of a bank guarantee of Kshs. 1,175,525/- on 25th October 2023 by the Applicant's insurer be deemed proper and be admitted out of time.
 6. The Conditions securing the Appeal following the ruling issued on 21st September 2023 herein be varied to accommodate compliance out of time.
 7. This Honourable Court do issue a temporary order of injunction restraining the Plaintiff by herself, her agents, employees and/or assigns from in any way whatsoever dealing with, attaching, disposing of, auctioning or otherwise interfering with the Appellant movable property and any other attachable asset, in satisfaction of the judgment herein pending hearing and determination of the intended appeal; and
 8. The Honourable Court be pleased to stay the execution of the judgment and decree of Hon. D.W. Nyambu delivered on 5th April 2023 against the Appellant/Applicant pending the determination of the instant Appeal.
 9. The costs of the Application be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Julius Kirimi Muthuri, the applicant herein, sworn on even date. Dissatisfied with the trial court's judgment awarding the Respondent Kshs. 1,675,525, he lodged the appeal herein pursuant to the leave granted on 21/9/2023. He was further granted stay of execution on condition that he pays the respondent Ksh.500,000 and secures the payment of the balance vide a bank guarantee within 30 days. There has been a regrettable 4 day delay in complying with the aforementioned conditions which was occasioned by the process of securing the necessary approvals and release of the said amount. Unless an order of stay of execution is granted and the time within which the applicant is required to comply with the set conditions enlarged for a further 4 days, he stands to suffer substantial loss and damage since the respondent has threatened to execute the decree, thus rendering the appeal herein nugatory. The respondent will not suffer any prejudice if the application, which has been brought without any inexplicable and unreasonable delay, is allowed. He prays that payment of Ksh.500,000 to the respondent on 23/10/2023 and the issuance of a bank guarantee of Ksh.1,175,525 on 25/10/2023 by his insurer be deemed proper and be admitted out of time.
 3. The respondent opposed the application vide grounds of opposition dated 11/12/2023 that, "The application is res judicata as the reliefs sought were dealt with in the application dated 2/6/2023; The order of stay granted lapsed and became of no effect the moment the applicant defaulted in complying with the court order No 2 in the ruling of the court delivered on the 21/9/2023; There is no good and effective bank guarantee given by the applicant for the due performance and payment of the decretal sum in the event of the appeal not being successful; The applicant acted indolently and deliberately ignored the conditions attached to the order of stay and does not deserve a favourable order from this court."

Determination

4. On 21/9/2023, the court granted the applicant stay of execution on conditions *inter alia* that, "2. The applicant shall pay to the Respondent the sum of Ksh. 500,000/-, approximately 1/3 of the decretal sum, and secure the payment of the balance of the decretal sum by a suitable bank guarantee for the specific suit the subject of this appeal, within 30 days from today."
5. The applicant admits that as at the time of the lapse of the conditional stay of execution on 21/10/2023, the conditions set therein had not been met. This court accepts the sufficient explanation proffered by



the applicant for his belated compliance with the set conditions for stay on 23rd and 25th of October 2023. The court further notes the exhibited payment remittance advice made to the respondent on 23/10/2023 and the NCBA Bank guarantee dated 25/10/2023.

6. The issue of res judicata does not arise as the applicant is not seeking stay of execution but variation of the terms of stay already in place.

Orders

7. Accordingly, for the reasons set out above, the court allows the applicant's application dated 1/11/2023 in terms of prayers Nos. 4, 5 and 6, specifically as follows:
 1. The Court hereby enlarges the time within which the Appellant/Applicant was required to pay the Respondent Kshs. 500,000/- and to secure payment of the balance of the decretal sum being Kshs. 1,175,525/- by a bank guarantee for a further 4 days.
 2. The payment of the deposit of Kshs.500,000/- to the Respondent on 23rd October 2023 and the issuance of a bank guarantee of Kshs.1,175,525/- on 25th October 2023 by the Applicant's insurer are deemed proper and within time as extended.
 3. The Conditions securing the Appeal following the ruling issued on 21st September 2023 herein are hereby varied to accommodate compliance out of time.
8. The appellant shall file the Record of Appeal within 30 days.
9. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 11TH DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Ojong'a for the applicant.

Ms. Gatwiri Mwiti for the Respondent.

