



Gachuhi & another v Mutuku (Suing as the Administrator of the Estate of Benjamin Muendo Kiamba) (Civil Appeal E306 of 2023) [2024] KEHC 1441 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E306 OF 2023
FR OLEL, J
FEBRUARY 14, 2024**

BETWEEN

CHARLES GACHUHI 1ST APPELLANT

MERCY NYAWIRA MWANGI 2ND APPELLANT

AND

JANET KATUNGE MUTUKU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF BENJAMIN MUENDO KIAMBA) RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 4th December 2023 brought pursuant to provisions of Section 1A, 1(B), 3A and 79G and 95 of the [Civil Procedure Act](#), Order 22, rule 22, Order 42 Rule 6(2), & Order 51 rule 1 & 3 of the [Civil Procedure Rules](#) and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought are prayers 3 and 5 for stay of execution of the decree dated 24th October 2023, issued in Kangundo CMCC No 05 of 2021, and that the applicant be allowed to issue security in the form of a Bank guarantee.
2. This application is supported by the grounds on the face of the said application and the affidavit of the 2nd appellant dated 4th November 2023, while the respondent opposed this application through her replying affidavit filed in court on 29th January 2024.
3. The Appellant averred that they are wholly dissatisfied by the Judgment of Hon D.N Sure Principal Magistrate delivered in Kangundo CMCC No 05 of 2021 on 24th October 2023 and had preferred an appeal against the same basically challenging the quantum awarded as being on the higher side. She avers that they had an arguable appeal which had high chances of success and further that the said appeal was meritorious and stood a good chance of success as demonstrated in the Memorandum of Appeal filed.



4. The appellant was apprehensive that there was a strong likelihood that the respondent would apply for warrants of execution consequent of which she was likely to attach the appellant's assets and if sold that would cause them substantial loss and render the appeal filed to be rendered nugatory. Finally, the Appellants stated that they were ready and willing to furnish a bank guarantee as security for due performance of the decree and that the Respondent would not be prejudiced if orders sought are granted.
5. The Respondent did oppose this application through her Replying Affidavit dated 29th January 2024. she stated that the appeal as filed was frivolous, unmeritorious and should be dismissed suo moto as the judgment appealed against was sound and balanced. The appellant had been granted 30 days to settle the decree and had opted not to do so, but instead filed this Appeal. The applicant had not satisfied the pre requisite conditions for granting stay of execution under order 42 rule 6(2),(b) of the [civil procedure Rules](#), 2010 and therefore the said application ought to be dismissed.
6. In the alternative, if the court was inclined to grant an order of stay pending appeal, the respondent urged the court to order the appellant to pay her half the decretal sum of Kshs 353,013/= of the decretal sum as liability was not disputed and deposit the other half of the decretal sum being Kshs 353,013/= in a joint interest earning Account.
7. The applicant thus urged this court to find that the application was not merited and prayed that it be dismissed with costs.

Analysis & Determination

8. I have carefully considered the Application, its Supporting Affidavit, the Respondent's Replying Affidavit and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
9. Stay of execution pending appeal is governed by Order 42 Rule 6 of the [Civil Procedure Rules](#). It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See [Amal Hauliers Limited v Abdulnasi Abukar Hassan](#) (2017) eKLR & [Butt v Rent Tribunal](#) (1982) KLR 417
10. The ruling appealed against was delivered on 24th October 2023 and the Appeal herein was filed on 2nd November, 2023. This was within the statutory period provided under Section 79G of the [civil procedure Act](#) and thus it can be said that this appeal and this application has been filed timeously.
11. On the likelihood of suffering substantial loss, and security of the appeal, the court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See [Attorney General v Halal Meat Produces Limited](#) Civil Application No. Nairobi 270 of 2008; [Kenya Shell Ltd v Kibiru & another \(Supreme\)](#); [Mukuma v Abuoga](#) (1988) KLR 645.
12. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back his money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in his intended appeal, find it difficult or



impossible to realize the decree. This is the cornerstone of the requirement for security. See Court of Appeal in *Ndubiu Gitabi v Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100

Disposition

13. Taking all relevant factors into consideration, especially the fact that the appeal filed herein is only on quantum, and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;
 - a. The Appellant/Applicant do pay the respondent half the decretal Amount of Kshs 353,013/= and provide a bank guarantee for the other half of the decretal amount being Ksh.353,013/=, which bank guarantee will be specific to this Appeal and valid for the entire duration of the Appeal.
 - b. This condition is to be met within 60 days from the date of this ruling and in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
14. The costs of this Application will be in the cause
15. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 14TH DAY OF FEBRUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the Virtual Platform, Team this 14th Day of February, 2024

In the presence of:

Ms Ochoki for Appellant

Mr. Kagura for Respondent

Sam - Court Assistant

