



**Muchiri v Chege & another (Miscellaneous Civil Application
64 of 2020) [2024] KEHC 16941 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 16941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 64 OF 2020
F WANGARI, J
FEBRUARY 16, 2024**

BETWEEN

LIVINGSTONE MUCHIRI APPLICANT

AND

DICKSON KIMANI CHEGE 1ST RESPONDENT

EUNICE WANJIRU NJUGUNA 2ND RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 24/1/2023 seeking for the following orders;
 - a. Spent
 - b. That pending the hearing and determination of this application interpartes, this Honourable Court be placed to order for stay of execution of the decree and all consequential orders arising from the judgment delivered by Honorable J.M. Nangea, Chief Magistrate on 31st May 2019 in Mombasa CMCC No. 1154 of 2015, Dickson Kimani Chege v Livingstone Muchiri & Another
 - c. That this Honourable Court be pleased to enlarge or extend the time within which the Appellant ought to have filed a Notice of Appeal in compliance with Rule 76 (sic) of the Court of Appeal Rules in respect of the ruling of this Honourable Court delivered by Honourable Lady Justice D.O. Chepkwony on 9th December 2020.
 - d. That this Honourable Court be placed to order for stay of execution of the decree and all consequential orders arising from the judgment delivered by Honorable J.M. Nangea, Chief Magistrate on 31st May 2019 in Mombasa CMCC No. 1154 of 2015, Dickson Kimani Chege v Livingstone Muchiri & Another pending the hearing and determination of the intended appeal in the Court of Appeal.



- e. That this Honourable Court be pleased to grant such further or other orders and/ or directions as it may deem just and necessary to grant in the interest of justice
 - f. That the cost of this application be provided for.
2. The application was opposed through the Replying Affidavit dated 6/2/2024 stating that this application was misconceived and an afterthought and it offends the provisions of Order 42 Rule 6 of the Civil Procedure Rules.
 3. The application was disposed of by way of written submissions wherein both parties complied by filing detailed submissions together with various authorities in support of the parties' rival positions.

Analysis and Determination

4. I have considered the said submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, the issues for determination are;
 - a. Whether the Applicant has made out a case for grant of orders of stay pending hearing and determination of this application and intended appeal.
 - b. Whether time to file a Notice of Appeal to Court of Appeal ought to be granted.
 - c. Corollary to this finding is the issue of costs.
5. The principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.



6. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute.
7. In *RRW v EKW* [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”
8. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative. On substantial loss, the Applicant submit that he risks loss of liberty by way of being imprisoned to civil jail over a decretal sum of Kshs. 2.6 million as at the time of filing the application. I note that Notice to Show Cause was filed and served upon the Applicant in person on 22/6/2022. On the hearing date of the NTSC, that is on 23/8/2022, the Applicant’s counsel sought for time to enable him file a response to the NTSC.
9. I find that the Applicant was actively participating in the NTSC proceedings prior to filing of this application, 6 months after the NTSC was personally served upon him. I do agree with the Respondents that this is a ‘knee jerk reaction’ meant to delay the court proceedings and deny the Respondent the fruits of his judgment.
10. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR while enunciating this principle stated as follows: -

“...The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
11. It is my considered view that were this court to deny the Applicants an order for stay of execution, no prejudice shall be suffered by the Applicant. On the issue of delay, I note that the application was filed over 2 years after the ruling subject to this application was delivered. I have considered that submissions by the Applicant that he was not aware that the ruling had been delivered until 25/7/2022 via a letter by the Respondent’s counsel, and the explanation up to this date has merits.
12. However, the explanation on the delay from 25/7/2022 to 24/1/2023, the time of filing this application is not reasonable. I do sympathize and condole with the Applicant’s counsel for losing a close relative. This notwithstanding, a suit belongs to a party not the lawyer. The Applicant had a duty



to follow up on his matter with his lawyer. See *Duale Mary Ann Gurre v Amina Mohamed Mohamood & Another* (2014) eKLR.

13. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“...The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose...”

14. The Applicant has offered no security of the decretal sum.
15. On the decision as to whether or not to grant extension of time to file a Notice of Appeal, is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising this discretion were suggested by the Court of Appeal in *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR. They include the following: -
- i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice that will be suffered by the Respondent if the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue;
 - vi. The effect if any on the administration of justice or public interest if any involved.
16. In the circumstances and as discussed herein above, I am not convinced that the Applicant is deserving of the orders sought. The Respondent has been denied the fruits of his judgment for about 5 years since judgment was entered in his favour in the lower court.
17. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. In the present circumstances, I see no reason why I should deny the 1st Respondent costs of the application.

Determination

18. The upshot is that I make the following orders: -
- a. The application dated 24/1/2023 has no merit and is hereby dismissed.
 - b. Costs to the 1st Respondent

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF FEBRUARY, 2024.



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F. WANGARI

JUDGE

In the presence of: -

N/A by the Appellant

Kiragu Advocate for the Respondent

M/S Salwa, Court Assistant

