



**Mulyungi & another v Teresa (Civil Appeal 252 of 2023)
[2024] KEHC 1471 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 252 OF 2023
FR OLEL, J
FEBRUARY 14, 2024**

BETWEEN

ROGEOUS MUTETI MULYUNGI 1ST APPELLANT

NELSON MUTHANGYA KAVALA 2ND APPELLANT

AND

CECILIA TERESA RESPONDENT

RULING

A. Introduction

1. Before court for determination is the application dated 2nd October 2023 filed by the Appellant/applicant, who seeks for stay of execution of the judgment/decree issued in Machakos CMCC NO 352 of 2020 by Honourable Francis Andayi (CM) dated 19th September 2023 pending hearing and determination of the appeal filed. The said application is supported by the supporting affidavit of the 1st appellant where he does state that he is aggrieved by the said judgment of the trial court and had filed an appeal as against it. The appeal was meritorious and had high chances of success and thus there was need to grant stay to avoid the said appeal being rendered nugatory.
2. The appellant further stated that his insurer was ready and willing to provide a bank guarantee from Family Bank Ltd as security to secure the decretal amount pending determination of the said appeal. That if the respondent was allowed to execute, she would not be in a position to refund the sums utilized and thus it would be in the interest of justice to allow the prayers as sought.
3. This application was opposed by the respondent through the replying Affidavit if her advocate Munyoki Muthangya dated 17th October 2023. He stated that the decretal sum plus costs totaled to a sum of Kshs.304,189.75/= and they were not opposed to the said application being allowed on condition that the appellant pays the respondent half the decretal sum of Kshs.152,094.88/= and



deposit the other half of the said decretal sum in a joint interest earning account pending determination of the Appeal filed.

The Analysis & Determination

4. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit filed by both parties and find that the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
5. Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”
6. In [Visbram Ravji Halai v Thornton & Turpin](#) Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions namely, establishment that the application has been made without unreasonable delay, satisfaction of substantial loss and the furnishing of security. The Court, in exercising its discretion, should also further opt for the lower rather than the higher risk of injustice and finally the court will also consider the overriding objective as stipulated in sections 1A and 1B of the [Civil Procedure Act](#), which the courts are now enjoined to give effect to. See [Suleiman v Amboseli Resort Limited](#) [2004] 2 KLR 589, [Samvir Trustee Limited v Guardian Bank Limited](#) Nairobi (Milimani) HCCC 795 of 1997 & [Machira T/A Machira & Co Advocates v East African Standard \(No 2\)](#) [2002] KLR 63.
7. The appellant is obviously aggrieved, by the judgment delivered and did file this appeal promptly. The grounds of appeal do disclose arguable grounds to challenge the judgment appealed against even though the appeal is challenging quantum awarded only. Secondly, the decretal amount is a tidy sum and no affidavit of means has been filed by the respondent to show that indeed if the said sum is released to her, she will be in a position to refund the same should the appeal succeed. See [G. N. Muema P/A \(516\) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another](#) (2010) eKLR & [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another](#) (2006) eKLR.



8. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person of means, I find that the Appellants has satisfied this court that they will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellants have therefore fulfilled this condition.
9. On the security, the Appellants have indicated that their insurer is ready and willing to provide a bank guarantee. The Respondent on the other hand opposes the same. In determining what appropriate security should be offered, 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 her 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 her 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.
10. The law is that where the Applicant succeeds, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its 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

11. Taking all relevant factors into account especially the fact that the appeal is only challenging the quantum as awarded and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff, I grant a stay of execution of the decree herein on condition that;
 - (a) The Applicant pay to the Respondent half of the decretal sum plus cost being a sum of Ksh. 152,094.88/= and gives a bankers guarantee to pay the remaining half of the decretal sum and costs being Ksh.152,094.88/= from a reputable financial institution specific to this appeal for the whole duration of the appeal.
 - b. The said conditions are to be met within 45 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.
 - c. The costs of this application shall be in the cause
12. 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 Masila for Respondent



