



REPUBLIC OF KENYA



KENYA LAW
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**Mutua v Onginjo (Civil Appeal 314 of 2023)
[2024] KEHC 1473 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 314 OF 2023
FR OLEL, J
FEBRUARY 14, 2024**

BETWEEN

GEOFFREY MUTHIANI MUTUA APPELLANT

AND

GODFREY ODHIAMBO ONGINJO RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 8th January 2023 brought pursuant to provisions of Order 42 Rule 6, (1),(2) & Order 51 rule 1 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) a for stay of execution of the decree dated 21st November 2023, issued in Mavoko CMCC No E159 of 2022, and that costs of this Application be provided for.
2. This application is supported by the grounds on the face of the said application and the affidavit of one Peter Ngola Makau, the legal claim’s manager of Britam General Insurance Co ltd dated 8th January 2024, while the respondent opposed this application through his replying affidavit filed in court on 30th January 2024.
3. The Appellant averred that they are wholly dissatisfied by the Judgment of Hon R.W. Gitau Senior Resident Magistrate dated 21st November 2023 delivered in Mavoko CMCC No E519 of 2022 and had preferred an appeal against the same both on liability and quantum. He averred that the plaintiff had an arguable appeal which has high chances of success and further that the said appeal is meritorious and stands a good chance of success as demonstrated in the Memorandum of Appeal filed.
4. The appellant was apprehensive that the there is strong likelihood that the respondent will apply for warrants of execution consequent of which he is likely to attach the appellant’s assets and if sold that would cause him substantial loss and render the appeal filed to be rendered nugatory. Finally, the



Appellant stated that he is ready and willing to deposit half of the decretal amount in court as security for due performance of the decree and that the Respondent will not be prejudiced if orders sought are granted.

5. The Respondent did oppose this application through his Replying Affidavit dated 22nd January 2024. He stated that the appeal as filed was frivolous and unmeritorious and should be dismissed suo moto as the judgment appealed against was sound and fair. The appellant had been granted 30 days to settle the decree but opted not settle the decretal sum. 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 and order of stay pending appeal, the respondent urged the court to order the appellant to pay them two thirds of the decretal sum being Kshs.361,833.33 and the rest be deposited in a joint interest earning account pending determination of this Appeal.
7. The applicant thus urged this court to find that the application was not merited and prayed that it be dismissed with costs.

B. 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 21st November, 2023. The Appeal herein was filed on 7th December 2023, while the application for stay was filed on 15th January 2024. 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 file 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 Gitahi v Warugongo](#) (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100



C. Disposition

13. Taking all relevant factors into consideration, especially the fact that the appellant has offered to deposit half the doctoral sum, 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 of the decretal amount issued under the decree dated 21st November 2023 delivered in Mavoko CMCC E519 of 2022 and deposit the other half of the decretal amount in a joint interest earning account opened at a reputable bank and held in the joint names of counsel for the Appellant and counsel for the Respondent pending hearing and determination of this Appeal.
 - b. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
 - c. The costs of this Application will be in the cause
14. 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: -

Mr Sang for Appellant

Ms Amiya for Respondent

Sam - Court Assistant

