



REPUBLIC OF KENYA



KENYA LAW
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**Munene v Robert (Civil Appeal E149 of 2023)
[2024] KEHC 892 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E149 OF 2023**

FR OLEL, J

FEBRUARY 7, 2024

BETWEEN

EVANS MUNENE APPELLANT

AND

ROBERT MBUVI JOHN ALIAS ROBERT RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 14th August 2023 brought pursuant to provisions of Section 1A, 1B, 3A and 79G of the *Civil Procedure Act*, Order 22, rule 22, Order 42 Rule 6(2), & Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (a), (b) and (c) of the said application are basically spent and the main prayer sought are prayers (d) for stay of execution of the decree dated 25th January 2023, issued in Machakos MCCC No E144 of 2022, and that costs of the said Application be provided for.
2. This application is supported by the grounds on the face of the said application and the affidavit of the appellant dated 14th September 2023, while the respondent has opposed this application through his replying affidavit filed in court dated 20th September 2023.
3. The Appellant averred that he is wholly dissatisfied by the Ex parte Judgement of Hon M. E. Analo Senior Resident Magistrate dated 25th January 2023 delivered in Machakos MCCC No E144 of 2022 and applied to have it set aside. The trial court did consider his application to set aside the said judgement and vide a ruling dated 24th May 2023, dismissed it as being unmerited, hence this Appeal. He avers that he has an arguable appeal which has high chances of success as demonstrated in the grounds of the Memorandum of Appeal filed.
4. The appellant further averred that the Respondent had through his advocate had already demanded payment of the decretal amount being a sum of Kshs.1,051,280/= and was therefore apprehensive that there was a strong likelihood that the respondent would 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 nugatory.
5. Finally, the Appellant stated that he was ready and willing to furnish security for due performance of the decree and that the Respondent will not be prejudiced if orders sought are granted. The appellate court had unhindered discretionary powers to allow this application to give effect to the overriding objective of the *Constitution* and *Civil Procedure Act*. Finally, all factors considered, there was lower risk of injustice in granting the orders sought as the contrary would lead to undesirable outcome.
 6. The Respondent did oppose this application through his Replying Affidavit dated 20th September 2023. He stated that the appeal as filed was frivolous, incompetent, unmeritorious and misconceived/constituted an abuse of the process of court as the memorandum of Appeal filed was unsigned by the Appellant and/or his Advocate. The Appellant had been properly served with summons to enter appearances and had not taken the opportunity to defend himself. The appeal as filed therefore had no chance of success and should not be allowed.
 7. If the court was inclined to grant the orders sought, the Respondent prayed that the Appellant be directed to deposit the entire decretal sum plus cost and interest, being Kshs.1,051,280/= into a joint interest earning account held in the joint names of the advocates herein.
 8. The applicant thus urged this court to find that the application was not merited and prayed that it be dismissed with costs.

Analysis & Determination

9. I have carefully considered the Application, its Supporting Affidavit, the Respondent's Replying Affidavit and the Appellants submissions filed. The only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
10. 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 Abdunasi Abukar Hassan* (2017) eKLR & *Butt v Rent Tribunal* (1982) KLR 417
11. The same finding was also upheld in *Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990* [1990] KLR 365, where 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.
12. The ruling appealed against was delivered on 24th May, 2023. The Appeal herein was filed on 22nd June 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 file timeously. The Respondent



did allege that the memorandum of Appeal was not signed but this is not the correct position as the memorandum of Appeal filed herein (in the court file) is signed.

13. 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); Mukumav Abuoga (1988) KLR 645.
14. 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

15. Taking all relevant factors into consideration, 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 deposit the entire decretal sum plus costs and interest, being a sum of Kshs.1,051,280/= in a joint interest earning account held at a reputable bank, which account will be held in the joint names of both counsel for the Appellant and counsel for the Respondent pending hearing and determination of the Appeal filed herein.
 - b. This condition is to be met within the next 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.
16. The costs of this Application will be in the cause.

It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 7TH DAY OF FEBRUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 7th day of February, 2024

**In the presence of: -

Ms Owada for Appellant

Mr. Kilonzo for Respondent

Sam - Court Assistant

