



Kimaile v Misi (Suing as the Mother and Personal Representative of the Estate of Samuel Nzioka Kivuka - Deceased) & 2 others (Civil Appeal E128 of 2023) [2024] KEHC 3107 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3107 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E128 OF 2023
MW MUIGAI, J
MARCH 7, 2024**

BETWEEN

BENJAMIN MUISYI KIMAILE APPLICANT

AND

JOYCE NGINA MISI (SUING AS THE MOTHER AND PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL NZIOKA KIVUKA - DECEASED) 1ST RESPONDENT

MAKINDU MOTORS LIMITED 2ND RESPONDENT

PETER MULEI T/A MULLEY'S SUPERMARKET 3RD RESPONDENT

RULING

Notice of Motion Application

1. Vide application dated 6.06.2023 brought under section 3A, 79G and 95 of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and order 51 Rule 1 and 3 of the [Civil Procedure Rules, 2010](#) the Applicant seeks the following orders, that;
 - a. Spent
 - b. Spent
 - c. The Court stay the execution of the judgment/ decree delivered on 25th May 2023 by Honourable Opanga (P.M) sitting at Kangundo in Civil Suit No 87 of 2019 pending the hearing and determination of the Appellant's Appeal filed at the High Court of Kenya at Machakos.



- d. This Court allows the Applicant to furnish the court with security in the form of a Bank Guarantee from a reputable bank pending the full hearing and determination of this Appeal
 - e. Spent
 - f. The costs of this Application abide the outcome of this Appeal.
2. The Application is supported by an affidavit sworn by Benjamin Muisyo Kimaile on 6.06.2023 in which he deposes that aggrieved by the judgment in Kangundo Civil suit no 87 of 2019 intends to appeal and is apprehensive that the Respondent may proceed and levy execution against them and that if the orders sought are not granted, the appeal will be rendered nugatory. He indicated that he was ready to furnish the court with a bank guarantee.

Grounds Of Opposition

3. The Respondent opposed the Application through a grounds of opposition dated 22.06.2023 on the grounds that;
- a. The applicant's application is frivolous, incompetent and vexatious, bad in law, incurable defective, an abuse of the court process, an afterthought and brought in bad faith and brought after inordinate delay.
 - b. The appellant has not given any good grounds why the application should be allowed.
 - c. The appellant has not offered any meaningful security for costs as required in law and should be ordered to release to the Plaintiff/1st Respondent half of the decretal sum amounting to Kshs 687,318.75 and deposit the balance of Kshs 687,318.75 in a joint interest earning account within fourteen days from the date of ruling of this application to demonstrate his seriousness as is the normal practice in the courts so that the interests of both parties is protected.
 - d. The 1st Respondent objects to the bank guarantee security being proposed by the Appellant as it only protects the interests of the appellant and not hers.
 - e. The Respondent is a person of means and is business lady and can refund the same in the event the appeal herein is successful.
 - f. The application is improperly before this Court.
4. The Application was canvassed by way of written submissions.

Applicant's Submissions

5. Vide submissions filed on 20.07.2023 the Applicant reiterated the contents of the Supporting affidavit and while relying on the case of *Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi* [2015]eKLR , *Esther Wamaitba Njibia & 2 others v Safaricom Limited* [2014] eKLR, *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR further opined that it had satisfied the conditions for stay provided for in order 42 Rule 6)of the *Civil Procedure Rules*.
6. On the occurrence of substantial loss, It was submitted that the Applicant had stated that his insurer was willing to provide 50% of the judgment amount to be held by the Honourable Court pending the hearing and determination of the intended Appeal and has provided a bank guarantee while the Respondents financial status is unknown and is highly likely unable to refund the decretal sum if the appeal succeeds. This because he has not furnished the court with any documentary evidence to prove



his financial standing. Reliance was placed on the case of *Edward Kamau & another v Hannab Mukui Gichuki & another* [2015] eKLR.

7. It was submitted that there has been no inordinate delay in filing the application.

1st Respondent Submissions

8. Vide submissions filed on 12.07.2023, the 1st Respondent opposed the bank guarantee as both parties interests are not protected by it. The 1st respondent reiterated the contents of its grounds of opposition and urged the court to dismiss the application.
9. The 2nd and 3rd Respondents did not respond to the application nor file submissions.

Determination

10. I have considered the Application, the grounds of opposition and the submissions of parties on record and I find that the issue for determination is whether this court should issue orders of stay of execution.
11. On the issue of stay, Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules, 2010* 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.”

12. The first issue is whether the application has been filed without unreasonable delay. I note that Judgment in Kangundo CMCC 87 of 2019 was delivered on 25.5.2024 in the presence of advocates for the plaintiff, defendant and 1st 3rd Party. The court also issued 30 days stay. This application was filed on 9.06. 2023 thus there is no inordinate delay in filing.

13. Secondly, the Applicant has stated that she stands to suffer loss if the orders sought are not granted but has not demonstrated how exactly it will suffer. Substantial loss was discussed in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, as:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the



case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#). This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

14. Similarly in the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, it was observed that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#). This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

15. On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted, I beg to differ. The onus of proving the Respondent’s inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in *Stephen Wanjohi v Central Glass Industries Ltd.* Nairobi HCCC No 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income.
16. On the issue of security, furnishing of security is key in getting orders of stay pending appeal. The Applicant has indicated that his insurer is willing to deposit security on his behalf in the form of a bank guarantee. The Court has a duty to balance the rights of both parties. The bank guarantee between Family bank and the Applicant’s insurance company, Directline Assurance Company Limited is for a period of 12 months from 18th February 2022, the same has since expired and there is no guarantee that the interests of the Respondents will be catered for.
17. In [Machira T/A Machira & Co Advocates v East African Standard \(No 2\)](#) [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.



18. The decretal amount in this case is Kshs 1,374,637.50 being general and special damages. The Respondent contends that the accident and liability is not in dispute and this has not been rebutted by the Applicant.

Disposition

1. In the circumstances, I hereby grant stay pending the hearing and determination of the Appeal on condition that the Applicant pay the Respondent half the decretal sum within 90 days and;
2. Deposit the other half in a Bank Guarantee within 90 days.

It is so ordered.

RULING DELIVERED, DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 7TH MARCH, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In the presence of:

No Appearance For The Applicant

No Appearance - For The Respondent

Geoffrey/patrick - Court Assistant(s)

(judge Bereaved)

Judgment Released To Registry On 26/3/2024.

M.W.MUIGAI

JUDGE

