



**Maingi v Mwongera & another (Civil Appeal E146 of 2023)
[2024] KEHC 2807 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E146 OF 2023
TW CHERERE, J
MARCH 14, 2024**

BETWEEN

ALBERT MWANGI MAINGI APPELLANT

AND

HARON MWONGERA 1ST RESPONDENT

JOHN M'MARETE 2ND RESPONDENT

RULING

Background

1. 1st Respondent lent KES. 420,000/- to 2nd Respondent which sum was guaranteed by the Appellant's title no. Kiirua/Naari-Maitei/601. When the sum was not paid, 1st Respondent sued the Appellant and 2nd Respondent for refund of the loan sum and damages for breach of contract and alternatively an order for attachment and sale of LR. Kiirua/Naari-Maitei/601 to recover the loan sum and damages, costs of the suit and interest.
2. The 1st Respondent's claim was denied but at the conclusion of the trial, judgment was entered on 21st August, 2023 in favour of the 1st Respondent for each of the prayers in the plaint.

Notice of motion

3. Aggrieved by the judgment, Applicant has filed this appeal. Simultaneously, Applicant on 15th November, 2023 filed the notice of motion dated 14th November, 2023 supported by his affidavit sworn on even date based mainly on the ground that he was not party to the loan agreement and sought orders for:
 1.spent
 2.spent



3. Stay of execution of judgment in Meru CMCC No. E005 of 2020 pending the hearing and determination of the appeal
 4. Any other order
 5. Costs be provided for
 6. Costs be in the appeal.
4. Respondent opposed the application by way of an affidavit sworn on 11th January, 2024 contending that Appellant/Applicant was party to the loan agreement and is liable to pay the sum of KES. 1,262,416/- in terms of the decree dated 25th August, 2023.

Analysis and Determination

5. I have considered the application in light of affidavits on record and submissions and cited authorities and although the parties submitted on the substance of the appeal, the issue for determination is whether a case has been made for an order of stay of execution pending appeal
6. Order 42 (6) of the *Civil Procedure Rules* provides that no order for stay of execution shall be made unless application has been made without unreasonable delay; substantial loss is demonstrated and security for the due performance of such decree or order is offered. (See *Endmor Steel Millers Ltd vs James Wakhulunya Makuto* [2016] eKLR).
7. The impugned judgment was delivered on judgment dated 21st August, 2023, this application was filed timeously on 15th November, 2023.
8. There is a myriad of cases on what constitutes substantial loss. In *Standard Assurance Co. Ltd -vs- Alfred Mumca Komu* [2008] eKLR the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”
9. Applicant has neither pleaded that his land which is currently valued at KES. 8,000,000/- is likely to be sold to recover the judgment sum which will render his appeal which he contends is triable nugatory and cause him irreparable loss nor demonstrated that he is likely to suffer any substantial loss if the impugned judgment is not stayed.
10. I notice that sale of Applicant/Respondent’s land did not form part of the loan agreement and the Applicant/Appellant’s contention that his appeal is triable has therefore been well demonstrated. That being the case, the sale of Applicant/Respondent’s land will therefore no doubt cause him irreparable loss.
11. None of the parties submitted on security which is a prerequisite for granting an order for stay of execution pending appeal.
12. From the foregoing analysis, I find that the notice of motion dated 14th November, 2023 has merit and it is allowed in the following terms
 1. An order of stay of execution of judgment and decree in Meru CMCC NO. E005 OF 2020 is granted pending the hearing and determination of the appeal on condition that Applicant/Appellant deposits with the court KES. 100,000/- within 14 days from today



2. Record of appeal be filed and served in the next 45 days
3. Mention on 28th May, 2024 to confirm compliance with these orders and for orders concerning the hearing of the appeal
4. Costs shall be costs in the appeal

DATED IN MERU THIS 14th DAY OF March 2024.

TW. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellant/Applicant - Mr. Ndubi for Ndubi Ondubi & Associates

For 1st Respondent - Mr. Mutuma for Mutuma & Kosgei Advocates

For 2nd Respondent - Mr. Mwirigi for Mwirigi Kaburu & Co. Advocates

