



**Munyao v Kivuvo & another (Suing as the Personal Representatives of the Estate of Stella Katiti Mbithi - Deceased) (Civil Appeal 11 of 2024) [2024] KEHC 2535 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2535 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 11 OF 2024  
FROO OLEL, J  
MARCH 12, 2024**

**BETWEEN**

**BRIAN WAMBUA MUNYAO ..... APPELLANT**

**AND**

**SAMSON MBITHI KIVUVO ..... 1<sup>ST</sup> RESPONDENT**

**JENIFFER NAFULA MBITHI ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF STELLA  
KATITI MBITHI - DECEASED**

**RULING**

1. The Application before this court is a notice of motion application dated 23.01.2024 brought pursuant to the provisions of section 1A, 3A, 79G and 95 of the *Civil Procedure Act* and Order 42 rule (6) of the Civil Procedure Rules and all other enabling provisions of law. Prayers 1 and 2 are spent and the main prayers sought is prayer (3) for stay of execution of judgment delivered in Machakos CMCC No E381 of 2022, pending the hearing and determination of this Appeal and costs of the application.
2. The Application is supported by a supporting affidavit of one Joy Muthoka a legal officer of UAP Old Mutual Insurance Company ltd dated 23<sup>rd</sup> January 2024 and is opposed by the Respondent, Samson Mbithi Kivuvo through his replying affidavit dated 02.02.2024.
3. The applicant averred that judgment was entered as against him on 21<sup>st</sup> December 2023 for the sum of Kshs.2,064,263.31/= and that he was aggrieved by the said judgement and had instructed his advocate to file an appeal as against the said judgement and seek for orders of stay of execution. The appeal was arguable and high chances of success as the trial courts finding on liability was erroneous and quantum awarded excessive .The respondent was a person of unknown means and he was apprehensive that if the decretal sum was paid out, the Respondent would not be in a position to recover the same from the respondent and therefore prayed to be allowed to provide security in the form of a bank guarantee.



4. This application was opposed by the respondents who deposed that the Appellant insurer was not a party to this suit and therefore, could not be allowed to provide a bank guarantee/ insurance bond, yet this was not a declaratory suit where ordinarily they would participate. Further no bank guarantee/ insurance bond had been annexed or tendered before this court, which made the application defective in substance. The respondent also averred that they were persons of means and in the unlikely event that the appeal succeeded, they would be in a position to refund the sums paid out. The application was therefore not merited and prayed for the same to be dismissed.

### **Analysis & Determination**

5. I have carefully considered the Application, as well as the corresponding affidavits. 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 *Butt Vs Rent Restriction Tribunal (1982) KLR 417* and *James Wangalwa & Another Vs Agnes Nalika Chereto (2012) eKLR*)
6. The judgment appealed against was delivered on 21<sup>st</sup> December 2023. The Appeal herein was filed on 18<sup>th</sup> January, 2024 and this application was also filed on 24<sup>th</sup> January 2024. Thus, it can be said that this appeal and application for stay of execution have been filed timeously.
7. On the likelihood of suffering substantial loss, it is sufficient if an applicant seeking a stay of execution demonstrated that he/she would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful. See *G. N. Muema P/A (516) Mt View Maternity & Nursing Home Vs Miriam Maalim Bishar & Another (2010) eKLR* , *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR*.
8. Guided by the above authorities and in the absence of the requisite proof from the Respondents that they are persons of means, it would be safe to hold that the appellant would suffer substantial loss and the appeal would be rendered academic in nature if the decretal sum is paid out to the Respondent. The Appellant has therefore fulfilled this condition.
9. On the security, the Appellant has indicated that his 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 Vs Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008*; *Kenya Shell Ltd Vs Kibiru & another (Supreme)*; *Mukuma Vs Abuoga (1988) KLR 645*.
10. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he/she would find himself 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 Nduhiu Gitahi Vs Warugongo (1988) KLR 621*; *IKAR 100;(1988-92) 2 KAR 100*.



## **Disposition**

11. Taking all relevant factors into account 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 Kenya shillings One Million ( Kshs.1,000,000/=) and issue a bank guarantee for the remaining sum due under the decree being Kenya shillings one million, sixty four thousand, two hundred and sixty three hundred and thirty one cent (kshs.1,064,263.31/=). The bank guarantee will be specific to this appeal and will be valid for the entire period of this Appeal, until it is heard and determined.
  - b. The said conditions are to be met within 30 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 12<sup>TH</sup> DAY OF MARCH, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 12<sup>TH</sup> DAY OF MARCH, 2024.**

In the presence of: -

Ms Mutuku for Appellant

Mr Muthoka for Respondent

Sam Court Assistant

