



REPUBLIC OF KENYA



**Mbithi & another v Mutisya (Civil Appeal E44 of 2023)  
[2024] KEHC 2852 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2852 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E44 OF 2023  
TM MATHEKA, J  
MARCH 11, 2024**

**BETWEEN**

**SHADRACK MWITHI MBITHI ..... 1<sup>ST</sup> APPLICANT**

**JOSHUA MWITHI MBITHI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SIMON MBITHI MUTISYA ..... RESPONDENT**

**RULING**

1. Before me is the Notice of Motion dated 31<sup>st</sup> May 2023. It seeks inter alia a stay of execution of the Judgment Decree delivered on the 2<sup>nd</sup> May 2023 by the Hon. L K Mwendwa PM in Tawa MCCC E14 of 2020 pending the hearing and determination of the appeal.
2. The applicants also seek that they be allowed to furnish the court with a security in the form of a Bank Guarantee from a reputable Bank pending the hearing and determination of the appeal.
3. That the court provides for costs
4. That the judgment was against the appellants in favour of the respondent whereby the court awarded liability at 100%, general damages of Ksh 500,000 plus costs and interest.
5. The application is supported by the affidavit of Shadrack Mwithi Mbithi to the effect that he has an arguable appeal. There is a memorandum of appeal dated 23<sup>rd</sup> May 2023 in which the appellant attacks the subordinate court's decision on the basis that the respondent was not entitled to Ksh 500,000, and that the sum was against the conventional figures that the appellant's submissions were not considered. It is noted that liability is not contested.
6. The application is opposed via the affidavit of Simon Mbithi Mutisya on the ground of lacking merit. That there is no opposition to liability; that the applicants have not complied with order 42 Rule 6 (b)



- on the provision of security for the due performable of the decree; that the application if allowed be on condition that  $\frac{3}{4}$  of the decretal sum be paid to him and the balance be in an interest earning account
7. Parties filed submissions
  8. The applicants set out for determination the issues; whether they have demonstrated that they will suffer substantial loss if the orders are not granted; whether the application was brought without delay; whether they are ready to furnish security that might ultimately be binding to them.
  9. It is submitted that due to the fact that the respondent has not demonstrated by evidence that if the appeal succeeds he will be able to refund the decretal sum should it be paid to him is proof that they will suffer substantial loss. That the application was brought without delay, and that they have offered a bank guarantee as security. They argue that they do not need to demonstrate and arguable appeal.
  10. They cite *Bake 'n' Bite NRB Limited v Daniel Mutisya Mwalonza* [2015]eKLR, on the proposition that there is no requirement to establish an arguable appeal; *Esther Wamaita Njibia & 2 others v Safaricom Limited* [2014]eKLR on the principles upon which the court exercises its discretion – to avoid injustice or hardship ,to do justice to the parties ;*Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012]eKLR, on the issue of substantial loss being the cornerstone on which the jurisdiction to preserve the status quo is exercised, and the caution not to bear weight on whether or not there is an arguable appeal; *Edward Kamau & Anor v Hannh Mukui Gichuki & Another* [2015] eKLR on the duty of a respondent to avail an affidavit of means to demonstrate financial ability and that the evidential burden shifts to the respondent on this issue
  11. It is argued that they have fulfilled all the requirements for them get the orders sought in this application
  12. The respondent relies on *Butt v Rent Restriction* Tribunal 1982 KLR 417 on the interpretation of the precursor to order 42 rule 6(2) *CPR* 2010, that the grant or refusal of a stay of execution is the exercise of judicial discretion, and the Court of Appeal in *Duncan Nduracha v Fuad Mohammed & 2 others* [2011]eKLR that discretionary power cannot be exercised capriciously or at the whim of the court, on the unlikely authority on temporary injunction and irreparable harm *Nguruman Limited v Jan Bonde Nielsen & 2 Others* CA No 77 of 2012, and on s. 107 to 109 of the *Evidence Act* that he who alleges must prove, and that the applicants had not proved that they would suffer irreparable harm, *Kenya shell Limited v Kibiru* [1986] KLR 410, *Joseph Gachie t/a Joska Metal Works v Simon Ndeti Muema* [2012]eKLR where the judge observed It is not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted since by granting stay would mean that the status quo should remain as it were before the judgement and that would be denying a successful litigant of the fruits of his judgement which should not be done if the applicant has not given to the court sufficient cause to enable it to exercise its discretion in granting the order of stay. See *Kenya Shell Ltd v. Benjamin Karuga Kibiru and Another* [1986] KLR 410; 1 KAR 1018; [1986-1989] EA 266.
  13. That the applicants have not made any provisions for costs and cite Order 22 rule 22(3) of the *CPR 2010*, and among others *GianFranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR on payment of security for the performance of the decree, which would be released to the respondent in an unsuccessful appeal without having to resort to execution proceedings. *Machira t/a Machira & Co Advocates v East Africa Standard* (no.2) (2002) KLR 63 on the caution against the obsession with protecting an appellant or intending appellant t in total disregard of the successful litigant who is entitled to the fruits of his judgment hence the respondent would suffer prejudice.



14. That the court if inclined to grant the prayers to order release of ½ the decretal sum to the respondent and he other be deposited in a joint interest earning account.
15. The only issue for determination is whether the applicants have established that they will suffer substantial loss. This is because the application was brought within the required time, the applicants are willing are willing to give security.
16. The respondent at some point put forward arguments and authorities intended for the application for an injunction which is not the same as stay of execution pending appeal.
17. It is true that the respondent did not place before me evidence that should the whole decretal sum be paid out he would be able to refund. Balancing the right of the appellants to challenge the judgment against them and the respondent's entitlement to the fruits of his judgment is the crux of this application.
18. The respondent has made this easy for the court because he concedes if the court considers his entitlement to the fruits of his judgment then the applicants can get the order to pursue their appeal.
19. In the circumstances neither by whim nor caprice, but on the facts and authorities before me I make the following orders;
20. The application for stay of execution pending appeal is allowed on the following conditions;
  - a. that he applicants pay the respondent half the decretal sum within 45 days of this order
  - b. that the balance deposited in a joint interest account in the names of counsel within 45 days of this order
  - c. that the applicants file their appeal and serve within 45 days hereof.
  - d. in default of either A or B the order of stay of execution pending appeal will lapse and the application will stand dismissed with costs to the respondent
21. Costs of this application to the respondent

**DATED, SIGNED AND DELIVERED THIS 11<sup>TH</sup> MARCH 2024**

.....

**MUMBUA T MATHEKA**

**JUDGE**

**CA NELIMA**

Kimondo Gachoka & Co advocates for the appellants

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Kyalo Muia & Co Advocates for the Respondent

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