



REPUBLIC OF KENYA



Muhuyi v Mulinya (Civil Appeal 85 of 2023) [2024] KEHC 2616 (KLR) (11 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 85 OF 2023
SC CHIRCHIR, J
MARCH 11, 2024**

BETWEEN

ZEBBY MUMELO MUHUYI APPLICANT

AND

BENSON MALULI MULINYA RESPONDENT

RULING

1. This Applicant's Notice of Motion dated 4th July 2023 seeks for the following orders:
 - a. (Spent).
 - b. (Spent)
 - c. That pending the hearing and determination of this appeal the Honourable court be and is hereby pleased to grant an order of stay of execution of the judgment and decree in Kakamega small claim No E066 of 2023 delivered and issued on 16/5/2023
 - d. That the cost of his application abide the outcome of the appeal.
2. The Application is supported by the Affidavit of of Zebby Mumelo Muhuyiwho.
3. The Applicant sates that his appeal has a high chances of success based on the fact that the jurisdiction of the small claims was not properly invoked ; that the title deed on which the the claim was based was cancelled, and finally that the matter was both subjudice and res judicata.
4. He claims that he was willing to deposit security as the court determines pending the determination of the appeal.
5. He avers that he will suffer substantial loss should execution proceed and that the respondent was not in a position to refund the money if the appeal would succeed.
6. The Respondent did not respond to the Application.



Applicant's submissions

7. The appellant's submission is that the subject matter of the suit in the lower court was a land matter and consequently the small claims court had no jurisdiction to entertain it
8. He claims that he will suffer a substantial loss if the stay was not granted since the award granted by the small claim court would injure his financial standing.
9. On the part of the security for costs, he submitted that the court has the discretion to grant stay without the need for security.
10. He relied in the case of *Ujagar Singh v Runda Coffee Estates Limited* (1966) EA 263 cited in *Centre for Mathematics, Science and Technology Education in Africa (CEMASTEA) v Apex security Services Limited* (2018) eKLR where the court ordered preservation of the *status quo* pending the hearing and determination of the appeal.
11. He submitted that the appeal has a high chances of success and that unless the stay is granted, the appeal would be granted nugatory and that he would suffer a substantial loss.

Determination.

12. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the *Civil Procedure Rules, 2010* which provides as follows: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 sub-rule (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.

(3)

13. The court, in the case of *Butt v Rent Restriction Tribunal* (1979) stated that the power of a court to grant stay of execution is discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision.



14. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties. In [RWW v EKW](#) (2019) eKLR the court of Appeal had this to say in this regard:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

15. On the issue of substantial loss, the applicant avers that the amount that the trial court awarded would injure his financial standing since he was a retired police man. He avers that the respondent did not file his affidavit of means and it cannot be guaranteed that the respondent will refund the decretal sum if the appeal was granted.

16. The decretal sum in this case is Kshs 317,870, and the Appellant has expressed fears that the respondent may not have the means to refund it in the event that the Appeal succeeds. Once the Appellant has expressed apprehension of the Respondent’s ability to refund the decretal sum , the burden shifts to the Respondent to demonstrate otherwise . In the case of [Superior Homes Ltd v Musango Kithome](#) (2018) eKLR the court of Appeal had this to say about the respondent’s burden in an Application for stay:

“...The law, however appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum.”

17. The Respondent in this case , has not responded to the Application , let alone demonstrate his financial capability. In the absence of rebuttal, this court has no reason to disbelieve the Appellant

18. On whether the application was made without unreasonable delay, the ruling was made on 16.05.2023 and the amended appeal filed on 23.05.2023 while the application filed on 4th July 2023. Am satisfied that the delay was not inordinate.

16. The Applicant has further argued that it has an arguable Appeal with high chances of success. I have perused the memorandum of Appeal. The Appellant has raised , among others, issues of jurisdiction and the existence of another related suit . The issues in my view are arguable. This is not to necessarily say that the Appeal will succeed . All that is required of this court is to ascertain if there is an arguable Appeal on record. (Ref: [Bake N Brite Nairobi Ltd v Daniel Mutisya Mwalonzi](#) (2015) eKLR .

17. The final issue for determination was on the security.

18. The applicant ought to satisfy the condition of security. In the persuasive decision of [Gianfranco Manenthi & another v Africa merchant Assurance Co. Ltd](#) [2019] eKLR the court observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the [Civil Procedure Rules](#), it is trite that the winner of litigation should not be denied the



opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls. Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals.... “.

16. From the above decisions, the issue of security is discretionary and it is upon the court to determine the same. The Applicant argues that the court can grant stay without security. It is worth noting that the right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment. Consequently, the Appellant must provide security so that the Respondent can easily have access to the money in the event that the Appeal fails. I do not therefore agree with the Appellant’s submission that security is not necessary.
17. The Application is merited. and consequently, I hereby proceed to make the following orders:
 - a) Pending the hearing and determination of the Appeal herein there shall be a stay of execution of the Judgment and decree of Kakamega small claim No E066 of 2023
 - b) The stay is conditional upon the Appellant depositing the decretal sum in court within 30 days from today’s date
 - c) Each party to meet their own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11TH DAY OF MARCH 2024.

S. CHIRCHIR

JUDGE.

In the presence of:

Godwin- Court Assistant

Mr. Mondia for the Applicant.

