



REPUBLIC OF KENYA



**Muthoka v Kazungu (Civil Appeal 120 of 2023)
[2024] KEHC 2580 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 120 OF 2023
SM GITHINJI, J
MARCH 11, 2024**

BETWEEN

KILONZO MUTHOKA APPELLANT

AND

WILFRED CHARO KAZUNGU RESPONDENT

*(Being an Appeal from the Judgment of the Magistrate's Court at Kilifi by
Hon Sitati – SRM in RMCC E109 of 2022 delivered on 17th July, 2023)*

RULING

1. For determination is the Appellant's notice of motion dated 7th August 2023 and filed on 21st August 2023 for orders: -
 1. Spent.
 2. Spent.
 3. That this honourable court be and is hereby pleased to issue stay of execution of the award on special damages of Kshs. 1,413,136/- in Kilifi MCC No. E109 of 2022 Wilfred Charo Kazungu vs Kilonzo Muthoka pending hearing and determination of this Appeal.
 4. That this honourable court be pleased to make any other or such further orders as it may deem fit and just to grant.
 5. That costs of this application be provided for.
2. The application is supported by the affidavit sworn by the Appellant and the grounds found on the face of the motion. The Appellant's case is that judgment was delivered on 17th July 2023 in Kilifi MCCC No. E109 of 2022 in favour of the Respondent who was awarded Kshs. 800,000/- general damages and Kshs. 1,413,136/- special damages. Aggrieved by the award on special damages, the Appellant



has now filed the present appeal. To him, special damages were not proved to justify the award. The Appellant deposed that to demonstrate good will, he has paid the sum awarded in special damages. He is apprehensive that the Respondent will proceed with execution if stay is not granted, which will in turn render the appeal nugatory.

3. The Respondent opposed the application. She filed a Replying Affidavit dated 18th September 2023 wherein she deposed that the application is unmerited, an afterthought aimed at delaying the course of justice. She added that the Respondent should deposit the decretal sum as security.
4. Parties were directed to file written submission and only the Appellant complied. I have carefully considered the Appellant's submissions and authorities cited to me, the sole issue for determination is whether the Appellant has met the threshold for granting an order for stay of execution of the judgment delivered on 17th July 2023.

Analysis and Determination

5. On matters stay of execution, Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) 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.
6. In *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions namely; - establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. The application must be made without unreasonable delay. In addition, stay may be granted for sufficient cause and that the Court in deciding whether or not to grant stay must be guided by the overriding objectives enshrined under section 1A and 1B of the [Civil Procedure Act](#).
7. In the present case, the impugned judgment was delivered on 17th July 2023 and the present application filed on 21st August 2023. This delay in my view is not unreasonable. However, I have carefully perused the notice of motion and supporting affidavit thereof I do not see how the Appellant has demonstrated substantial loss. Such attempt was made in their submissions. Counsel argued that the decretal amount of Kshs. 1, 413,136/- is a substantial amount which if executed will render the appeal nugatory, and that there is no guarantee that the Appellant will be able to recover the said amount.



8. On this principle, Platt, Ag. JA (as he then was) in Kenya Shell Limited vs. Kibiru [1986] KLR 410, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

9. On his part Gachuhi, Ag,JA (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

10. In the foregoing, I am not convinced that the reasons advanced by the Appellant amount to a demonstration of substantial loss. Be that as it may, I note that in the Replying Affidavit, the Respondent is somewhat open to granting of the orders sought as long as the decretal amount is deposited in court as security to pave way for the appeal. For this reason, and in the interest of justice, I hereby grant conditional stay of execution pending hearing and determination of the appeal in the following terms: -

- a. That the Appellant do deposit in court within 30 days the sum of Kshs. 1, 413,136/-, failure to which, the Respondent shall be at liberty to execute.
- b. Costs to abide the outcome of the appeal.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 11TH DAY OF MARCH, 2024.

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Nyambane for the Applicant/Appellant
2. Ms Murango for the Plaintiff/Respondent

