



Mutuku v Nzulai (Civil Appeal 262 of 2023) [2024] KEHC 2417 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL 262 OF 2023

FR OLEL, J

MARCH 6, 2024

BETWEEN

JAMES MULAKO MUTUKU APPELLANT

AND

JOSEPH MUSYOKI NZULAI RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 3rd November 2023 brought pursuant to provisions of Section 3A, 79G and 95 of the *Civil procedure Act*, (Cap 21), Order 42 Rule 6, (1),(2) & Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayers sought are prayers (3) and (5) a for stay of execution of the decree dated 21st September 2023, issued in Kithimani CMCC No 17 of 2022, and that they be allowed to provide security in the form of a bank guarantee for the decretal sum.
2. This application is supported by the grounds on the face of the said application and the supporting affidavit of the Applicant James Mulako Mutuku, dated 3rd November 2023, while there is no replying Affidavit or grounds of opposition filed by the Respondent.
3. The Appellant averred that they are wholly dissatisfied by the Judgment of Hon P Wechili, Senior Principal Magistrate dated 21st September 2023 delivered in Kithimani CMCC No 17 of 2022 and had preferred an appeal against the same both on liability and quantum. He averred that he had an arguable appeal which had high chances of success and further that the said appeal is meritorious and stands a good chance of success as demonstrated in the Memorandum of Appeal filed.
4. The appellant was apprehensive that the there is strong likelihood that the respondent will apply for warrants of execution consequent of which he is likely to attach the appellant's assets and if sold that would cause him substantial loss and render the appeal filed to be rendered nugatory. Finally, the



Appellant stated that he is ready and willing to provide a Bank guarantee for the decretal amount pending hearing and determination of this Appeal.

5. The Respondent did not file any Replying Affidavit and/or grounds of opposition, but be that as it may the court is still bound to consider the said Application on its Merit.

Analysis & Determination

6. I have carefully considered the Application, its Supporting Affidavit, and submissions as filed and do find that, the only issue for determination is whether the Appellant has met the conditions necessary for the grant of orders of stay of execution pending hearing and determination of this Appeal.
7. 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 *Amal Hauliers Limited Vs Abdunasi Abukar Hassan* (2017) eKLR & *Butt Vs Rent Tribunal* (1982) KLR 417
8. The ruling appealed against was delivered on 21st September, 2023. The Appeal herein was filed on 11th October 2023, while the application for stay was filed on 6th November 2023. The appeal was within the statutory period provided under Section 79G of the [civil procedure Act](#) and thus it can be said that this appeal and this application has been file timeously.
9. On the likelihood of suffering substantial loss, and security of the appeal, 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 his 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 his 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 would find himself unable to get back his money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in his 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 consideration, especially and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;
 - a. The Appellant/Applicant do pay the respondent half of the decretal Amount issued under the decree dated 21st September 2023 delivered in Kithimani CMCC 17 OF 2022 and provide a Bank Guarantee for the remining half of the decretal amount. The said Guarantee must be specific to this Appeal and valid for the entire duration until the Appeal is heard and determined on Merit.
 - b. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.



c. The costs of this Application will be in the cause

12. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF MARCH, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 6TH DAY OF MARCH, 2024.

In the presence of;

No appearance for Applicant

No appearance for Respondent

Sam Court Assistant

