



Gitonga v Muimi & another (Suing as the legal representative and administrator of the Estate of Muimi Musyimi Kiambi (Deceased) (Miscellaneous Application E069 of 2023) [2024] KEHC 4524 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION E069 OF 2023
LM NJUGUNA, J
APRIL 11, 2024**

BETWEEN

DAVID KIAMBI GITONGA APPLICANT

AND

CHRISTINE NZUNA MUIMI & ANGELINA MUTWA MUSYIMI (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF MUIMI MUSYIMI KIAMBI (DECEASED) RESPONDENT

RULING

1. The applicant filed a notice of motion dated 23rd November 2023, supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 - a. Spent;
 - b. Spent;
 - c. That the honourable court be pleased to issue a temporary order of stay of execution of the judgment, decree and other consequential orders herein pending hearing and determination of the appeal No 52 of 2023; and
 - d. That the costs of this application be in the cause.
2. Judgment was entered against the applicant for the sum of Kshs 3,410,550/= being general damages. The applicant has appealed against the said judgment on grounds that the award was inordinately high. It is his case that if the orders sought are not granted, the appeal will be rendered nugatory since the respondents have already commenced execution. That the applicant is willing to provide security for performance on such terms as the court shall deem fit and that the application has been brought without delay.



3. In opposition, the respondents filed a replying affidavit dated 27th December 2023 stating that the application is frivolous and the appeal does not raise any relevant issues. That this application is a way of delaying the respondents from enjoying the fruits of their judgment and the applicant has not demonstrated what loss will be suffered if the decretal amount is paid. That in any event, the 1st respondent is a person of means and is able to refund the money if the appeal succeeds. That there is an unexplained delay in filing the application since the impugned ruling was delivered on 30th August and the application was filed 3 months later. That there is no just cause to stay execution.
4. In this application, the court directed the parties to file their written submissions but only the applicant complied.
5. The applicant submitted that he will suffer substantial loss if execution of the decree continues and that the appeal will be rendered nugatory. Reliance was placed on Order 42 Rule 6 of the *Civil Procedure Rules* and the cases of *Kenya Orient Insurance Co. Ltd v Paul Mathenge Gichuki & another* (2014) eKLR, *Stanley Kiplagat Rono & another v William Kiprotich Cherus* (2021) eKLR and *RWW v EKW* (2019) eKLR where the general sentiment was that the purpose of an order for stay pending appeal is to preserve the subject matter of the appeal.
6. He stated that the application has been made without delay and so the same should be allowed as was held in the case of *Lena D. Korir v Kenyatta University* (2012) eKLR. That the application was filed within the period of 45 days given by the trial court and so the same should be deemed to have been filed timeously. That the applicant is willing to provide security for performance of the decree and that the respondents have not demonstrated their ability to refund the amount if the same is paid.
7. The issue for determination is whether the applicant deserves to be granted the orders sought.
8. Order 42 Rule 6(2) of the *Civil Procedure Rules 2010* provides:
 - (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.
9. It is the applicant’s argument that he is bound to suffer detriment if the order for stay is not granted and that the appeal will be rendered nugatory and an academic exercise. The detriment envisioned herein is in the form of execution for the decretal amount and the same is already underway. Execution is a legal process as was held in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”



10. Further, the memorandum of appeal was filed on 20th September 2023, within good time. The application herein was filed on 25th November 2023, after the appeal had been filed. In my view, the applicant filed his appeal promptly in a bid to challenge the decision of the lower court. This is a demonstration that he is willing to expedite the case.
11. In as much as the application herein seems to have been brought much later, the same comes when the appeal has already been lodged. Therefore, I think that the application was brought within reasonable time given that it comes after the appeal has been properly filed. By granting an order for stay of execution pending appeal, it is prudent to also consider that the respondents have a right to enjoy the fruits of their judgment. It is a balance that must be struck and, in my view, the Constitution will guide sufficiently as provided in Articles 48 and 159(2) and Order 42 Rule 6(b) of the Civil Procedure Rules on provision of security.
12. The applicant stated that he is willing to provide security for performance of the decree. In the absence of security for performance, parties open themselves up to conducting the proceedings in a laissez faire manner, at the risk of trivializing the whole litigation process and wasting precious judicial time. Order 42 Rule 6(b) of the Civil Procedure Rules is not intended to be punitive to the applicants but rather to ensure that the parties are committed to litigating the suit to its logical conclusion while keeping their eyes on the prize. To this end, it is prudent that the application for stay pending appeal be allowed on condition that security for performance be provided.
13. Therefore, I find that the application has merit and it is hereby allowed with orders as follows:
 - a. Pending hearing and determination of Embu High Court Civil Appeal No E052 of 2023, stay of execution of the judgment and decree arising from the judgment in Siakago PMCC No E117 of 2021 is hereby granted on condition that the applicant deposits half of the decretal amount in court within 21 days of this ruling; and
 - b. Costs of the application shall be in the cause.
14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF APRIL, 2024.

L. NJUGUNA

JUDGE

