



Mathiu v Kiende (Civil Appeal E028 of 2024) [2024] KEHC 4085 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E028 OF 2024
EM MURIITHI, J
APRIL 18, 2024**

BETWEEN

SIMON KINYUA MATHIU APPLICANT

AND

MWITI MARY KIENDE RESPONDENT

RULING

1. By a certificate of urgency dated 27/2/2024 pursuant to Order 22 Rule 22, Order 42 Rule 6 and Order 51 (1) of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act and all other enabling provisions of the law, the Applicant seeks that:
 1. Spent
 2. Spent
 3. There be stay of execution of the decree emanating from the judgment in Meru Small Claims Court Case Number SCCCOM/E474 of 2023 Mwititi Mary Kiende Vs Simon Kinyua Mathiu pending the hearing and determination of Appeal.
 4. Cost of this application be in the cause.
2. The application is premised on the grounds on the face of it and supporting affidavit of Simon Kinyua Mathiu, the Applicant herein sworn on even date. Following the delivery of the judgment herein awarding the Respondent an inordinately huge sum of money for breach of contract, he lodged an appeal against it. There is imminent and real danger of execution of the decree and he stands to suffer substantial loss unless stay is granted. He has no constant income as he is jobless and sickling, and the judgment was meant to enrich the Respondent because it was not backed by any law or the evidence. He faults the trial court for not only failing to record his evidence but also failing to take into account that the said breach of contract was as a result of inevitable circumstances beyond his control. His



appeal has high probability of success and it will be rendered nugatory if stay is denied. The application has been made in good faith and with unreasonable delay.

3. The Respondent has opposed the application vide his replying affidavit sworn on 4/3/2024. She avers that the application is misconceived and meritless because the alleged sickness with gastritis is neither a serious condition nor a good reason for stay. The application does not meet the mandatory conditions of stay under Order 42 Rule 6 of the Civil Procedure Rules, and as the successful party, she should benefit from a fair and just decree without allowing the Applicant to continue obstructing execution.

Determination

4. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, as follows: -

“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.

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.
 - 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.”
5. This court respectfully agrees with the Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417 that the power to grant stay is discretionary and such discretion should be exercised in such a way as not to prevent an appeal.
 6. This court notes that the application was filed timeously and without unreasonable delay on 28/2/2024 while the decision sought to be appealed against was made on 7/2/2024.
 7. The court considers from the grounds of appeal as raised in the appellant’s memorandum of appeal, particularly on jurisdiction of the trial court, the excessiveness of the damages awarded for breach of contract and the non-consideration of the Applicant’s evidence and submissions, that the appeal is indeed arguable, which is not one which must necessarily succeed and neither is it for the court to go into the merits of the intended appeal.
 8. Whereas the Applicant contends that he will suffer substantial loss if stay is denied as his appeal will be rendered nugatory, the Respondent likens grant of stay to obstruction of the execution process.
 9. 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, it 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. This is what substantial loss would entail. (See *James Wangalwa & anor v Agnes Naliaka Cheseto* (2012) eKLR).

10. The court is minded that the Respondent, as the successful litigant, is entitled to enjoy the fruits of her judgment, and the Applicant, as an aggrieved party, has an undoubted right to appeal against the trial court's decision.

Orders

11. Accordingly, in order to strike a balance between the two conflicting rights, the court will allow the application dated 27/2/2024 on the following terms:-
 1. An order for stay of execution of the judgment and decree in Meru Small Claims Court Case Number SCCCOM/E474 of 2023 pending the hearing and determination of the appeal is hereby issued.
 2. The Record of Appeal to be filed within sixty (60) days from the date hereof.
 3. The Applicant shall within 30 days from the date hereof pay to the Respondent the sum of Ksh.300,000 and deposit the balance of the decretal sum of Ksh.700,000 into an escrow account in the joint names of the advocates for the parties.
 4. In the event of default of any of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
 5. The costs of this application shall abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 18TH DAY OF APRIL, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms. Ojwang Sombe & Co. Advocates for the Applicant

Mr. K. Arithi for the Respondent

