



**Mburu alias Priscillar Njoki Mburu v Muchira alias Gabriel Kinyua Mwachira
(Civil Appeal E172 of 2023) [2024] KEHC 5545 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E172 OF 2023
DO CHEPKWONY, J
APRIL 12, 2024**

BETWEEN

**PRISCILLAH NJOKI MBURU ALIAS PRISCILLAR NJOKI
MBURU APPELLANT**

AND

**GABRIEL KINYUA MUCHIRA ALIAS GABRIEL KINYUA
MWACHIRA RESPONDENT**

JUDGMENT

1. What is before the court for determination is the Notice of Motion application dated 11th June, 2023 in which the Applicant seeks for:-
 - a. Spent;
 - b. Spent;
 - c. Execution of the Judgment delivered on 9th May, 2023 in Thika CMCC No.E433 of 2021 Gabriel Kinyua Muchiri v Priscillah Njoki Mburu and all consequential proceedings be and are hereby pending the hearing and determination of the Appeal.
 - d. This Honourable Court be pleased to issue such further orders or directions that it deem fit in the interest of justice.
2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of Tony Marire sworn on 11th June, 2023, where the Applicant has stated:-
 - a. That the trial court issued Judgment in favour of the Plaintiff on 9th May, 2023, which the Appellants have appealed against.



- b. That the Appellants' properties are at risk of being auctioned if the matter is not heard on priority and the orders of stay sought granted.
 - c. That stay of execution of the Judgment need to be granted pending the hearing and determination of the present application and the Appeal because in the absence the same, the Respondent will execute the Judgment thus expose the Appellants to irreparable loss.
 - d. That the Appeal will also be rendered nugatory if stay is no granted.
 - e. That it is just and proper that stay of execution of the Judgment be extended pending the hearing and determination of the present application and the Appeal.
3. The Respondent opposed the application through Replying Affidavit which he swore on 13th July, 2023. According to the Respondents, the application is misconceived and incompetent and should be struck out. He holds that the Supporting Affidavit has been sworn by an Advocate and deposes contentious issues without disclosing the sources of his information contrary to Rule 9 of the [Advocates Practice Rules](#) and Order 19 Rule 3(1) of the [Civil Procedure Rules](#). He has urged that the Supporting Affidavit be struck out.
 4. It is also the Respondent's contention that the application has not met the conditions set under Order 42 Rule 6 of the [Civil Procedure Rules](#). He contends that the Applicant has not explained the delay of close to two months, or demonstrated the substantial loss she will suffer if the stay is not granted. He also contends that the Applicant has not shown that he will not be able to repay the decretal sum and has not offered any security for the performance of the decree.
 5. It is further the Respondent's averment that the issue in dispute in the appeal is on quantum of damages as there was a consent on liability of 80 : 20% in his favour. He has then urged that in the event the court is inclined to allow the application, it should order payment of half of the decretal sum and for the balance to be held in an interest-earning savings accounts to be held in joint names of both advocates on record. Otherwise it is his prayer that the court dismisses the application.
 6. On 13th July, 2023 parties were directed to canvass the application by way of written submissions and the Appellant complied filing submissions dated 11th June, 2023 while the Respondents. Are dated 18th September, 2023.

Analysis and Determination

7. Having considered the application, the affidavit in support thereof and the Replying Affidavit and the submissions filed by either party, I find the main issue for determination being whether the execution of the Judgment issued on 9th May, 2023 in Thika CMCC No.E433 of 2021, Gabriel Kinyua Muchira v Priscillah Njoki Mburu and all consequential proceedings thereof should be stayed.
8. The law on stay of execution is enshrined under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides as follows:-

Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides:-

“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”
9. It is trite law that for a court to grant stay of execution three conditions must be met by the Applicant. The Applicant is required to establish that:-
- a. The application has been made without unreasonable delay.
 - b. He or she will suffer Substantial loss
 - c. He or she has offered security for due performance of the decree.
10. On the first condition, it is not in dispute that the Judgment herein was delivered on 9th May, 2023 and the present application filed on 13th July, 2023 which is more than 2 months later. However, the Applicant has not given or explained the reason for the delay. It therefore goes that although the period of delay is not so inordinate renders the condition unfulfilled.
11. As regards the second condition of substantial loss, the Applicant has only stated that she is likely to suffer substantial and irreparable loss but has not substantiated the same. It has been held by courts that it is not enough to simply state it thus the court in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR held:-
- “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”
12. The court agrees with the holding in the case of Kenya Shell supra that without the evidence of the substantial loss one is likely to suffer, it is difficult to grant stay orders as there is no reason why the Respondent should be kept away from enjoying its fruits of its Judgment. In this application, the Applicant has not substantiated the loss she will suffer if the order sought is not granted.
13. Lastly, is the issue of security for the due performance, the Applicant has not offered any security so as to fulfil this condition save for indication in her affidavit that she is able and willing to abide by any condition that the court will set out. It will be noted despite vehement opposition of the application, the Respondent has provided a breather for the Applicant that the stay could be granted if she deposits all the decretal sum on a joint-interest earning account in the names of both counsel. The issue of security was discussed in the case of *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where it was held that:-
- “... 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 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 degree in order to enjoy the fruits of his Judgment in case the appeal fails...”
14. It should be remembered that the three requirements/conditions set out under Order 42 Rule 6(2) complement each other so that failing to meet either of this leads to the application being rejected. These conditions are considered sequentially and the test objective. If an Applicant meets the first two conditions, he or she should meet the requirement to furnish. Secondly for due performance of



the decree by showing willingness to provide security or propose the law of security to safeguard this condition.

15. The purpose of an application for stay of execution pending appeal was discussed by the court in the case of *RWW v EKW* [2019]eKLR, held:-

“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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

16. In view of the above discussion, I find the Applicant has only fulfilled one condition, by indicating that she is able and willing to abide by any condition that the court will direct. It will also be noted that the Appellant has filed a Memorandum of Appeal and it would not be in the interest of justice to lock out the Appellant from the seat of justice.

17. In the upshot, the Notice of Motion application dated 11th June, 2023 is found meritable and is allowed in the following terms:-

- a. That there be a stay of execution of Judgment issued on 9th May, 2023 in Thika CMCC No.E433 of 2021, Gabriel Kinyua Muchira v Priscillah Njoki Mburu pending the hearing and determination of the appeal
- b. That order (a) above is premised on condition that the Applicant deposits the entire decretal amount in a joint interest-earning account in the names of the Advocates on record for the parties within thirty (30) days from the date of this ruling.
- c. That failure to comply with Order (b) above, the conditional orders for stay granted in (a) above shall automatically stand dismissed and the Respondent shall be at liberty to execute.
- d. The costs of the application to abide by the outcome of the appeal.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 12TH DAY OF APRIL, 2024.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either party

Court Assistance - Martin

