



Mundia v Melly (Civil Appeal E021 of 2023) [2024] KEHC 6821 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEHC 6821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E021 OF 2023
GMA DULU, J
APRIL 9, 2024**

BETWEEN

SIMON KINYUA MUNDIA APPELLANT

AND

ISAAC KIPSEREM MELLY RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 28th August 2023 filed by the applicant in person under Article 50 and 159 of the Constitution of Kenya, Section 1A, 1B, 3A, & 65 of the Civil Procedure Act and Order 40, 42, and 51 Rules 1 and 3 of the Civil Procedure Rules.
2. The applicant seeks the following orders:-
 1. Spent.
 2. Spent.
 3. That the court be pleased to grant a stay of judgment and execution of the judgment delivered on 4th May 2023 in Voi CMCC No. E170 OF 2021 *Simon Kinyua Mundia v Isaac Kipserem Melly* therefrom pending the hearing and final determination of the appeal filed herein.
 4. That costs of this application be provided for.
3. The application has grounds on the face of the Notice of Motion that on 26th May 2023 the applicant filed a memorandum of appeal; that the respondent has now filed a bill of costs in the said suit which suit was dismissed with costs; that the applicant will suffer irreparable loss and damage and loss unless the orders sought are granted.
4. The application was filed with a supporting affidavit sworn on 28th August 2023 by the applicant which amplifies the grounds and annexes copy of the Memorandum of Appeal and copy of the Bill of Costs.



5. The application is opposed through a replying affidavit sworn on 23rd October 2023 by the respondent in which it was deponed that the judgment herein is negative and thus there is nothing to stay; that there is no sufficient cause shown to warrant grant of the orders sought; and that no substantial loss has been demonstrated.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the applicant in person and the submissions filed by Mutinda & Wambura Nthiga Advocates for the respondent.
7. This being an application for stay of execution of judgment or order of the trial court, it is governed by the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*, which states as follows:-
 - “6(2) 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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
8. The applicant is a lay man. On the other hand the respondent has been represented herein by counsel who have cited a number of cases on the principles applicable in considering requests for grant of stay orders under Order 42 Rule 6(2) of the *Civil Procedure Rules*. I agree with the reasoning in those cases.
9. This application will however not be determined on the parameters in Order 42 Rule 6(2) of the *Civil Procedure Rules* but on the technicality of the orders sought in view of the negative orders issued by the trial court in the judgment.
10. As was held in the case of *Mbarak Said Ali & another v Sultan Palace Development Ltd* (2021) eKLR – “stay of execution orders cannot be granted where there is no positive order made in favour of the respondent which is capable of execution.”
11. In the present case, it is admitted by all parties, starting from the applicant, that the applicant’s suit was dismissed. So there was no order from the trial court which can be stayed as against the respondent. Thus no stay orders can be issued on the main judgment.
12. Though the applicant has mentioned taxation of the Bill of Costs herein, he has not applied for stay of taxation proceedings, or stay of execution of taxed costs. Thus this court cannot manufacture prayers and orders for him. In my view, if the applicant wants to be granted orders for stay of taxation of or taxed costs, he should specifically apply for the same.
13. As for the present application for stay of execution of judgment or decree pending appeal, it is not merited. I dismiss the application.
14. With regard to costs of the application, as an appeal has already been filed and is pending, I order that the costs of this application will abide the results of the appeal.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF APRIL 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE



In the presence of:-

Alfred – Court Assistant

Applicant in person

Mr. Mutinda for respondent

