



**Waiwire v Osiemo (Civil Appeal E1352 of 2023)
[2024] KEHC 3272 (KLR) (Civ) (5 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1352 OF 2023

JN NJAGI, J

APRIL 5, 2024

BETWEEN

JOSEPH MAINO WAIWIRE APPELLANT

AND

ZACHARIA MIRUKA OSIEMO RESPONDENT

RULING

1. The appellant filed an application dated 6th December 2023 seeking for the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That there be a stay of execution of enforcing the judgment entered into on 16th November 2023 pending the hearing and determination of Nairobi High Court Civil Appeal No. E1352 of 2023,
 - d. That the costs of the application be provided for.
2. The application is based on grounds stated on the face of the application and supported by the affidavit of the applicant. The applicant avers that he has lodged an appeal against the judgment of the lower court in Nairobi High Court Civil Appeal No. E1352 of 2023. That the respondent is likely to commence execution proceedings against him and if the same proceeds he will suffer substantial irreparable loss and damage.
3. It was further averred that the applicant has serious triable issues to be conversed and determined in the already filed appeal and that the said appeal has high chances of success. That should execution



commence, then the memorandum of appeal filed herein will be rendered nugatory. That the appellant is not denying the respondent the fruits of its judgment but exercising its right of appeal.

4. The respondent on the other hand through the replying affidavit sworn by Musili Mbiti Advocate on 10/1/2024, stated that he respondent is not opposed to the application for stay of execution on condition that the applicant be ordered to pay half the decretal sum being Kshs. 831, 864/- and deposit the other half being Kshs. 831, 864/= in a joint interest earning account of both advocates within 45 days' failure to which execution should proceed.
5. In reply to the prayer to pay part of the money to the respondent, the applicant stated that the respondent has not sworn an affidavit of means to demonstrate that he has the means to reimburse the applicant the money in the sum of Ksh.831,864/= in the event that the appeal is successful.

Analysis and Determination

6. The principles of granting stay of execution are stipulated in Order 42 Rule 6 of the *Civil Procedure Rules* which provides as follows:

- “(1) 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.
- (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.
- (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

7. I do note that the respondent is not opposed to the application save that he requests the court to order that half of the decretal sum be released to him and the other half be placed in a joint interest earning account of both advocates.
8. I have considered the application and weighed in the request by the respondent. In this kind of application, the court is required to balance the competing interests of the two parties where one party is exercising its undeniable right of appeal and the other which has a judgment in its favour and who should not be deprived the fruits of the judgment without just cause. This position was aptly



articulated in the case of *Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 Others* [2012] eKLR where it was held:

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.

9. I have considered that liability was entered in the ratio of 80:20 in favour of the respondent. The damages have been assessed. The appeal is on the quantum of damages awarded by the trial court. The appeal therefore cannot succeed in its entirety as the appellant is bearing the largest part of the liability. There is thereby no reason of denying the respondent access to part of the decretal sum. I consider a sum of Ksh.700,000/= to be a reasonable figure to be paid to the respondent and the rest be deposited in a joint interest earning account for both parties awaiting the outcome of the appeal.
10. The application is thereby allowed in the following terms:
 - (1) The applicant do pay the respondent a sum of Ksh.700,000/= within 45 days from the date hereof and the balance of the decretal sum be deposited, within the same period, in a joint interest earning account to be opened between the advocates on record for the parties herein, failure to which the orders granted herein shall stand vacated.
 - 2) The applicant to bear the costs of the application.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 5TH APRIL 2024

J. N. NJAGI

JUDGE

In the presence of:

N/ A for Applicant

Miss Kasina for Respondent

Court Assistant – Nyambala

30 days Right of Appeal.

