



REPUBLIC OF KENYA



KENYA LAW
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**Muriithi & another v Mburugu (Civil Appeal E045 of 2024)
[2024] KEHC 5861 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5861 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E045 OF 2024
EM MURIITHI, J
MAY 23, 2024**

BETWEEN

FREDRICK CHOMBA MURIITHI 1ST APPELLANT

MARTIN CHOMBA MURIITHI 2ND APPELLANT

AND

FRIDAH NAITO MBURUGU RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 2/4/2024 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 22 Rule 22, Order 42 Rule 6 and Order 51 (1) of the Civil Procedure Rules, the applicants seek that:
 1. Spent
 2. Spent
 3. There be a stay of execution of the decree emanating from the judgment delivered in Nkubu CMCC No. E034 of 2023 – Fridah Naito Mburugu versus Fredrick Chomba Muriithi & Martin Chomba Muriithi pending the hearing and determination of the Appeal.
 4. Costs of this application be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Lilian Munyiri, the legal officer at Gemini Insurance Company Limited, the applicants’ insurer. After the delivery of the impugned judgment on 29/2/2024 awarding the respondent inordinately high general damages, there is an imminent and real danger of execution to satisfy the decree. The applicants will suffer substantial loss that cannot be compensated by damages



if their properties are attached and auctioned. The judgment of the trial court was not supported by evidence that was tendered in court by the parties as well as a complete departure from established principles of law. The applicants have an arguable appeal with high probability of success which will be rendered nugatory if the application is not allowed. The applicants are willing to give security as the court may direct and the application has been made in good faith without any unreasonable delay.

3. The respondent did not file any response.

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 on 9/4/2024 while the decision sought to be appealed against was made on 29/2/2024. That delay of approximately one month cannot be termed as inordinate and inexcusable.
 7. The court notes from the grounds of appeal as raised in the applicants’ memorandum of appeal, and in particular whether the award of general damages of Ksh.1,200,000 and Ksh.100,000 for future medical costs was excessive, 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. The court notes the applicants’ willingness to offer security for costs for the due performance of the decree.

Orders

9. Accordingly, for the reasons set out above, the court allows the applicants’ application dated 2/4/2024 in the following terms:



1. An order for stay of execution of decree emanating from the judgment in Nkubu CMCC No. E034 of 2024 – Fridah Naito Mburugu Versus Frdrick Chomba Muriithi & Martin Chomba Muriithi pending the hearing and determination of the appeal is hereby issued.
2. The Record of Appeal to be filed within 60 days from the date hereof.
3. The Applicants shall within thirty (30) days from the date hereof pay to the Respondent the sum of Ksh.500,000 and deposit the balance of the decretal sum of Ksh.800,000 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 23RD DAY OF MAY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Oteko for the Applicant.

Ms. Mukaburu for the Respondent.

