



Masila v Warinwa (Civil Appeal E009 of 2023) [2024] KEHC 6822 (KLR) (21 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E009 OF 2023
GMA DULU, J
MAY 21, 2024**

BETWEEN

NICODEMUS MASILA APPELLANT

AND

FIESTA ACHAYO WARINWA RESPONDENT

RULING

1. Before me is an application dated 24th October 2023 filed under Section 1A, 1B & 3A of the [Civil Procedure Act](#) (Cap.21), and Order 42 Rule 6 and Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010.
2. The prayers in the application are as follows:-
 1. (Spent).
 2. (Spent).
 3. That the court be pleased to stay the judgment and its consequential orders delivered by Hon. T. N. Sinkiyian PM in Voi Civil Case No. E071 of 2021 pending hearing and determination of the intended appeal.
 4. That the costs of the application be provided for.
3. The application has grounds on the face of the Notice of Motion that the applicant has appealed against the judgment, and that he has already been served with notice of attachment and sale, and that if stay orders are not granted the intended appeal will be rendered nugatory.
4. The application was filed with a supporting affidavit sworn by Mwazighe Micar Advocate for the applicant on 24th October 2023 amplifying the grounds of the application.
5. The application has been opposed through a replying affidavit sworn on 17th November 2023 by Thomas O. Khaduli Advocate in which it was deponed inter alia, that the application for stay of



- execution was filed after the Bill of Costs had been filed; that the respondent had a right to enjoy the fruits of her ruling and judgment; that no amount had been paid to the respondent so far.
6. The application was canvassed through written submissions.
 7. This being an application for stay of execution of judgment pending appeal, it is governed by the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*.
 8. In particular, rule 6(2) provides 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 the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
 9. The decree herein is a money decree and judgment was delivered on 6th March 2023, from a case which arose from a business transaction, in a contractual relationship.
 10. I note that on appeal dated 3rd April 2023 has already been filed challenging the findings and the award of the trial court, though costs have already been taxed.
 11. In the circumstances of this case, I find that indeed, if the stay orders sought are not granted, the applicant is likely to suffer substantial loss, as the appeal may actually be rendered nugatory.
 12. With regard to the second consideration whether the application for stay was filed without unreasonable delay, I note that the appeal was dated 3rd April 2023 and filed on 4th April 2023, and the application for stay of execution was dated 24th October 2023 and filed on 25th October 2023. It was a period of six (6) months.
 13. Is that period of about six (6) months an inordinate delay? In my view, in the circumstances of this case, it was not inordinate delay, as the appeal having been filed, several orders were issued by the court to expedite the hearing of the appeal. During that time there was no need to apply for stay of execution. I thus hold that the application was filed without unreasonable delay.
 14. As regards provision of security by the applicant, I find no necessity of ordering provisions of security in this particular case of alleged breach of contract. I am however, of the view that the hearing of the appeal be expedited, as I see that though the trial court file has been availed, no record of appeal has been filed yet.
 15. Consequently, I allow the application on the following terms:-
 1. I grant stay of execution of judgment or decree pending hearing and determination of the appeal.
 2. The stay orders granted above are subject to the record of appeal being filed and served within the next 30 days.
 3. In default of (2) above the say orders herein granted will lapse and be of no effect.
 4. The costs of this application will abide the decision in the appeal.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF MAY 2024 IN OPEN COURT AT VOI VIRTUALLY.



GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Mr. Mwandoto for applicant

Mr. Khaduli for respondent

