



Malik Boeki Company Limited & another v Musumba (Sued as the Personal Representative of the Estate of the Late Sisto Njiru Njeru) (Civil Appeal E006 of 2024) [2024] KEHC 4984 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E006 OF 2024
LM NJUGUNA, J
MAY 15, 2024**

BETWEEN

MALIK BOEKI COMPANY LIMITED 1ST APPELLANT

DUNCAN WAMAE NDWIGA 2ND APPELLANT

AND

SAIDA ANYANGO MUSUMBA RESPONDENT

**SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE
SISTO NJIRU NJERU**

RULING

1. Vide a notice of motion dated 07th February 2024, the applicants/ appellants seek the following orders:
 - a. Spent;
 - b. Spent;
 - c. That an order does issue staying the execution of the judgment of the honourable learned magistrate Hon. S. Ouko (SRM) delivered on 21st December 2023 in Runyenjes SPMCC No. 70 of 2018 and any other consequential orders thereon pending hearing and determination of the main appeal;
 - d. That the costs of this application be in the cause.

The application is supported by the grounds on its face and facts deposed in the supporting affidavit thereof.

2. The appellants have lodged an appeal against the above cited decision and through the application herein, they are seeking orders for stay of execution pending determination of the appeal. It is their



case that if execution for the decretal sum continues, the appeal may be rendered nugatory and/or an academic exercise. That it is in the interest of justice that this court exercises its discretion in their favour and grant stay of execution and give them a fair chance to be heard on the appeal.

3. The respondent filed a replying affidavit stating that the court should allow her to enjoy the fruits of her judgment and disallow the application. That the applicants were granted 30 days stay by the trial court but they did not institute this application earlier. It was her argument that the application has been brought in bad faith and the applicants have not demonstrated what detriment they will suffer, neither have they offered any security for performance. She urged the court to allow this litigation to come to an end by dismissing the application for stay.
4. The court directed the parties to file their written submissions but only the respondent complied.
5. The respondent submitted that the applicants have failed to comply with the conditions for stay provided in Order 22 Rule 22 and Order 42 Rule 6(2)(b) of the *Civil Procedure Rules*. She relied on the cases of *Gianfranco Marenthi & Another v. Africa merchant Assurance Co. Ltd* (2019) eKLR and *Kenya Tanzania Uganda Leasing Co. Ltd v. Mukenya Ndunda* (2013) eKLR. That the applicants had been granted 30 days stay by the trial court but they did not move this court formally until the period had lapsed. She urged the court to dismiss the application.
6. The issue for determination is whether the application meets the threshold for issuance of orders for stay of execution.
7. In considering whether or not to grant stay of execution, the court is expected to look at the circumstances of the case and test them against the provisions of the law before applying its discretion on the matter. I am guided by Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides:
 - (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.
8. First, the applicant argued that he will suffer substantial loss if the orders are not granted since the respondent may proceed to execute for the decretal sum hence rendering the appeal nugatory and an academic exercise. If the applicants' apprehension is that the respondent will move to execute, this is not sufficient cause because execution is a lawful process which the respondent is entitled to pursue. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, the court was of the view that substantial loss is indeed dependent on whether alteration of *status quo* will substantially affect the case. It was held that: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.”



9. Secondly, as to whether the application was brought without delay, the impugned judgment was delivered on 21st December 2023 while the stay application was filed on 07th February 2024. In my view, there is no inordinate delay in filing the application. On the third aspect of security for performance of the decree, Order 42 Rule 6(2)(b) of the *Civil Procedure Rules* provides that the intended security must be ultimately binding to the applicant. The applicants have not offered any form of security for performance if stay is granted. Security for performance enables the applicant to be held accountable for prosecuting the appeal without delay and guarantees the respondent of payment in the event that the appeal does not succeed. Even if the appeal succeeds, the applicants will not lose their money because it is held at stake.
10. Article 48 of the *Constitution* of Kenya 2010 guarantees every person the right of access to justice. Further, Article 50(1) of the *Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. More importantly, Article 159(2) of the *Constitution* guides me in application of discretion in order to serve justice to all parties in this matter. I am therefore inclined to grant the orders only on the strength of the *Constitution*.
11. Further, justice is meant to serve both the applicant and the respondent herein. While the applicant has a right to appeal, the respondent has a right to be compensated for the fatal injuries suffered by her kin as a result of the accident. At the same time, I am reminded of the role of the court in administration of justice as stated in the case of *Kamuti v Kariuki* (Miscellaneous Civil Cause E001 of 2023) (2023) observed that:
- “The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out unless for a good reason.”
12. In the end, I find that it is in the interest of justice that the following orders do issue:
- a. Pending hearing and determination of the appeal, stay of execution of the judgment in Runyenjes SPMCC No. 70 of 2018 is hereby issued on condition that the applicants deposits half of the decretal sum in court within 30 days of this ruling, failing which the respondent may proceed to execute; and
 - b. Costs of this application shall abide the outcome of the appeal.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF MAY, 2024.

L. NJUGUNA

JUDGE

