



REPUBLIC OF KENYA



**Karangu v Muthumbi (Civil Appeal E382 of 2023)
[2024] KEHC 7049 (KLR) (Civ) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7049 (KLR)

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

CIVIL

CIVIL APPEAL E382 OF 2023

JN MULWA, J

JUNE 12, 2024

BETWEEN

SIMON MBIRUA KARANGU APPELLANT

AND

JOSEPHAT GITAU MUTHUMBI RESPONDENT

*(Being an Appeal from the Ruling of Honourable V. M.
Mochache in SCCC/E3596 OF 2022 Delivered on 12th May 2023)*

RULING

1. This Appeal arose from the Ruling of the SCCC. E3596 OF 2022 delivered on 12/05/2023. The Memorandum of Appeal is dated 17/05/2023 and filed on the 19/05/2023 simultaneously with a Notice of Motion dated 17/05/2023 wherein the Appellant/Applicant seeks review of the dismissal order and stay of execution of the judgment dated 28/02/2023 pending hearing and determination of SCCIV/1545/2023.
2. The grounds for the Application are stated at its face and upon an affidavit sworn by the Appellant on even date.
3. In response to the Application, the Respondent filed a Replying Affidavit sworn on 15/06/2023. In addition, the parties were on 6/11/2023 directed to file written Submissions but as at March, 2024 only the appellant had filed his submissions albeit out of time.
4. I have considered the Supporting and Opposing Affidavits as well as the Appellants Submissions.



The impugned Ruling subject of this Appeal is dated 12/05/2023 dismissing the Applicant's Application dated 9/03/2023 seeking for stay of execution of the Small Claims Court case delivered on 25/02/2023.

5. From the documents availed to the court the decretal sum is stated at Kshs. 1,200,000/= being material damage that arose from a road traffic accident involving the Appellants vehicle that was at the material times comprehensively insured by Invesco Company Limited which company failed to settle the decretal sum after which the Appellant filed a declaratory suit to compel the insurance company to settle the decretal sum in SCC CIV/E1545/2023.
6. Upon the above material facts the Appellant deposesdepones that if stay of execution is not granted, he will be exposed to double jeopardy. It is therefore the Appellant's pleaAppellant plea to the court that the Declaratory suit be heard and determined before execution of the judgment of the primary suit subject of this Appeal.
7. To the above submissions, the Respondent deposes nes that the Appellant despite being served with court process in the primary suit, he failed to defend the same resulting to ex parte judgment delivered on 24/02/2023 that he also failed to settle despite having been notified of the entry of judgment and therefore the judgment being regular, a decree was taken out ready for execution.
8. The Respondent opposed the Application for Stay of Execution which application was dismissed by the court vide a ruling dated 12/05/2023. It is the subject of this Appeal.
9. It is the Respondents position deposition that the Applicant cannot seek for both review orders as well as appealing against the same ruling by dint of Order 45 Rule 2 of the Civil Procedure Rules (CPR) nor does he meet the threshold for grant of review orders nor has he met conditions set out under Order 42 Rule 6 CPR for grant of stay orders pending appeal.

Analysis And Determination

10. The Appellant seeks two main orders; review and setting aside orders of the ruling of the court dated 12/05/2023 being a dismissal of his application forofor stay of execution of judgment in the primary suit delivered on 28/02/2023 pending hearing and determination of a declaratory suit he had filed against the insurer of his vehicle.
11. In both cases, the Applicant has not invoked the correct legal provisions for review, Order 45 CPR and for stay being Order 42 Rule 6 CPR.

Further, it is clear that the Applicant has not met the threshold under Order 45 Civil Procedure Rules (CPR) as no discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge. Further nNo error or mistake has been demonstrated stated to have been apparent on the face of the record nor has been pointed out. The prayer for review therefore fails. fall lat on the ground.
12. On the matter of stay of execution pending Appeal, the underpinning principle is that the Applicant must satisfy the court that substantial loss may result unless the order is granted made and security for the due performance of the decree must be provided. None of these have been provided as required under Order 45 CPR..
13. In addition, the two reliefs, review and appeal cannot be invoked together. Order 45 Rule 1 (2) CPRCivil Procedure Rules (CPR) is specific that a party who is not appealing from a decree may apply



for a review of the judgment or order or ruling¹/ruling. The Appellant in my considered view had only one option; either to appeal to this court against the impugned ruling or apply for a review order against the said ruling but not both.

14. Additionally, the court has not been told that there is in existence an appeal pending hearing and determination of this instant application from the primary suit judgment nor is there any submission that the said judgment was not regular.
15. In such circumstances therefore the court would be very slow to stay execution of such judgment as doing so would be denying the decree holder enjoyment of fruits of his judgment.
16. For the above, the court has relied on the pronouncements of the superior courts in:
 1. James Wangalwa & Another V. Agnes Naliaka (2012) eKLR
 2. Mary Help of the Sick Mission Hospital V. Peter Thuku Kamau (2023) eKLR
 3. Mukuma V. Abuoga (1988) KLR 645
 4. Jane Wanjiku Anyango Oloo V. Buzeki Enterprises ltd a& Another (2021) eKLR
17. For the foregoing, I find the application dated 17/05/2023 to be devoid of merit. It is dismissed with costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE, 2024.

JANET MULWA

JUDGE

¹ HCCA No. E382 of 2023

