



**Kyalo v Kilonzo (Civil Appeal 295 of 2023) [2024] KEHC 6853 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6853 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 295 OF 2023**

**FR OLEL, J**

**JUNE 7, 2024**

**BETWEEN**

**CHARLES KILONZO KYALO ..... APPELLANT**

**AND**

**PAUL WAMBUA KILONZO ..... RESPONDENT**

**RULING**

1. The application before this court for determination is the Notice of Motion application dated 12<sup>th</sup> February 2024 brought pursuant to provisions of Section 1A, 1(B), 3A, 79G & 95 of the Civil Procedure Act, Order 22, rule 22, Order 42 Rule 6(2), & Order 51 rule 1 of the Civil Procedure Rules and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought are prayers 3 and 4 for stay of execution of the decree dated 2<sup>5th</sup> October 2023, issued in Kangundo CMCC No E142 of 2022, and that the applicant be allowed to issue security in the form of a Bank guarantee.
2. This application is supported by the grounds on the face of the said application and the affidavit of the appellant dated 12<sup>th</sup> February 2024. The respondents opposed this application through their grounds of opposition dated 9<sup>th</sup> April, 2024.
3. The Appellant averred that they are wholly dissatisfied by the Judgment of Hon Ole Keiwua Chief Magistrate dated 25<sup>th</sup> October 2023 delivered in Kangundo CMCC No E142 of 2022 and had preferred an appeal against the same basically challenging the liability and quantum as awarded. He avers that he has an arguable appeal which has high chances of success and further that the said appeal was meritorious and stood a good chance of success as demonstrated in the Memorandum of Appeal filed.
4. The appellant was apprehensive that there is strong likelihood that the respondent will apply for warrants of execution consequent of which he is likely to attach the appellant's assets and if sold that would cause them substantial loss and render the appeal filed to be rendered nugatory. Finally, the



Appellant stated that he is ready and willing to furnish a bank guarantee as security for due performance of the decree and that the Respondent would not be prejudiced if orders sought are granted.

5. The Respondent did file his grounds of opposition dated 9<sup>th</sup> April 2024, where he averred that the said application was frivolous, incompetent, bad in law, and constituted an abuse of the process of the court as it was brought after inordinate delay and in bad faith after proclamation had been effected by his auctioneers. The applicant had not filed any appeal and/or if filed he had not served the same upon the respondents and that was in clear breach of the provisions of section 79G of the [civil procedure Act](#).
6. If the court was minded to grant the orders sought, then the Respondent prayed that the applicant be directed to release half the decretal sum of Kshs.860,680/= to the respondent and the other half of the decretal sum Kshs.860,680/= be deposited in an interest earning account within 14 days from the date of the ruling to be delivered herein.

### **Analysis & Determination**

7. I have carefully considered the Application, its Supporting Affidavit, and the grounds of opposition filed and only issue which arises for determination is whether the Appellant has met the conditions necessary for the grant of orders of stay of execution pending appeal.
8. Stay of execution pending appeal is governed by Order 42 Rule 6 of the [Civil Procedure Rules](#). It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See [Amal Hauliers Limited Vs Abdulnasi Abukar Hassan \(2017\)](#) eKLR & [Butt Vs Rent Tribunal \(1982\)](#) KLR 417
9. The decree appealed against was delivered on 25<sup>th</sup> October, 2024. The Appeal herein was filed on 16<sup>th</sup> November 2023. This was within the statutory period provided under Section 79 of the [civil procedure Act](#) and thus it can be said that this appeal has been file timeously.
10. On the likelihood of suffering substantial loss, and security of the appeal, the court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See [Attorney General Vs Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008](#); [Kenya Shell Ltd Vs Kibiru & another \(Supreme\)](#); [Mukuma Vs Abuoga \(1988\)](#) KLR 645.
11. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back his money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in his intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. See [Court of Appeal in Nduhiu Gitahi Vs Warugongo \(1988\)](#) KLR 621; [IKAR 100;\(1988-92\)](#) 2 KAR 100.
12. Though the applicant has proposed that he be paid half the decretal sum, I do not that this appeal in premised on both liability and quantum. The respondent has not shown that he is a person of means and would be able to refund the sums paid out to him should this appeal succeed.



## **Disposition**

13. Taking all relevant factors into consideration, and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;
  - a. The Appellant/Applicant do provide a bank guarantee for the entire decretal amount, the same is to be specific to this Appeal and shall be valid for the entire Appeal period.
  - b. This condition is to be met within 30 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
14. The costs of this Application will be in the cause.
15. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7<sup>TH</sup> DAY OF JUNE, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 7<sup>TH</sup> DAY OF JUNE, 2024.**

**In the presence of: -**

No appearance for Appellant

Mr. Mutinda for Respondent

Sam Court assistant

