



REPUBLIC OF KENYA



KENYA LAW
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**Mbitha v Onyango t/a Onyango Onunga Advocates (Civil Appeal
61 of 2023) [2024] KEHC 7939 (KLR) (2 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 7939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 61 OF 2023
SM GITHINJI, J
JULY 2, 2024**

BETWEEN

JUMWA CHARO MBITHA APPELLANT

AND

JANE A ONYANGO T/A ONYANGO ONUNGA ADVOCATES .. RESPONDENT

*(An Order setting aside the Orders of the trial court in case number
SPMs Originating Summons No.110 of 2022 Jumwa Charo Mbitha
& Another vs=Jane Onyango T/A Onyango Onuga Advocates)*

RULING

Representation:

Mr Abubakar for the Appellant

Mr Onyango for the Respondent in person

1. For determination is the Notice of Motion dated 26th June 2023 seeking the following orders;
 1. Spent.
 2. That this Honourable court do stay the execution of the ruling of the Honourable J.M Kituku Senior Principal Magistrate sitting at Kilifi delivered on 18th April 2023 in SPMCC (OS) No. 110 of 2022 [Jumwa Charo Mbitha & Another v Jane Onyango T/A Onyango Onunga advocates](#) pending the hearing and determination of the appeal herein.
 3. Spent.
 4. Costs of this application be in the cause.



2. The application is founded on the grounds set out on its face and the supporting affidavit of Jumwa Charo Mbitha the 1st Applicant on her behalf and on behalf of the 2nd Applicant stating that she is aware that the effect of the trial court's ruling is that the Respondent is entitled to be paid Kshs. 3,000,000/= as legal fees and as such the Respondent may initiate a process of claiming the same from them and may proceed to attach the said property in execution of the decree that she has obtained thus they may suffer irreparable loss and damage and may lose a property they may not be able to recover. Additionally, that no prejudice will be suffered by the Respondent as the property shall be preserved until this appeal is heard and determined.
3. The respondent filed a replying affidavit stating that the Applicants have not met the mandatory conditions envisaged under Order 42 Rule 6 (2) of the *Civil Procedure Rules* 2010 and more particularly failure to provide security for due performance of the decree. Further, the Applicants have not proved that if stay of execution is not granted they stand to suffer substantial loss, as they have not availed evidence in support.

Disposition

4. The application was disposed of by way of written submissions. I have considered the submissions by the parties as well as the authorities relied upon. The issue for determination is; whether the order sought for stay of execution is merited.
5. The application was canvassed by way of written submissions. I have considered the rival affidavits, the submissions by the parties as well as the authorities relied on. The issue for determination is whether the order sought for stay of execution is merited.
6. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:
 - 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.
7. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay, and in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions; the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
8. Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
9. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely



- (a) that substantial loss may result to the applicant unless the order is made,
 - (b) that the application has been made without unreasonable delay, and
 - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
10. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, 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.”

11. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

- 9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

12. Having perused through the Application and the supporting affidavit it is anchored upon, I am of the view that the Applicants have not demonstrated how they stand to suffer irreparable loss. They have further not demonstrated their willingness to offer security for the due performance of the decree in their quest for stay of execution. Thus, I find that the Applicants have not met the conditions for grant of orders for stay of execution. Consequently, the application dated 9th June 2023 fails for want of merit and the same is hereby dismissed with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 2ND DAY OF JULY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

- 1. Ms Ogunga holding brief for Ms Onyango for the Respondent



2. Mr Hamisi for the Appellant – absent
Court; -Mention on 19th September, 2024.

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S.M. GITHINJI

JUDGE

2/7/2024

