



Wachira v Mwisho & another (Suing as Legal Representatives of the Estate of Japhet Muisyo Morris - Deceased) (Civil Appeal E045 of 2024) [2024] KEHC 8944 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E045 OF 2024
SM GITHINJI, J
JULY 25, 2024**

BETWEEN

MOSES MWANGI WACHIRA APPELLANT

AND

MORRIS KUVENGWA MWISHO 1ST RESPONDENT

SARAH NDUNE MUTA 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JAPHET MUISYO
MORRIS - DECEASED**

*((Being an Appeal from the Judgment of Hon Geoffrey M. Mokuu- Resident
Magistrate delivered on 4th April, 2024 in Kaloleni MCCC No.E094 of 2023))*

RULING

Representation:

Mokaya & Onyambu Advocates for the Appellant

Mung'oma Mung'oma & Co. Advocates for the Respondent.

1. By way of an application dated 25th April, 2024 by the Appellant/ Applicant brought under Order 42 Rule 6 (2), Order 51 Rule 1 of the Civil Procedure Rules Sections 1A,1B of the Civil Procedure Act seeking the following orders;
 1. Spent.
 2. Spent.
 3. That this Honourable Court be and is hereby pleased to issue stay of Execution of the judgment in Kaloleni MCCC No. E094 of 2023 Morris Kuvengwa Mwisho & Sarah Ndune



Muta (Suing as Legal Representatives of Estate of Japhet Muisyo Morris (Deceased) delivered by Hon. Geoffrey M. Mokuu (RM) on 4th April, 2024 pending the hearing and determination of the Appeal.

4. That costs of this Application be in the cause.
2. The application is supported by grounds on the face of it as well as the Supporting Affidavit sworn by Moses Mwangi Wachira on the 26th day of April, 2024. He deposed that judgment was delivered on 4th April, 2024 and being dissatisfied with the judgment, he has since preferred an Appeal against the said judgment. He also asserted that the trial court misapprehended the law by disregarding his evidence in determining the manner in which the accident occurred.
3. He contended that the award on quantum was erroneous and without justification as the Respondents failed to prove their case to the required standard. Further, that he is apprehensive that should the Respondent move to execute the judgment award, he will suffer loss and damage that cannot be compensated by an award of damages.
4. In response, the Respondent filed a Replying Affidavit sworn by Morris Kuvenga Mwisho on 2nd May, 2024.

Disposition

5. I have considered the grounds in support of the application dated 25th April, 2024, the Replying affidavit in response and the submissions by counsels. In my view, the issue for determination is whether this court ought to grant stay of execution pending appeal.
6. The principles upon which the court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the [Civil Procedure Rules](#) which requires an applicant seeking a stay of execution pending appeal to demonstrate that -
 - a. Substantial loss may result to the applicant unless the order is made;
 - b. The application was made without unreasonable delay; and
 - c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.
7. A stay of execution should only be granted where sufficient cause is shown. In [Antoine Ndiaye v African Virtual University](#) (2015) eKLR Gikonyo J opined that -

....stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...”
8. The purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In [RWW vs. EKW](#) (2019) eKLR, it was observed that:

“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. The above are the principles to bear in mind in determining the application. The first consideration is whether the application was filed timeously. The judgment of the trial Court in this matter was delivered on the 4th April, 2024. The memorandum of appeal and this application were filed in this court on the 25th April, 2024. In my view, there was no delay in filing the application.

10. As to what substantial loss is, the court 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 Civil Procedure Rules. 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. I have considered the grounds on the face of the application and the supporting affidavit annexed to the application to determine whether the applicant has persuaded this court on the loss they would suffer if this application is not allowed. In my view, the Appellant has not given any demonstration of substantial loss, neither has it offered any security as stipulated under Order 42 rule 6 above. In the absence of such, I am inclined to find that the Appellant has failed to meet the threshold for granting an order for stay of execution pending appeal.

12. The outcome is that the application dated April 25, 2024 is unmerited. It is hereby dismissed with costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25TH DAY OF JULY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Wangechi for Respondent

2. Mr Alex holding brief for Miss Nyambane for the Appellant/Applicant

Mention on 17/10/2024.

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S.M. GITHINJI

JUDGE

25/7/2024

