



**Mwitome & another v Mwai (Civil Appeal E113 of 2022)
[2024] KEHC 10014 (KLR) (6 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E113 OF 2022
RM MWONGO, J
AUGUST 6, 2024**

BETWEEN

SHADRACK MUKARIA MWITOME 1ST APPELLANT

M'ARIMI GUANTAI MORIS 2ND APPELLANT

AND

FRANCIS MUCIRA MWAI RESPONDENT

*((Being an Appeal from the Judgment and Decree of the Hon. P.M. Mugure
(PM) delivered on 7th November, 2022 in Wang'uru CMCC No. 90 of 2019))*

RULING

1. In the Lower Court, Judgment was entered against the Appellants/Applicants on 7th November, 2022. Liability was entered against the Appellants at 100%, general damages were awarded at Kshs.1,000,000/= and special damages of Kshs.3,050/= were awarded plus costs and interest.
2. Aggrieved by the judgment, the appellants lodged an appeal on 1st December 2022 and seek stay of execution pending appeal. In the motion dated 10th February 2023 they seek the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to grant a stay of execution of the Judgment and/or Decree issued by Honourable P.M Mugure on 7th November, 2022 pending the full hearing and determination of this Appeal in Kerugoya HCCA 113 of 2022.
 4. That this Honourable Court allow the Applicant to furnish the Court with security in the form of a Bank Guarantee from the Family Bank.



5. That the Application be heard inter parties on such date and time as this Honourable Court may direct.
6. That the costs of this application abide the outcome of the appeal.
3. The application is based on the grounds on the face of the application and the supporting affidavit of Maureen Orina, in which she deposes, inter alia:
 1. That that the appellants have an arguable appeal with high chances of success as the Respondent did not prove liability against the Appellants herein nor deserve the quantum awarded.
 2. That the Appellants are reasonably apprehensive that if the decretal amount is paid over to the Respondent, the said Respondent would be in no position to refund the same if the Appeal is successful.
 3. That the Appellants are reasonably apprehensive that the Respondent may levy execution against them and the same will render the Appellants' appeal nugatory and the same will cause the Appellants to suffer irreparable loss and damage.
 4. That that there is an impending risk of execution by the Plaintiff/Respondent against the said judgment delivered on 7th November 2022, a step that will render this application nugatory and our intended appeal useless.
 5. That the Appellants' insurance company Direct line Assurance Limited is willing and able to furnish the court with a bank guarantee from DTB Bank as security.
4. The respondent on 14th February, 2023 deposed a Replying Affidavit with inter alia, the following averments:
 1. That the Appellants have not provided a certified copy of the decree they are appealing on.
 2. That the Appeal is therefore frivolous and contains no arguable points of law, just a mere attempt to deny the Appellant the fruits of judgment.
 3. That the Appellants have not demonstrated to this honourable Court that the Respondent is a man of straw unable to refund the decretal sum if the Appeal succeeds.
 4. That if this Court is inclined to grant the Application, it also directs that pending the hearing of the intended Appeal the Appellants remit half the decretal amount in court and the other half to the Advocates on record representing the Respondent.
 5. The parties were directed to file submissions, but the Appellant failed to do so.
 6. In the Respondent's submissions, they assert that the main issue for determination is whether the court ought to allow the prayer for stay of execution and if so, under what conditions.
 7. The respondent also submits that while determining the question of stay pending appeal, the court ought to balance the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment.
 8. The respondent finally submits that courts have held that the mere fact that the decree holder is not a man of means does not necessarily justify him from benefiting from the fruits of his judgement. On the other hand, the general rule is that the court ought not to deny a successful



litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher court.

Issues for Determination

9. The only issue for determination is whether stay of execution pending hearing of the appeal should be granted.

Analysis and Determination

10. 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:

“No order for stay of execution shall be made under sub rule (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.
- C. That substantial loss may result to the applicant unless the order is made.”

11. The appellant’s case is that they are reasonably apprehensive that the Respondent may levy execution against them and the same will render their appeal nugatory and the same will cause them to suffer irreparable loss and damage.
12. The respondent depose that the Appellants have not demonstrated to this honourable Court that the Respondent is a man of straw unable to refund the decretal sum if the appeal succeeds.
13. In *Machira T/A Machira & Co Advocates vs East African Standard (No2)* [2002] KLR 63 it was held that:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

14. On the other hand, in *Samvir Trustee Limited v Guardian Bank Limited Nairobi* (Milimani) HCCC795 of 1997. The court stated:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would



be overwhelming hindrance to the exercise of the discretionary powers of the court. The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant. For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”

15. It is clear that the applicant has an arguable appeal and will suffer substantial loss in case stay of execution is not granted. Similarly, the respondent is entitled to the fruits of the judgment. Thus, the court must balance the parties’ rights, and determine whether the application has been made without undue delay.
16. The trial court delivered its judgement on 7th November, 2022. The appellant filed his Notice of Motion application dated 10th February, 2023 on 13th February, 2023, about ninety (90) days late. In my view the appellant’s application was filed without any unreasonable delay.
17. In *Netplan East Africa Limited v Investment & Mortgages Bank Limited* [2013] eKLR, it was held that:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. When such delay is established, unless it is well explained, it becomes inexcusable”
18. In my view delay in filing the application is not so substantial as to deny him the right of appeal.
19. Finally, the court ought to consider whether the applicant has offered such security as the court may order for the due performance of such decree or order as may ultimately be binding on the applicant.
20. Here, the appellants argue that their insurance company, Direct line Assurance Limited, is willing and able to furnish the court with a bank guarantee from Family Bank as security. They have annexed a copy of the Bank Guarantee marked “MO3”.
21. The respondent submits that the appellant’s offer of a bank guarantee as security is not enough to cover the Respondent. Equally, the court does not consider the said guarantee to be worded sufficiently to secure the respondent in this case. In *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR Odunga J held as follows:

“The Bank Guarantee given by Diamond Trust Bank and annexed to the supporting affidavit may not specifically cover the Respondent. However, the Court in fashioning the security is not necessarily bound by what is offered by the Applicants.”



22. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, the court stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

Disposition

23. Ultimately, this court has the discretion to determine the security that the applicants ought to provide. Given that it has been two years since the delivery of judgment the court orders as follows:

1. The application succeeds to the extent herein.
 - a. The applicants shall deposit 75% of the decretal sum into a joint interest earning account in the names of the parties’ counsel within 21 days from the date hereof.
 - b. The balance of 25% shall be provided by way of a bank guarantee specifically recorded in favour of the respondent within 21 days from today’s date.
 - c. The parties shall co-operate in the opening and facilitation of effectuation of the account in (a) above and shall maintain records of such co-operation.
 - d. In the event of default in respect in any of the orders above, execution may proceed.
2. The applicants shall file their Record of Appeal within 45 days, from the date hereof.

24. Orders accordingly.

DATED AT KERUGOYA THIS 6TH DAY OF AUGUST, 2024.

R. MWONGO

JUDGE

Delivered in the presence of:

1. No representation - Kimondo for Applicants
2. Macharia - for Respondent
3. Murage, Court Assistant

