



**M’Naituri v Charuru SDA Self Help Group (Through the Chairman George Mungiria Akwalu)  
(Civil Appeal E157 of 2022) [2024] KEHC 11101 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11101 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E157 OF 2022  
EM MURIITHI, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**JAPHET M’NAITURI ..... APPELLANT**

**AND**

**CHARURU SDA SELF HELP GROUP (THROUGH THE CHAIRMAN GEORGE  
MUNGIRIA AKWALU) ..... RESPONDENT**

**RULING**

1. By a Notice of Motion under certificate of urgency dated 5<sup>th</sup> April 2024 brought under Section 3 & 3A and 63e of the *Civil Procedure Act*, Order 50 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, the Appellant seeks:
  1. Spent
  2. The court be pleased to issue temporary orders staying execution of judgment and all consequential orders in Tigania PMCC No. 43/2020 pending hearing and determination of this application and pending hearing and determination of this appeal.
  3. The court to grant other orders it deems just to grant.
  4. Costs of application be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Japhet M’Naituri, the Appellant herein, sworn on even date. He avers that he has appealed against the trial court’s judgment, which appeal has overwhelming chances of success. Despite having been paid Ksh. 436,000, the trial court ordered him to pay the Respondent Ksh, 4,420,025. There is imminent danger of attachment and the subsequent sale of the land, the subject matter herein and all other properties to satisfy the decree, and thus the stay sought is justified. The Respondent had sued him in Tigania Criminal case No. 260/2019 wherein he was acquitted



in February 2024. He is quite poor now and had no money to instruct his advocate on time but nonetheless, the court should hear him.

3. The Respondent has opposed the application vide a replying affidavit sworn by George Mungiria Akwalu, its Chairman on 28/5/2024. He avers that although the Appellant filed this appeal way back on 24/11/2022, he only learnt about it when his advocates on record M/S Kevin Ouma & Co. Advocates were served with the instant application. Pursuant to the trial court's decree of Ksh. 4,420,025, they commenced execution and duly served the Appellant with all the applications. The application has been brought in bad faith, is misconceived, incompetent, lacks merit, is an abuse of the court process and is a delay tactic to deny him the right to enjoy the fruits of his judgment. The Appellant has not demonstrated that he has an arguable appeal and he urges the court to consider the principles set out in Order 42 Rule 6(2) of the Civil Procedure Rules especially the Appellant's failure to furnish security for costs.
4. The application was canvassed by way of written submissions which were duly filed by both parties.
5. The Appellant relies on *Karia v Keshe* (Environment and Land Appeal E006 of 2023) [2024] KEELC 1184 (KLR) (6 March 2024) (Ruling) and *Gathua v Nyarogo & 2 Others* (Environment and Land Appeal E020 of 2023) [2024] KEELC 1687 (KLR) (20 March 2024) (Ruling) in urging that the application was filed without delay, and unless the orders sought are granted, the appeal will be rendered nugatory and he will suffer irreparable damages.
6. The Respondent urges that the appeal has been brought too late in the day since the appeal, which was only served upon it on 16/4/2024 was filed on 24/11/2022. It faults the Appellant for failing to demonstrate what substantial loss he stands to suffer if stay is denied, and cites *Machira t/a Machira & Co. Advocates v East African Standard (No. 2)* (2002) KLR 63.

### **Analysis and Determination**

7. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, as follows: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

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.
  - 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.”
8. Whereas the Appellant contends that his appeal, which has overwhelming chances of success will be rendered nugatory unless stay is granted, the Respondent is unflinching that the Applicant is



underserving of the stay sought owing to his failure to proffer a satisfactory explanation for his unreasonable delay in filing this application.

9. It is pleaded that the Appellant lacked the wherewithal to instruct counsel in good time to file the application, and thus his impecuniosity should not impede his right to appeal.
10. There is no doubt that the Appellant unreasonably delayed in filing this application on 5/4/2024 as the judgment sought to be appealed against was delivered on 24/10/2022. Although he lodged his memorandum of appeal in this court on 24/11/2022, he slumbered until he was roused therefrom by the impending execution. That unbecoming conduct of the Appellant militates against grant of the stay of execution.
11. The court is minded that the decretal sum of Ksh.4,420,025 is quite substantial. The court notes that the grounds of appeal inter alia faulting the trial court for awarding prayers which were not sought in the plaint and ordering a refund of monies that were not paid by the Respondent to him, cannot be said to be frivolous.
12. This court, after delicately balancing the undoubted right of the Appellant to appeal against the trial court's decision and the Respondent's right to enjoy the fruits of its judgment, finds that the Appellant will suffer substantial loss if execution is allowed to proceed and his appeal succeeds.

### **Orders**

13. Accordingly, for the reasons set out above, the court allows the Appellant's application dated 5/4/2024 in the following terms:
  1. An order for stay of execution of the Judgment and Decree in Tigania PMCC No. 43/2020 pending the hearing and determination of this appeal is hereby issued.
  2. The Record of Appeal to be filed within 60 days from the date hereof.
  3. The Appellant shall pay to the Respondent the sum of Ksh.1,000,000/= and deposit the balance of the decretal sum into an escrow account in the joint names of the advocates for the parties within thirty (30) days from the date hereof.
  4. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
  5. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances

Mrs. Kaume for the Appellant.

Ms. Oteko for Mr. Ouma the Respondent.

