



Yakarim Transporters v Katana & another (Legal Representatives of Estate of Sammy Katana Bayo (Deceased)) (Civil Appeal E016 of 2024) [2024] KEHC 10777 (KLR) (18 September 2024) (Ruling)

Neutral citation: [2024] KEHC 10777 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E016 OF 2024
SM GITHINJI, J
SEPTEMBER 18, 2024**

BETWEEN

YAKARIM TRANSPORTERS APPELLANT

AND

SALMA MWALIMU KATANA 1ST RESPONDENT

MCHEMUNDA KATANA BAYO 2ND RESPONDENT

**LEGAL REPRESENTATIVES OF ESTATE OF SAMMY KATANA BAYO
(DECEASED)**

(Being an Appeal from the Judgment of Hon D.Wasike – Principal Magistrate delivered on 23rd January, 2024 at SPM’s Court at Kilifi)

RULING

Representation:

Mokaya & Onyambu Advocates for the Appellant/ Applicant

Mboku & Company Advocates for the Respondents

1. The Appellant/Applicant herein filed a Notice of Motion Application under Certificate of Urgency dated 29th February, 2024 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 Kilifi Mccc No. 96 Of 2022 Salma Mwalimu Katana & Mchemuda Katana



Bayo (suing As The Legal Representatives Of The Estate Of Sammy Katana Bayo (deceased) v Yakarim Transporters Limited delivered by Hon. D. Wasike-PM on 23rd January, 2024 thereof pending the hearing and determination of this Appeal.

4. That costs of this Application be in the cause.
2. The application is supported by the grounds on the face of it and the supporting affidavit sworn by Alwi Muhsin Karim on even date. He deponed that judgment was delivered on 23rd January, 2024 and that the Appellant being dissatisfied with the said judgment has since lodged an appeal in this court being Malindi HCCA NO. E016 of 2024. That the appeal is against both liability and quantum. He also deponed that the appellant will suffer irreparable loss and damage should this court fail to grant a stay of execution as the Respondents are not of any means to refund the decretal sum should the appeal succeeds.
3. He stated that the Appellant has an arguable and meritorious Appeal with high chances of success hence the stay orders prayed for herein ought to be granted to await the outcome of the Appeal. Further, that the Respondents will not be prejudiced in any way if the orders sought are granted.

Disposition

4. I have considered the Appellant's application for stay of execution pending appeal as well as the respective advocates' submissions on the matter which I consider relevant in determination of the Application at hand.
5. The operative law in this instance, as correctly pointed out by both Counsels, is Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides as follows:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.
 - (2) 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.”
6. In an application such as this, sufficient cause must be shown by the Applicant. There must also be a threat of substantial loss if the order is not granted and the application must have been brought without unreasonable delay. Additionally, there must be such security as directed by the Court. Even with the foregoing, the grant of stay remains a discretionary order that must also consider the fact that the Court ought not to make a practice of denying successful litigants the fruits of their judgement. This is in line with the authorities of [Masisi Mwita v Damaris Wanjiku Njeri](#) (2016) eKLR and [Gatobu M'Ibutu Karotho v Christopher Murithi](#) (2008) eKLR.
7. It is not contested that the Application was brought without undue delay, therefore this requirement has been sufficiently satisfied.



8. On substantial loss, the applicant stated that the Respondent has since threatened to commence execution proceedings against them and that they are apprehensive of suffering irreparable loss and damage. In my view, the Appellant has only stated that they are apprehensive of suffering irreparable loss but the same has not been demonstrated. The process of execution having been put in motion by the Respondent does not by itself amount to substantial loss. Execution is a legal process.
9. Having considered the entire application, I have to bear in mind that this Court has been tasked to balance the competing interests of the Appellant/Applicant as against that of the Respondents who need not be denied the right of enjoying the fruits of their Judgment. Having carefully weighed the application and the applicable law, I am not persuaded that proof of substantial loss and that the appeal will be rendered nugatory if the application is rejected, have been established. I am not persuaded that the Appellant has met the threshold for granting the orders sought and in the end the application cannot stand. The upshot is that the application dated 29th February, 2024 is dismissed with costs to the Respondents.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 18TH DAY OF SEPTEMBER, 2024.

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Wanyama for the Respondent
2. Mr Mokaya for the Applicant

.....

S.M. GITHINJI

JUDGE

