



**Damaric Ventures Ltd v Kimwaka (Suing as Next Friend and Father to Susan Wanza Kitheka)
(Civil Appeal E215 of 2024) [2024] KEHC 12349 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E215 OF 2024**

FR OLEL, J

OCTOBER 16, 2024

BETWEEN

DAMARIC VENTURES LTD APPELLANT

AND

**KITHEKA KIMWAKA (SUING AS NEXT FRIEND AND FATHER TO SUSAN
WANZA KITHEKA) RESPONDENT**

RULING

1. The application before this court is the Notice of Motion application dated 31st July 2024 brought pursuant to provisions of Section 3A of the *Civil Procedure Act*, Order 42 Rule 6(2), & Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provision of law. Prayers (1) and (2) of the said application are spent and the main prayers sought are prayers (3) and (4) for stay of execution of the decree dated 31st July 2024, issued in Mavoko CMCC No 807 of 2020, and that the costs of and incidental to this Application do abide the results of the said Appeal.
2. This application is supported by the grounds on the face of the said application and the affidavit of Elias Maina Muthumbi dated 31st July 2024, while the respondent opposed this application through his replying affidavit dated 27th August 2024.
3. The Appellant averred that they are wholly dissatisfied by the Judgment of Hon .D. Kuto, Senior Principal Magistrate dated 31st July 2024, delivered in Mavoko CMCC No 807 of 2024, and had preferred an appeal against the same challenging both the liability and quantum awarded by the trial court for being on the higher side. He avers that they had an arguable appeal which had high chances of success. Further, the appeal as filed was meritorious and stood a good chance of success as demonstrated in the Memorandum of Appeal filed.
4. The appellants were apprehensive that there was a strong likelihood that the respondents would apply for warrants of execution consequent of which they were likely to attach the appellant's assets and if



sold that would cause them substantial loss and render the appeal filed to be rendered nugatory. Finally, the Appellant stated that they were ready and willing to furnish security for the due performance of the decree and that the Respondents would not be prejudiced if the orders sought were granted.

5. The Respondents did oppose this application through the Replying Affidavit filed by the 1st respondent and dated 27th August 2024. He stated that the appeal as filed was frivolous, unmeritorious, and should be dismissed suo moto as the judgment appealed against was sound. The applicant had also not demonstrated the substantial loss they would suffer if the orders of stay were not granted nor had they satisfied the other pre-requisite conditions for granting stay of execution under order 42 rule 6(2), (b) of the civil procedure Rules, 2010. The respondent thus urged this court to dismiss this Application with costs.
6. In the alternative, if the court was inclined to grant an order of stay pending appeal, the respondent urged the court to order the appellants to pay them two thirds of the decretal sum and deposit the rest in a joint interest earning account pending determination of the Appeal.
7. The respondent thus urged this court to find that the application was not merited and prayed that it be dismissed with costs.

Analysis & Determination

8. I have carefully considered the Application, its Supporting Affidavit, the Respondent's Replying Affidavit and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
9. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See *Amal Hauliers Limited Vs Abdulnasi Abukar Hassan (2017) eKLR & Butt Vs Rent Tribunal (1982) KLR 417*.
10. To the foregoing I would add that an order of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the same, shall also consider the overriding objective stipulated under sections 1A and 1B of the *Civil Procedure Act*, to enable court give effect to the overriding objective, while in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589*.
11. On the likelihood of suffering substantial loss, and security of the appeal, The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General Vs Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008; Kenya Shell Ltd Vs Kibiru & another (Supreme); Mukuma Vs Abuoga (1988) KLR 645*.
12. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back his money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in his intended appeal, find it difficult or



impossible to realize the decree. This is the cornerstone of the requirement for security. See Court of Appeal in Nduhiu Gitahi Vs Warugongo (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100.

Disposition

13. Considering all relevant factors, especially the fact that the appeal challenges both quantum and liability, and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;
 - a. The Appellant/Applicant do deposit the decretal sum of Kshs.515,625/= in a joint interest-earning account held in the joint names of the counsels herein and opened at a reputable bank.
 - b. The said Amount is to be deposited within the next 45 days from the date of this ruling and in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
14. The costs of this Application will be in the cause
15. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 16TH DAY OF OCTOBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 16th Day Of October 2024.

In the presence of: -

Ms Wangare for Appellant

Mr. Langat for Respondent

Susan Court Assistant

