



**Makura v Korir (Civil Appeal E621 of 2024)
[2024] KEHC 12739 (KLR) (Civ) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E621 OF 2024

JN MULWA, J

OCTOBER 24, 2024

BETWEEN

ALICE WAMBUI MAKURA APPELLANT

AND

PETER KORIR RESPONDENT

RULING

On Notice of Motion Dated 22/5/2024

1. The Application for consideration is the Appellant's Motion dated 22/5/2024. She seeks an order of stay of execution of the judgment delivered on 6/9/2019 in Milimani MCCC No 2158 of 2015 pending the hearing and determination of the appeal filed herein.
2. The application is based on the grounds on its face and supported by the affidavit of the Appellant sworn on even date.

It is opposed by the Respondent's grounds of opposition dated 3/6/2024.

Both parties relied on their affidavits and oral submissions before the court which have been considered.

3. The conditions necessary for the grant of stay of execution orders pending appeal are stated in Order 42 rule 6(1) & (2) of the [Civil Procedure Rules](#) which provide that:

“6.

- (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."

4. From the said provisions, it is clear that in order to succeed in an application for stay of execution, an applicant must demonstrate that substantial loss may result unless the order of stay is issued; that the application has been brought without undue delay; and must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant.
5. There is no dispute that there was inordinate delay in filing the instant application as the impugned judgment was delivered on 6/9/2019, five years after the judgment was delivered and only set in motion by an application for setting aside the judgment before the trial court, which was denied by a ruling dated 12/10/2023. The applicant's justification for the delay is that the period of less than one month, after the trial court's ruling is excusable. Upon careful consideration, the court is satisfied that the delay is explained to the satisfaction of the court. The court is however not blind to the fact that the impugned judgment was delivered five years before the instant application was filed. Her application to set aside the judgment was denied by the trial court on 12/10/2023.
6. The court has perused the Memorandum of Appeal dated 22/5/2024. There is an allegation that the applicant herein was not served with summons to enter appearance nor heard by the trial court, which issues are for interrogation at hearing of the intended appeal.
7. On Substantial loss, the Applicant/Appellant submits that should execution proceed and the decretal sum of Kshs 175,916 is paid to the respondent, there is no guarantee that he will refund the decretal sum in the event that the appeal succeeds. It is well settled that where an appellant expresses such reasonable fears, the evidential burden of proof shifts to the respondent to controvert the same by way of affidavit evidence as that is a matter which is peculiarly within his or her knowledge, as held in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR.
8. On the matter of security, the applicant has not offered any security but undertakes to comply with whatever the court finds fit and just citing the case of *Kibugu Farmers' Cooperative Limited v Philip Mungai t/a Mungai Electrical Ventures* (2019) eKLR for the holding that sufficient security must be offered, and the respondent proposing that the full decretal sum be deposited in court as security for the due performance of the decree.



9. In light of above the court is persuaded to allow the Appellant's application dated 22/5/2024 upon the following terms;
- a. An order of stay of execution of the trial court's judgment delivered on 6/9/2019 is granted pending hearing and determination of the appeal upon the following terms:
 - b. The full decretal sum shall be deposited in court within 30 days as security for the due performance of the decree. In default the stay order shall lapse automatically.
 - c. The Record of Appeal shall be filed within 60 days of this ruling
 - d. Trial court file shall be provided to the court within 60 days.
 - e. Directions on the hearing of the appeal shall be taken on 3/2/2025.
 - f. Costs of this application shall abide by the outcome of the Appeal.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024.

JANET MULWA

JUDGE

