



REPUBLIC OF KENYA



KENYA LAW
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**Nzioki v Muithya (Civil Appeal E132 of 2024)
[2024] KEHC 12293 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E132 OF 2024**

FR OLEL, J

OCTOBER 15, 2024

BETWEEN

JONAH WAMBUA NZIOKI APPELLANT

AND

PATRICK MUSYOKA MUTHYA RESPONDENT

RULING

1. The Appellant/ Applicant filed a Notice of Motion application dated 6th May 2024 seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That an order of this Honourable court do issue staying the execution of the judgment of the lower court in Kangundo CMCC 28 of 2020 and all consequential orders therefrom pending the hearing and determination of the appeal.
 - d. That costs of this application be in the cause.
2. The Application is supported by the affidavit of the applicant, John Wambua Nzioki who contends that judgment was entered against him on 9th April 2024 for the sum of Kshs.2,760,000/= plus costs and interest and being aggrieved by the said Judgement, he had filed this Appeal and is willing to abide by the conditions set by the court as a pre-condition for issuance of orders of stay of execution pending determination of the said Appeal. Lastly, the applicant also averred that the Respondent would suffer no prejudice if the orders sought are granted.
3. The application was not opposed, but Mr Nzuki Nzioka , counsel for the respondent did urge court to direct the Appellant to deposit the decretal sum as security pending determination of this Appeal.



Analysis & Determination

4. I have carefully considered the Application and Supporting Affidavit and the only issue which arise for determination is whether this court should grant stay of execution of the Judgment/Decree delivered on 9th April 2024 in in Kangundo CMCC 28 of 2020.
5. 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 Butt Vs Rent Restriction Tribunal (1982) KLR 417 and James Wangalwa & Another Vs Agnes Nalika Chereto (2012) eKLR)
6. The judgment appealed against was delivered on 9th April 2024. The Appeal herein was filed on 3rd May, 2024 and this application was also filed on 6th May 2024. Thus, it can be said that this appeal and application for stay of execution have been file timeously.
7. On the likelihood of suffering substantial loss, it was sufficient if an applicant seeking a stay of execution demonstrated that he/she would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful. See G. N. Muema P/A (516) Mt View Maternity & Nursing Home Vs Miriam Maalim Bishar & Another (2010) eKLR , National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR
8. Guided by the above authorities and in the absence of the requisite proof from the Respondent that he is a person of means, I find that the Appellant has satisfied this court that he would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
9. On the security, the Appellants have indicated that they are ready and willing to abide by this courts orders as to security for due performance of the decree.
10. 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.

Disposition

11. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, and since based on the grounds of appeal, the same is as against quantum awarded, I do grant stay of execution of the decree herein on condition that;
 - a. The Appellant/Applicant do deposit the entire decretal sum in a joint interest-earning account in the joint names of advocates for the appellant and advocates for the respondent at a reputable financial bank for the whole duration of this appeal.



- b. This condition is to be met within 60 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.

12. The costs of this Application will be in the cause.

13. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 15TH DAY OF OCTOBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 15TH DAY OF OCTOBER, 2024.

In the presence of: -

Mr. Mbuvo for Appellant

Mr Nzioka for Respondent

Susan Court Assistant

