



REPUBLIC OF KENYA



**Mwangi v Manthi (Suing as the legal administrator of Estate of Victor Kioo Manthi (Deceased)
(Civil Appeal E024 of 2022) [2023] KEHC 1080 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E024 OF 2022
GMA DULU, J
FEBRUARY 16, 2023**

BETWEEN

JOHN NYAGA MWANGI APPLICANT

AND

**KIOO MANTHI (SUING AS THE LEGAL ADMINISTRATOR OF ESTATE OF
VICTOR KIOO MANTHI (DECEASED) RESPONDENT**

RULING

1. Before me is an application by way of Notice of Motion dated 27th April 2022 filed under section 1A, 3A 79G and 95 of the *Civil Procedure Act* (Cap. 21) and Order 42 Rule 6 of the *Civil Procedure Rules*.
2. The application has five (5) prayers, two of which have been spent as follows:-
 1. (Spent)
 2. (Spent)
 3. That there be a stay of execution of the judgment and decree herein pending hearing and determination of the appeal.
 4. That the costs of this application be provided for.
3. The application has grounds on the face of the Notice of Motion that an appeal has been filed against the judgment delivered on 4th April 2022 which is highly meritorious and that unless restraining orders are granted the respondent may move to proclaim the appellant's goods and the intended appeal will become superfluous.
4. The application is supported by the affidavit sworn on 27th April 2022 by John Nyaga Mwangi the appellant/applicant which amplifies the grounds of the application, and also states that the judgment



was for an amount of Kshs.950,000/= together with costs and that the respondent was a person of no known financial means. Exhibited to the affidavit is a copy of the Memorandum of Appeal.

5. The application is opposed through a replying affidavit sworn on 17/05/2022 by Kioo Manthi the respondent in which it was deponed that the applicant had not met the threshold for grant of the stay orders sought.
6. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by Joel Ngigi & company advocates for the applicant, and submissions filed by P. Wasolo & company for the respondents.
7. This court's powers to grant stay of execution of judgment or decree is an exercise of judicial discretion - see *Butt -vs- Rent Restrictions Tribunal* (1982) KLR 417.
8. The exercise of that discretion is pegged on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. In particular Rule 6(2) is relevant and provides as follows –
 - “6(2) No order for stay of execution shall be made under subrule (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.”
9. In the present case, the judgment of the trial court was delivered on 4th April 2022 and this application filed on 28th April 2022. I find no inordinate delay in filing this application.
10. On whether the applicant may suffer substantial loss if the stay orders sought are not granted, I note that the judgment is a money decree, and there is a contention that the respondent might not be able to repay the amount of decree if the same is paid, and the appeal is then successful. I note that the appeal is premised principally on the quantum of damages.
11. In the circumstances of this case, I find that if the entire decretal amount is paid to the respondent, the applicant may suffer substantial loss if the same is not repaid. However, since the appeal is primarily on the quantum of damages awarded. I will grant stay of execution only on condition that the applicant pays part of the decretal amount of Kshs.400,000/= to the respondent.
12. With regard to provision of security, the applicant has offered to provide a bank guarantee. However, in my view, the payment of part of the decretal amount to the respondent herein, is sufficient security.
13. Consequently, I allow the application and order as follows:-
 - a. I grant stay of execution of judgment or decree herein pending determination of appeal.
 - b. The stay herein granted will be subject to the applicant/appellant paying to the respondent through counsel part of the decretal amount Kshs.400,000/= within 45 days from today.
 - c. In the event of default in (b) above, the stay orders herein granted will automatically lapse and be of no effect.
 - d. The costs of the application will follow determination of the appeal.

DELIVERED, SIGNED & DATED THIS 16TH DAY OF FEBRUARY, 2023, IN OPEN COURT AT MAKUENI.



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GEORGE DULU

JUDGE

