



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Boudziza v Mwanza (Civil Appeal E806 of 2022)
[2023] KEHC 1970 (KLR) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E806 OF 2022**

JN NJAGI, J

MARCH 10, 2023

BETWEEN

DOHA BOUDZIZA PLAINTIFF

AND

JACQUELINE KOKI MWANZA DEFENDANT

*(Application for orders for stay of execution of the judgment
and decree in Nairobi Mililani CMCC No 504 of 2020.)*

RULING

1. The Appellant/Applicant has filed an application dated October 24, 2022 seeking for orders for stay of execution of the judgment and decree in Nairobi Mililani CMCC No 504 of 2020 pending the hearing and determination of the appeal filed herein.
2. The application is premised on grounds on the face of the application and support by the affidavit of the Applicant. The Applicant contends that the appeal has high probability of success. That the same may be rendered nugatory if the order for stay of execution is not granted as the Respondent may proceed to execute the claim. That the Respondent is a person of straw and may not be in a position to make good any loss/damage incurred or suffered by the Applicant if the decree herein is enforced and the appeal ultimately succeeds. That the orders sought will not occasion any prejudice to the Respondent whereas the Applicant stands to suffer great prejudice should he not be allowed to ventilate the appeal. That he runs a retail business and in the event of an attachment, he stands to suffer substantial loss because he will not be able to manage the needs of his family. That the application was brought without unreasonable delay. That he is ready to furnish security in the form of a bank guarantee for due performance of the decree pending the outcome of the appeal.
3. The application was opposed by the Respondent vide her replying affidavit sworn on the November 21, 2022 in which she deposes that the application is not made in good faith and is merely intended



to delay the execution of the decree. That the Respondent will be prejudiced by the delaying tactics employed by the Applicant and is a denial of her enjoyment of the fruits of the judgment. That the Applicant will not suffer any loss or damage if execution of the decree is carried out. That the Respondent will be the one to suffer if the orders are granted as they will delay the fruits of the judgment.

4. I have considered the grounds in support of the application and the grounds in opposition thereto. An applicant for stay of execution pending appeal has to satisfy the conditions set out in Order 42 rule 6(2) of the [Civil Procedure Rules, 2010](#). These are that:
 1. The application was brought without unreasonable delay.
 2. The applicant will suffer substantial loss unless the orders sought are granted.
 3. The applicant has given security for due performance of the decree as may be binding on him.
5. The impugned judgment was delivered on the 19th of September 2022 and the instant application was filed on the October 25, 2022. Though the appeal was filed after the statutory period of appeal had lapsed, the delay was not inordinate. The application was filed without unreasonable delay.
6. The decretal sum awarded by the lower court stands at Ksh.3,170,158.15/-. This is a substantial amount of money. The Applicant deposed that the Respondent is a person of straw who may not be able to refund the money in the event that the appeal succeeds. The Respondent in her replying affidavit did not respond to the issue whereas the burden had shifted to her to demonstrate that she was in a position to refund the money. Having failed to do so the Applicant may end up losing the money and thus suffering substantial loss in the event that the appeal succeeds.
7. The Applicant says that he is willing to offer security in form of a bank guarantee. This is a sign of good faith that the application is not just meant to delay the hearing of the appeal.
8. The purpose of an application for stay of execution pending appeal is to preserve the subject matter of the appeal and the court should strive to balance the interests of the two parties. In [HGE v SM](#), Civil Appeal No20 of 2020, Kakamega (2020) eKLR the court observed that:

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. It has also to be noted that the grant or refusal of an application for stay pending appeal is discretionary. The Applicant herein has an undeniable right of appeal. The Respondent on the other hand has a judgment in her favour for which she should not be denied the fruits of the judgment without a just cause. In balancing the rights of the two, I am of the view that I should allow the application on condition that the Applicant deposits with this court a bank guarantee of the entire decretal sum within a month from the date hereof, failing which the order will stand vacated.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF MARCH 2023.

J. N. NJAGI

JUDGE



In the presence of:

Ms Owuor for Applicant

Muithya for Respondent

Court Assistant – Simon

30 days right of appeal.

