



**Kinyua v Gitonga (Suing as the legal representative of the Late Mutethia Jason Mworita (Deceased) (Civil Appeal E011 of 2023) [2023] KEHC 2250 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2250 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E011 OF 2023  
TW CHERERE, J  
MARCH 16, 2023**

**BETWEEN**

**PURITY KINYA KINYUA ..... APPLICANT**

**AND**

**KAGWIRIA GITONGA (SUING AS THE LEGAL REPRESENTATIVE OF THE LATE MUTETHIA JASON MWORITA (DECEASED) ..... RESPONDENT**

**RULING**

1. By a judgment dated 28<sup>th</sup> November, 2022, the court in Tigania PMCC E76 OF 2021 entered judgment for the Respondent as against the Appellant/Applicant for KES1,060,498.60/- less 40 % contributory negligence, plus costs and interest.
2. By a notice of motion dated 20<sup>th</sup> February, 2023, supported by an affidavit sworn on even dated by the Applicant, Applicant seeks orders for stay of execution pending the hearing and determination of the appeal and offered to provide a bank guarantee as security for the decretal sum. The application is based on the grounds that Applicant has filed an appeal which has high chances of success and is unlikely to recover the decretal sum if it is paid to the Respondent.
3. Respondent opposed the application vide a grounds of opposition dated and filed on 08<sup>th</sup> March, 2023 where Respondent states that the appeal has no chance of success, the Applicant has not demonstrated substantial loss and finally that Respondent is a woman of means capable of refunding the decretal sum in the event the appeal succeeds.
4. On 21<sup>st</sup> February, 2023, this court granted a temporary order for stay of execution on condition that KES. 350,000/- was deposited with the court but that was never to be.



## **Analysis and Determination**

5. I have considered the notice of motion in the light of affidavit and grounds of opposition on record and submissions filed on behalf of the Respondent.
6. Order 42 (6) of the *Civil Procedure Rules* provides that no order for stay of execution shall be made unless application has been made without unreasonable delay; substantial loss is demonstrated and security for the due performance of such decree or order is offered. (See *Endmor Steel Millers Ltd v James Wakhulunya Makuto* [2016] eKLR).
7. The impugned judgment was delivered on 28<sup>th</sup> November, 2022. This application was filed timeously on 18<sup>th</sup> January, 2023 about 2 months after the judgment was delivered.
8. I have considered whether Applicant has demonstrated that it is likely to suffer substantial loss if stay of execution is not granted. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. (See *Standard Assurance Co. Ltd v Alfred Mumea Komu* [2008] eKLR).
9. A party seeking an order of stay pending appeal bears a specific burden regarding proof of substantial loss. In this case, Applicant avers that Respondent is not in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the evidential burden shifts to the Respondent to show that she would be in a position to refund the decretal sum if it is paid out to her if the pending appeal were to succeed. Other than state that she is in a position to refund the decretal sum if the appeal succeeds, Respondent has discharged the evidential burden to prove that she has the means to refund the decretal sum in the event she loses the appeal.
10. Appellant has offered to furnish a bank guarantee for due performance of the decree herein pending the hearing and determination of the appeal.
11. Whereas it is not my duty at this stage to determine if the Applicants have an arguable appeal, I find that it would be in the interest of justice to afford the Appellant an opportunity to prosecute her appeal.
12. In the end, the notice of motion dated February 20, 2023 is allowed in the following terms:
  - (1) There shall be a stay of execution of judgment in Tigania PMCC E076 OF 2021 pending the hearing and determination of this appeal on condition that the Appellant/Applicant Shall:
    - (a) Pay the Respondent KES. 200,000/- (Two hundred thousand) within 7 days from today's date
    - (b) Deposit KES. 300,000/- (Three hundred thousand) with the court within 14 days from today's date
  - (2) The record of appeal be filed and served within 30 days from today's date
  - (3) Thereafter parties shall file and serve summons with each party having 14 days
  - (4) Mention on 13<sup>th</sup> July, 2023 to confirm compliance and for further orders
  - (5) Costs shall abide the outcome of the intended appeal

**DATED AT MERU THIS 16th DAY OF March 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**



For Appellant/Applicant - Ms. Soi for Kimondo Gachoka & Co Advocates

For Respondent - Ms. Mbogo for M.D.Maranya & Co. Advocates

