



REPUBLIC OF KENYA



KENYA LAW
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**Kimeru Enterprises Limited v Mukaria (Civil Appeal
E147 of 2022) [2023] KEHC 1986 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1986 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E147 OF 2022
EM MURIITHI, J
MARCH 9, 2023**

BETWEEN

KIMERU ENTERPRISES LIMITED APPELLANT

AND

AGNES KANJA MUKARIA RESPONDENT

RULING

1. By its application under certificate of urgency dated October 26, 2022, the Appellant seeks stay of execution of the decree issued in Meru CMCC No E259 of 2021 pending the hearing and determination of this appeal. The Appellant's counsel, in his affidavit in support of the application, faults the trial court for treating the salvage value of Kshs 100,000 as special damages instead of deducting it from the pre-accident value. He is apprehensive that if execution is allowed to proceed and the decretal sum paid to the Respondent, it would be impossible for the Respondent to refund it, as her financial capability is unknown. He avers that the Appellant is willing and ready to furnish security and/or comply with other orders as to security as the court may deem fit to grant.
2. The Respondent has opposed the application vide her replying affidavit sworn on October 31, 2022. She avers that the application is superfluous, an abuse of the court process and designed to frustrate the course of justice by unnecessarily prolonging litigation. She avers that contrary to the alarm raised by the Appellant, she has not been issued with a decree by the trial court. She takes offence to the Appellant's allegation that she must demonstrate her wealth to be entitled to satisfaction of a legal judgment awarded to her by the trial court. She is advised that the Appellant's right to appeal subsists even after settlement of the judgment debt thus all claims to the contrary are specifically opposed and cannot sustain the orders sought here. She is open to stay being granted on condition that the Appellant deposits the entire decretal sum into her advocate's bank account within 4 working days from the date of the order, in default of which the order shall automatically lapse.



3. The Appellant urges that it is willing to furnish security to the tune of Kshs 150,000, and the Respondent will not be prejudiced if stay is granted. It urges that if the balance of the decretal sum is released to the Respondent who is not a person of means, chances of recovering the same will be nil and the appeal will be rendered nugatory. It urges that there has been no unreasonable delay in filing the application because the impugned judgment was delivered on September 23, 2022, and cites *Kenindia Assurance Co Ltd v Patrick Muturi*, [1999] eKLR *Bungoma Line Sacco Society Ltd v Super Bargains Hardware (K) Ltd* [2021] eKLR and *Geofrey Kamau Ndishu & Anor v Peter Muchiri Muriungi* [2022] KEHC 2[KLR].
4. The Respondent submits that this application is premature and incompetent because the decree herein cannot be processed as the lower court file was transmitted to this court immediately the appeal was filed, and the application ought to be dismissed with costs. She urges that the Appellant has not proved prejudice upon execution, and relies on *MFI Document Solutions Ltd v Paretto Printing Works Limited* [2021] eKLR, *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and *Danros (K) Limited & Another v Murtaza Adaamjee* [2021] eKLR. She however expresses her willingness to conditional stay being granted upon deposit of the entire decretal sum in her advocate's bank account within 4 working days.

Analysis and Determination

5. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, as follows: -
 - “ 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
 - 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.”

Substantial loss

6. The cornerstone consideration for granting stay is substantial loss, which has been espoused by the Court of Appeal (Platt, AG JA) in *Kenya Shell Limited v Kibiru Another* [1986] eKLR as follows: -

“If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be



prevented. Therefore, without this evidence it is difficult to see why the Respondents should be kept out of their money.”

7. The Appellant is apprehensive that if the decretal sum is paid to the Respondent, who is not a person of means, the same will be lost, and its appeal will be rendered nugatory. The Respondent has not attempted to demonstrate her financial capability to rebut the Appellant’s legitimate fears. The Appellant, in its memorandum of appeal faults the trial court for treating the salvage value of Kshs 100,000 as a special claim instead of deducting it from the pre-accident value among other grounds. Those grounds cannot be termed as being frivolous as they are clearly arguable.
8. The court considers that the Respondent’s right to enjoy the fruits of her judgment must be balanced with the Appellant’s undoubted right to appeal against the trial court’s decision.
9. The court finds that the application herein was filed timeously without any delay as the judgment sought to be appealed against was delivered on September 23, 2022.
10. The court appreciates the Appellant’s willingness to offer security for the due performance of the decree, and the Respondent’s inclination to accept payment of the entire decretal sum, as security.
11. The allegation that the decree herein was not issued is neither a consideration nor a bar to the grant of the orders of stay.

Orders

12. Accordingly, for the reasons set out above, the court allows the Appellant’s application dated October 26, 2022 in the following terms:
 1. An order for stay of execution of the Judgment and Decree in Meru CMCC No E259 of 2021 pending the hearing and determination of this appeal is hereby issued.
 2. The Record of Appeal to be filed within 60 days from the date hereof.
 3. The Appellant shall pay to the Respondent the sum of Kshs 150,000/= and deposit the balance of the decretal sum into an escrow account in the joint names of the advocates for the parties within 30 days from the date hereof.
 4. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
 5. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 9TH DAY OF MARCH, 2023.

EDWARD M MURIITHI

JUDGE

Appearances:

M/S Jackson Omwenga & Co Advocates for the Appellant.

M/S Kaimba Peter Advocates for the Respondent.

