



REPUBLIC OF KENYA



**Musingi & another v Martin (Civil Appeal 044 of 2022)
[2023] KEHC 3181 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 044 OF 2022
TM MATHEKA, J
MARCH 17, 2023**

BETWEEN

ROBERT MANETU MUSINGI 1ST APPELLANT

WILSON NDOLO MUTWIWA 2ND APPELLANT

AND

JANE NDINDA MARTIN RESPONDENT

RULING

1. Before me is the Notice of Motion dated August 19, 2022 which was filed during vacation under certificate of urgency. It is brought under Order 22 Rule 22, Order 42 Rules 4,6 & 7, Order 51 Rules 1 & 3 of the *Civil Procedure Rules 2010*, Sections 3, 3A & 79G of the *Civil Procedure Act*, Article 159 (2) (a) & (d) of the *Constitution of Kenya 2010* and all other enabling provisions of the law. The applicants sought orders:
 - a. Spent.
 - b. Spent.
 - c. That this honorable Court be pleased to grant stay of execution of the judgment and/or decree issued by Honorable JO Magori, Senior Principal Magistrate on July 19, 2022 pending the hearing and determination of this application.
 - d. That this honorable Court be pleased to grant stay of execution of the judgment and/or decree issued by Honorable JO Magori, Senior Principal Magistrate on July 19, 2022 pending the full hearing and determination of this appeal in Makueni.
 - e. That this honorable Court allows the applicant to furnish the Court with security in the form of a bank guarantee from Family Bank.



- f. That the application be heard inter- partes on such date and time as this honorable Court may direct.
 - g. That the costs of this application abide the outcome of the appeal.
2. The application is supported by the grounds on its face and the Affidavits of Mercy Waweru Advocate and the 2nd appellant sworn on the same day.
 3. The 2nd appellant deposes that the judgment on quantum is excessive hence the appeal has high chances of success as per the memorandum of appeal exhibited as WNM-1. It is also his case that the respondent is a person of unknown means and they are apprehensive that if the decretal sum is paid out to her the appeal will be rendered an academic exercise. Further that his underwriter, Directline Assurance Company, is ready, willing and able to furnish the Court with a reasonable Bank Guarantee as security for the performance of the decree. A copy of Bank Guarantee is exhibited as WNM-2.
 4. The application is opposed through the replying affidavit of the respondent sworn on October 7, 2022. She depones that the appeal is not arguable and has no probability of success; that the allegation of inability to refund the decretal amount is baseless and unfounded; that no security has been given as the applicant has not given sufficient grounds for the proposal to furnish Court with a Bank Guarantee; that since the duration for hearing and determining the appeal is unknown, there is no guarantee that the Bank Guarantee will be valid at the time of conclusion of the appeal. Further, she deposes that the Bank is not a party to this suit and has no obligation on its part to settle the claim.
 5. While exhibiting the medical report as JNM-1 the respondent depones that her injuries were assessed at 10% incapacity and she continues to suffer as she has difficulties walking. It is her position that half of the decretal sum should be released to her if the Court is inclined to grant stay.
 6. The application was canvassed through written submissions.

The Applicants' Submissions

7. For the applicants it is submitted that the appeal is arguable as the award is excessive and was made without considering the limit in decided cases and in total disregard of their submissions. They rely on the case of *Kenya Revenue Authority –vs- Sidney Keitany Changole & 3 Others* (2015) eKLR where the Court of Appeal held that:

“This Court has further held that the applicant need only prove or establish one arguable point noting that an arguable appeal is not necessarily one that will succeed but one that is not frivolous.”

8. They submit that whether or not the appeal is arguable is demonstrated by the grounds set out in the memorandum of appeal.
9. On whether substantial loss will occur if stay is declined, they submit that the affidavits in support of the application have specifically stated that the respondent's means are unknown hence a high likelihood that she will not be able to refund the decretal amount if it is paid to her. They contend that the respondent has neither disclosed nor furnished the Court with any documentary evidence to prove her financial standing. They rely on the case of *Edward Kamau & Anor –vs- Hannah Mukui Gichuki & Anor* (2015) eKLR where the Court (Aburili J) stated that;

“This Court appreciates that the applicants being a party seeking favorable exercise of the court's discretion is under a legal duty to place some material before the court upon which



such discretion should be exercised. In other words, they should prove that the respondent is impecunious that if the decretal sum is paid then they will not recoup should the appeal succeed, thereby rendering it nugatory. They have also argued that although the respondent is offering a bank guarantee, that is not deposited on her affidavit of means. I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed”

10. The applicants submit that the application was filed without unreasonable delay and that they are ready and willing to provide security in the form of a bank guarantee. They rely on the case of *Gianfranco Manenthi & Anor -vs- Africa Merchant Assurance Co Ltd* (2019) eKLR where the Court observed that;

“The applicant must show and meet the condition of payment of security for due performance of the decree...order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the Court that if the appellant fails to succeed on appeal, there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree.”

The Respondent’s Submissions

11. For the respondent it is submitted that the applicants have not provided evidence of substantial loss to be suffered if the stay orders are not granted. He relies on the case of *Macharia T/A Macharia & Co Advocates -vs- East African Standard No 2* (2002) 2KLR 63 where the Court stated:

“In these kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific detail and particulars. Where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant stay.”

12. Further, that there is no indication in the applicants’ supporting affidavit that she will be unable to refund the decretal sum if the appeal succeeds.

13. With regard to security, it is submitted that the applicants have not annexed any documents from Family Bank showing that the Bank has agreed to guarantee them. That there is no indication on whether the applicants are account holders with Family Bank and whether the guarantee is for the entire decretal sum or not. Accordingly, it is contended that no security has been offered. She relies on the case of *Equity Bank Ltd -vs- Tanga Adams Co Ltd* (2006) eKLR where it was held that;

“Of even greater impact is the fact that an applicant has not offered security at all and this is one of the mandatory tenets under which the application is brought...let me conclude by stressing that all the four, not one or some must be met before this Court can grant order of stay.”

14. Relying on the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, it is submitted that the affidavit purporting to offer a bank guarantee has been sworn by the applicants’ Advocate instead of the applicants. It is contended that there is no indication on whether the Advocate is well versed with the financial capabilities of the applicants and can prove the same.



15. Having considered the application, the rival affidavits and submissions, the only issue for determination is whether the application is merited;

Whether stay of execution should be granted

16. Order 42 Rule 6 of the *Civil Procedure Rules*, provides the conditions upon which the Court dealing with such application should consider; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and whether the applicant has furnished security for the due performance of the decree.
17. Judgment being appealed was delivered on 19th July 2022 and the Memorandum of Appeal was filed on August 19, 2022 which is within the 30 days' period provided for filing appeals from the subordinate Court to the High Court. This application was filed on August 31, 2022, about two weeks after the filing of the Memorandum of appeal. This delay cannot be said to be inordinate.
18. As for substantial loss, the appellants are apprehensive that if the decretal amount is released to the respondent, they might not recover the same if the appeal succeeds. The trial Magistrate found the appellants 100% liable and awarded the respondent Kshs 800,000/= as general damages, Kshs 50,000/= as future medical expenses and Kshs 80,128/= as special damages.
19. While it is the applicants who are apprehensive about the respondent's financial ability, the respondent would have eased the situation by filing an affidavit of means demonstrating that there would be no risk as this is information which is exclusively in her possession/knowledge through an affidavit of means. The Court has nothing to indicate the respondent's ability to refund the decretal sum if the appeal succeeds. The possibility of substantial loss is not farfetched.
20. As for security, there is a document headed Application for Additional Banking Facilities Kes 100 million annexed to the affidavit of the 2nd appellant as MWN 2 and not the Advocate's. The said document purpose is indicated as "...for providing security for awards and or costs awarded in various Court cases/claims pending before Court". It bears the date stamp received 23rd Feb 2022 Family Bank Moi Avenue. It is undated but its duration is indicated to be "12 months with an option to renew". However, the same appears to be incomplete. The part for the bank official's initials is not signed, it is not sealed by the Directors and many parts are unsigned. It is not a document this court can rely upon as clearly it is incomplete and does not live up to a Bank Guarantee.
21. The Judgment of the subordinate court was not annexed to the application. I have however noted from the memorandum of appeal that the main complaint by the applicant is the quantum of damages being excessive, and the 100% liability. The applicant is not saying that the finding on liability was erroneous in toto. The respondent has a valid judgment and expects to enjoy the fruits of that judgment. The Court has a duty to balance the competing interests between the parties, the appellants' right to pursue their appeal, and the respondent to enjoy the fruits of winning the first round. Accordingly, I am inclined to agree with the respondent that the court needs to make a finding on whether some of the decretal award should be released to her and what should happen to the rest.
22. In the circumstances I find that the application has merit. It is allowed in the following terms:
 - a. An Order of Stay of execution of the judgment and/or decree issued by Honorable JO Magori, Senior Principal Magistrate on July 19, 2022 be and is hereby issued pending the full hearing and determination of this appeal in Makueni.
 - b. The Applicants to release to the respondent one third of the total decretal sum within 30 days hereof in default the order of stay to lapse automatically



- c. The balance of the decretal sum be deposited in a joint interest earning account in the names of the advocates of the parties within 45 days hereof. In default thereof the order of stay to lapse automatically
- d. The applicants to file and serve the record of appeal within 60 days hereof.
- e. The costs of this application abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 17TH MARCH 2023

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MUMBUA T MATHEKA

JUDGE

C/A Mwiwa

Kimondo Gachoka & Co Advocates for the appellant

Karanja & Partners Advocates

