



**Muchui v M'Itumitu (Suing as the legal representative of the Estate of Mutua Gitonga)
(Civil Appeal E131 of 2022) [2023] KEHC 2192 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E131 OF 2022
EM MURIITHI, J
MARCH 16, 2023**

BETWEEN

DUNCAN MUCHUI APPELLANT

AND

**GITONGA MUTHARE M'ITUMITU (SUING AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF MUTUA GITONGA) .. RESPONDENT**

RULING

1. By a notice of motion under certificate of urgency dated September 19, 2022 by the appellant/ applicant, Duncan Muchui, brought under order 42 rule 6 and order 22 rule 22 of the Civil Procedure Rules, section 1A, 1B & 3A of the *Civil Procedure Act*, section 5 (b) (iv) of the *Insurance (Motor Vehicles Third Party Risks) Act* and all other enabling provisions of the law, the applicant seeks stay of execution of the judgment and decree of the trial court pending the hearing and determination of this appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Edinah Masanya, the corporate legal officer at Britam General Insurance Company, the insurer herein sworn on even date. After the trial court delivered its judgment, the insurer was convinced that the award on quantum of damages was unjustified, and instructed its advocates on record to appeal against it. She verily believes that the appeal raises arguable issues with high chances of success, as shown by the annexed memorandum of appeal. Their advocates applied for copies of the lower court proceedings to enable them compile the record of appeal but the same are yet to be furnished. She is apprehensive that the respondent may execute the decree upon lapse of the interim stay orders issued by this court unless restrained by the court.
3. The applicant urges that if the said decree is executed, the appeal will be rendered nugatory and the applicant will suffer injustice and prejudice, because if the decretal sum of Kshs 8,800,930 is paid to the Respondent, he is unlikely to refund the same in the event the appeal succeeds. The Applicant states that he risks having his goods sold by public auction, if execution is allowed to proceed, and the



insurer is willing to satisfy the judgment after the appeal is heard and determined to a maximum of Kshs 3,000,000 as provided under section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*. The insurer is also ready to offer security of Kshs 3,000,000 as per the statutory limit provided under section 5(b)(iv) of the *Insurance (Motor Vehicles Third Party Risks) Act*. It is further urged that the Respondent will not be prejudiced as he will enjoy the fruits of his judgment if the appeal fails.

4. The respondent has opposed the application vide his replying affidavit sworn on September 27, 2022. He avers that the application is marred/riddled with probabilities, speculations, falsehoods and utterances that are solely meant to mislead the court into issuance of the orders sought. He avers that the reasoning and eventual quantum of damages as assessed by the trial court was in regard to the evidence he presented, which the applicant did not controvert. He has been counseled that as a successful litigant, he is entitled to the fruits of his judgment, and the application is meant to delay that enjoyment. He faults the applicant for failing to demonstrate what substantial loss he stands to suffer if the decretal sum is paid to the respondent.
5. There is no demonstrable attempt by him to execute the decree, and the applicant is just speculative. He reiterates that he is a man of means capable of refunding the decretal sum if the appeal is successful. He challenges the insurer, which is not a party to these proceedings, to offer security for the entire decretal sum instead of Kshs 3,000,000. He avers that the applicant has not laid down a good case for grant of stay orders, and urges the court to dismiss the application with costs. He is, however, agreeable to stay being granted upon payment of half the decretal sum to him and the balance to be deposited in a joint interest account in the names of the counsels herein.

Analysis and Determination

6. 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

7. The cornerstone consideration for granting stay is substantial loss, as clearly stated 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.”

8. The applicant contends that he will suffer substantially by losing the colossal decretal sum if the same is paid out to the respondent, whose ability to refund the same, in the event the appeal succeeds, is unknown. On his part, the Respondent maintains that he is a man of means and thus able to refund the entire decretal sum if the appeal is successful.

9. The court notes from the grounds of appeal as raised in the applicant’s memorandum of appeal, that the appeal is indeed arguable, which is not one which must necessarily succeed; and it is considered that it is not for the court to go into the merits of the intended appeal at this stage.

10. The court accepts that the decretal sum in issue of Kshs 8,800,930 is quite substantial and the Applicant’s apprehension that the same may not be refunded, in the event the appeal succeeds, cannot be trivialized. The court is minded that the Respondent, as the successful litigant, is entitled to enjoy the fruits of his judgment, and the Applicant, as an aggrieved party, has an undoubted right to appeal against the trial court’s decision.

Delay

11. The judgment sought to be appealed against was delivered on September 8, 2022 while the instant application was filed on September 23, 2022. The applicant has alluded to the unavailability of the lower court proceedings as the reason behind the non-compilation of the record of appeal. This court finds that the period of approximately 2 weeks does not constitute unreasonable or undue delay.

Security

12. The court appreciates the Applicant’s willingness to offer security for the due performance of the decree, and the respondent’s express inclination to accept payment of half the decretal sum, as security.

Orders

13. Accordingly, for the reasons set out above, the court allows the applicant’s application dated September 19, 2022 in the following terms:

1. An order for stay of execution of the judgment and decree in Maua CMCC No E117 of 2021 pending the hearing and determination of this appeal is granted.
2. The record of appeal shall be filed within 60 days from the date hereof.
3. The applicant shall within thirty days (30) days from the date hereof pay to the respondent the sum of Kshs 3,000,000/= and deposit with the court a bank guarantee for the payment of the balance of Kshs 5,800,930/=.



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 for stay of execution shall abide the outcome of the appeal.

Order accordingly

DATED AND DELIVERED ON THIS 16TH DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Samuel Gitonga & Co Advocates for the Appellant.

M/S Ngunjiri Michael & Co. Advocates for the Respondent.

