



REPUBLIC OF KENYA



**Mulyungi v Mwendwa (Civil Appeal E038 of 2023)  
[2023] KEHC 1773 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1773 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E038 OF 2023**

**FR OLEL, J  
MARCH 16, 2023**

**BETWEEN**

**ROGEOUS MUTETI MULYUNGI ..... APPELLANT**

**AND**

**MARY KAVULA MWENDWA ..... RESPONDENT**

**RULING**

1. The application before this court is the notice of motion application dated February 13, 2023 brought pursuant to provisions of section 1A, 3A & 79 of the [Civil Procedure Act](#), order 42 rule 6(2) of the [Civil Procedure Rules](#) and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is that there be a stay of execution of the judgment/decree issued in Machakos CMCC No 349 of 2022 herein pending the hearing and determination of the appeal and that costs be provided for. The application is supported by a supporting affidavit of the appellant Rogeous Muteti Mulyungi dated February 20, 2023.
2. This application is opposed by the respondents who filed replying affidavit's dated March 6, 2022 sworn by one Munyoki Muthangya.
3. The appellant averred that they are aggrieved by the judgment dated February 15, 2023 delivered in Machakos CMCC No 349 of 2022 and have subsequently filed an appeal against the said judgment, where the respondent was awarded Kshs 300,000/=, special damages of Kshs 5,580 and costs. They state that they have an arguable appeal which has high chances of success and further that the said appeal is meritorious and stands a good chance of success as demonstrated in the memorandum of appeal filed.
4. Further they state that the respondents are likely to set in motion execution process by sending auctioneers to attach the appellant's property and unless stay is granted they will suffer substantial loss,



which the respondents cannot refund should the appeal be successful and that the appeal has been brought without inordinate delay

5. Finally, the applicants state that they are ready and willing to give security for the decretal sum in form of a bank guarantee and that the respondent will not be prejudiced if orders sought are granted. They also confirm that this appeal has been filed without undue delay and similarly this application too has been brought without undue delay.
6. The respondent did oppose this application by their replying affidavit dated March 6, 2023. They state that they are not opposed to stay pending appeal being granted but the appellant should pay them half the decretal sum to them and the other half be deposited in a joint interest earning account pending determination of the appeal.

### **Analysis & Determination**

7. I have carefully considered the application, supporting affidavit, the respondent's replying affidavit and parties' respective submissions and the only issue for determination is whether the appellant has met the conditions necessary for the grant of stay pending appeal.
8. Stay of execution pending appeal is governed by order 42 rule 6 of the *Civil Procedure Rules*. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the applicant  
(see *Butt v Rent Restriction Tribunal* (1982) KLR 417 and *James Wangalwa & another v Agnes Nalika Chereto* (2012) eKLR)
9. In the case of *Masis Mwita v Damris Wanjiku Njeri* (2016) eKLR provided the guiding principles which the court should consider while determining an application of this nature. These were;
  - a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  - b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not to be rendered nugatory should that appeal court reverse the judge's discretion.
  - c. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements.
10. The judgment appealed against was delivered on February 15, 2023. The appeal herein was filed on February 21, 2022 and this application filed on February 21, 2023. Thus it can be said that this appeal and application for stay of execution have been file timeously.
11. On the likelihood of suffering substantial loss, it is evident that the decretal sum together with costs is a tidy sum of money. The appellant raises reasonable grounds that the respondent's will not be able to refund the said sum without hardship if paid out to them. I note that the respondents have not filed an affidavit of means as a basis of assessing if they can repay the decretal sum (if paid out).



12. In the case of *G. N Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another* (2010) eKLR the court states as follows;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

13. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* (2006) eKLR the Court of Appeal held thus;

“Once an applicant expresses a reasonable fact that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

14. Guided by the above authorities and in the absence of the requisite proof from the respondent’s that they are person of means, I find that the appellant has satisfied this court that they would suffer substantial loss if the entire decretal sum is paid to the respondent before the appeal is heard and determined.

15. On the security, the appellant have indicated that they are ready and willing to provide security by giving a bank guarantee. The respondent on the other hand pleads with the court to order that the appellant pays half the decretal sum and the other half be deposited in an interest earning joint account in the joint names of counsels on record.

16. The court has to balance the interest of the appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the respondent who seeks to enjoy the fruits of her judgment. In other words, the court should not only consider the interest of the appellant but also consider, in all fairness, the interest of the respondent who has been denied the fruit of her judgment. See *Attorney General v Halal Meat Produces Limited* civil application No Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another* (Supreme); *Mukuma v Abuoga* (1988) KLR 645.

17. The law is that where the applicant succeeds, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.

18. This issue of adequacy of security was dealt with in the Court of Appeal in *Ndubiu Gitahi v Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal expressed itself as follows;

“The process of giving security is one which arises constantly so long as the opposite party can be adequately protected. It is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even handedly without prejudicing



the issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even handed manner, that there would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant so as to tempt him into settling the appeal nor will any party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”

**Disposition**

- 19. Taking all relevant factors into consideration and having read the memorandum of appeal, it is clear that the appellants are only appealing on quantum and not liability. I do grant stay of execution of the decree herein on condition that;
  - a. The appellant do pay half the decretal sum of Kshs 150,000/= to the respondent within the next 30 days from the date of this ruling.
  - b. The appellant’s/applicant’s do give a bankers guarantee to pay the other half of the decretal sum, plus special damages and assessed costs together accruing interest from a reputable financial bank specified to this appeal for the whole duration of the appeal.
  - c. This condition is to be met within 30 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the respondent shall be at liberty to execute.
- 20. The costs of this application are awarded to the respondent.
- 21. It is so ordered.

**READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 16<sup>TH</sup> DAY OF MARCH, 2023.**

**RAYOLA FRANCIS**

**JUDGE**

**In the presence of:-**

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