



Mwito v Murungi (Suing as the Legal Representative of the Estate of Boniface Mwenda Mithika - Deceased) (Civil Appeal E022 of 2023) [2023] KEHC 2126 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E022 OF 2023
TW CHERERE, J
MARCH 16, 2023**

BETWEEN

ROMANO MUGAMBI MWITO APPELLANT

AND

STEPHEN MITHIKA MURUNGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BONIFACE MWENDA MITHIKA - DECEASED) RESPONDENT

RULING

1. By a judgment dated January 19, 2023, the court in Maua CMCC No E113 of 2022 entered judgment for the Respondent as against the Appellant/Applicant for KES 2,500,000/- plus costs and interest.
2. By a notice of motion dated February 16, 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 states he is willing to provide security for the due performance of 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 it is paid to the Respondent whose means are unknown.
3. Respondent opposed the application vide a replying affidavit sworn on March 3, 2023 in which he avers that Applicant has not demonstrated substantial loss and that this is meant to delay the enjoyment of the fruits of his judgment.
4. On February 16, 2023, this court granted a temporary order for stay of execution on condition that KES 500,000/- 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 both parties and the cited authorities.



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 *Equity Bank Limited v Japhet Kubai Ikiamba & another* [2021] eKLR and *Julius Muturi Thumi v Josphat Ntongai with Solomon Gitundu as the Guardian* [2021] eKLR).
7. The impugned judgment was delivered on January 19, 2023. This application was filed timeously on February 16, 2023 which is less than a month 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 *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] 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 he would be in a position to refund the decretal sum if it is paid out to him if the pending appeal were to succeed. Respondent has not discharged the evidential burden to prove that he has the means to refund the decretal sum in the event that he loses the appeal.
10. Appellant has offered to furnish security for due performance of the decree herein pending the hearing and determination of the appeal. Respondent on the other hand prays that part of the decretal sum be paid to him as the successful litigant and in support of this proposition relies on *Machira t/a Machira & Co Advocates v East African Standard* [2002] eKLR.
11. Whereas it is not my duty at this stage to determine if the Applicant has an arguable appeal, I find that it would be in the interest of justice to afford the Appellant an opportunity to prosecute his 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 Maua CMCC No E113 of 2022 pending the hearing and determination of this appeal on condition that the Appellant/Applicant shall:
 - a. Pay the Respondent KES 500,000/- (Five hundred thousand) within 14 days from today's date
 - b. Deposit KES 500,000/- (Five hundred thousand) with the court within 30 days from today's date
 2. The record of appeal be filed and served within 30 days from today's date
 3. Thereafter, parties file and exchange submissions with each party having 14 days
 4. Mention on July 13, 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 - Mr. Thuku for J.M.Mwangi & Co Advocates



For Respondent - Ms. Asuma for Mutembei & Kimathi & Co. Advocates

