



**Mwiruri & another v Muka & 2 others (Suing as the Legal Representatives and Administrators of the Estate of the Late Noel Benedict Muka Oyiengo) (Civil Appeal 281 of 2022) [2023] KEHC 1632 (KLR) (Civ) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1632 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 281 OF 2022**

**JN MULWA, J**

**MARCH 10, 2023**

**BETWEEN**

**BENSON GITONGA MWIRURI ..... 1<sup>ST</sup> APPELLANT**

**TIMOTHY MBARIO IGERIO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BEATRICE OWADE ..... 1<sup>ST</sup> RESPONDENT**

**JACKTON JONAH OYIENGO (SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE ESTATE OF THE LATE NOEL BENEDICT MUKA OYIENGO) ..... 2<sup>ND</sup> RESPONDENT**

**NOEL BENEDICT MUKA OYIENGO ..... 3<sup>RD</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE ESTATE OF THE LATE NOEL BENEDICT MUKA OYIENGO**

**RULING**

1. By application dated May 6, 2022, the appellants sought orders of stay of execution of the trial court's judgment delivered on the April 5, 2022 in Milimani CMCC No 1098 of 2017 upon which, being dissatisfied, they filed this appeal. The application is premised upon provisions of order 42 rule 6, order 50 rule 6 of the Civil Procedure Rules and other provisions under the Civil Procedure Act.
2. The appeal is dated May 5, 2022 and the main grievance is that the trial court erred by disallowing the appellant's application seeking an order to set aside the *ex-parte* judgment a decree dated May 7, 2021 so as to allow them defend the suit. On the May 7, 2022, the appellants were granted temporary stay



orders upon conditions set the court. They complied with the said conditions by depositing a sum of Kshs one million into court pending hearing and determination of the appeal.

3. The application is grounded on the reasons stated at the face and by an affidavit shown by Linda Njenga the Legal Manager of the appellant's motor vehicle insurer who states that it will be responsible for satisfying the decree at the end, as the court may ultimately determine. It is opposed by grounds of opposition dated May 25, 2022.
4. In addition to the above, both parties filed written submissions to urge their rival positions. The court has carefully considered the parties pleadings, depositions and submissions.

### **Analysis and Determination**

5. The main issue for determination is whether the appellants have met the threshold for grant of the orders for stay of execution pending hearing and determination of the appeal. The decretal sum as may be seen from the respondent's submissions is Kshs 3,862,234.58 whereas the trial court apportioned liability at 20:80 in favour of the respondent herein. These awards arose from a road traffic accident whereof the respondent's kin died in the said accident involving the appellants motor vehicle.
6. As stated in the *Butt v Rent Restriction Tribunal* [1982] KLR 417, the power of the court to grant or refuse an application for stay of execution is a discretionary power that should be executed so as not to make an appeal nugatory, if there are no other overwhelming hindrance. However, an applicant must put forth good and sufficient grounds to pursuant the court to exercise the said powers in its favour.
7. Stay of execution pending appeal is anchored in order 42 rule 6 of the *Civil Procedure Rules*. A party applying must comply with the conditions that;
  - i. The application must be filed without delay.
  - ii. The court must be satisfied that substantial loss may result to the applicant unless the order is made, and
  - iii. The applicant must offer such security as the court may order for due performance of such decrees; or as may ultimately be binding on him.
8. On delay, there is no issue as the application was filed timeously. Substantial loss is the cornerstone on an application for stay pending appeal. I have considered the appellant's contention that the respondent may not be able to pay back the said sum should the appeal be successful.
9. In the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike & another* [2006] eKLR, it is well settled that where an applicant expresses reasonable fears, the evidential burden of proof shifts to the respondent to controvert the same by way of affidavit evidence as that is a matter peculiarly within his or her knowledge.
10. The court has not seen any rebuttal on the said fears and as such, the court is satisfied that if the decretal sum is paid out to the respondent, substantial loss may occur should the appeal be successful. It must be noted and appreciated that an appeal is a right to any litigant but subject to orders that a court may determine, depending on each case – *Direct line Assurance Co Ltd v Daniel Nzioka* [2023] eKLR.
11. The court is not persuaded by the respondent's submissions that the appellants have not established any factors which show that the execution, if stay is not granted, will create a state of affairs that will irreparably negate their very essential core should they be successful in the appeal. See also *GN Wabome v HKM & PG* [2018] eKLR. I am satisfied that failure by this court to grant stay orders to



the appellants will gravely leave them disadvantaged, and should the appeal be successful, may cause substantive loss and damage to them.

12. On the matter of security for the due performance of the decree, the court is minded that it is a money decree. But what I have to ask is if the decretal sum of over Kshs million, is paid out to the respondent, would he be able to refund should the appeal be successful? I have rendered myself on the above sufficiently. The respondent is said to be a machine operator with a salary of less than Kshs 40,000/= per month. I need not go further in that regard.
13. I have also considered the appellants draft statement of defence as filed. It raises reasonable trial issues. Without attempting to venture into the merits of the appeal, I am satisfied that the orders sought by the appellants are merited.
14. Consequently, the application dated July 21, 2022 is allowed upon the following conditions being complied with by the appellants;
  - a) The record of appeal shall be filed and served within 60 days of this ruling.
  - b) There shall be a stay of execution of the trial court's ruling dated April 5, 2021 and the decree pending the hearing and determination of the appeal.
  - c) That the sum of Kshs 1 million deposited in court shall remain so deposited as security pending the hearing and determination of the appeal.
  - d) Costs of this application shall abide the outcome of the appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH, 2023**

**J. N. MULWA**

**JUDGE**

