



M’Mbui & another v Kenya Women Microfinance Bank PLC (Civil Appeal 112 of 2022) [2023] KEHC 3212 (KLR) (12 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 112 OF 2022
EM MURIITHI, J
APRIL 12, 2023**

BETWEEN

FRIDAH KATHURE M’MBUI 1ST APPLICANT

ERNEST MUGAMBI THURANIRA 2ND APPLICANT

AND

KENYA WOMEN MICROFINANCE BANK PLC RESPONDENT

RULING

1. Before the Court is a Notice of Motion under certificate of urgency dated September 26, 2022 brought under Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, Section 1A, 1B and 3A of the *Civil Procedure Act*, Article 159(2)(a) & (d) of the *Constitution* and all other enabling provisions of the law, where the Applicants seek stay of execution of the judgment and order made by the Chief Magistrate Court at Meru in CM No 276 of 2019 pending the hearing and determination of the Appeal herein.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Ernest Mugambi Thurania, the 2nd Applicant herein, sworn on even date. The Applicants have filed an appeal against the trial court’s judgment, which appeal raises serious arguable issues, and unless stay is granted, the Respondent will enforce the judgment, and they will suffer irreparable loss and damage. The application has been made in utmost good faith without undue delay and the Respondent will not be prejudiced in any way if the orders sought are granted.
3. The Respondent has opposed the application vide its replying affidavit sworn by Fridah Mutema, its Regional Manager-Mount Kenya North on October 19, 2022. She avers that the application is based on imaginary apprehension, baseless, frivolous and thus ripe for dismissal, as the Applicants have failed to either prove that the Respondent is actively in the process of executing the decree of the court or furnish security for costs.



4. The court on September 27, 2022 issued a temporary stay of execution of the trial court's judgment pending the hearing and determination of this application *inter-partes*.

Analysis and Determination

5. 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. Norder 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."

6. The Applicants contend that their appeal will be rendered nugatory if execution is allowed to proceed. On its part, the Respondent faults the Applicants for failing to support their assertion that it is actively in the process of executing the decree.
7. The court is mindful of the fact that the decretal sum of Ksh 2,552,454.23 is substantial. The court notes that the grounds of appeal questioning the legality of the repossession of Motor Vehicle Registration No KCE 212 L by the Appellants, the particulars of illegalities and breach of contract among others cannot be said to be frivolous.
8. This court finds that the Applicants will suffer substantial loss if execution is allowed to proceed and their appeal subsequently succeeds.
9. On whether there has been undue delay, this court finds that the application has been brought timeously on September 26, 2022 because the judgment sought to be appealed against was delivered on July 19, 2022.

Orders

10. Accordingly, for the reasons set out above, the court allows the Applicants' application dated September 26, 2022 in the following terms:
 1. An order for stay of execution of the Judgment and Decree in Meru CMCC No E276 of 2019 pending the hearing and determination of this appeal is granted.



2. The Record of Appeal to be filed within 60 days from the date hereof.
 3. The Applicants shall within thirty days (30) days from the date hereof deposit the entire decretal sum in an interest earning account in the joint names of the advocates for the parties.
 4. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
11. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 12TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S. Kiogora Arithi & Associates Advocates for the Appellant.

M/S Wambugu & Muriuki Advocates for the Respondent.

