



**Jekawa Agencies Limited v Macharia & another (Suing as legal representatives  
of the estate of the Late Elijah Gachoka Macharia) (Civil Appeal  
E044 of 2023) [2023] KEHC 19328 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19328 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E044 OF 2023**

**FR OLEL, J  
JUNE 21, 2023**

**BETWEEN**

**JEKAWA AGENCIES LIMITED ..... APPELLANT**

**AND**

**MARY WANJIKU MACHARIA ..... 1<sup>ST</sup> RESPONDENT**

**ROBERT WACHIRA MACHARIA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE  
ELIJAH GACHOKA MACHARIA**

**RULING**

1. The application before this court is the Notice of Motion application dated March 15, 2023 brought pursuant to provisions of Section 1A, 1B, 3A & 79 of the *Civil Procedure Act*, Order 42 Rule 6(2), Order 22, Rule 22, Order 51 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 Kangundo CMCC No E37 OF 2020 herein pending the hearing and determination of the appeal filed and that costs be provided for. The application is supported by a supporting affidavit of Paul Mugwe advocate of the appellant dated March 15, 2023 and a further affidavit of one Erick Onderi dated April 14, 2023. This application is opposed by the Respondent, who filed a Replying Affidavit's dated March 23, 2023 sworn by one Robert Wachira Macharia.
2. The Appellant averred that they are aggrieved by the judgment dated February 21, 2023 delivered in Kangundo CMCC No E037 of 2020, where the respondent was awarded 5,025,090/= plus costs and interest. They had filed an appeal, which they state is arguable, and which has high chances of success. Further that the said appeal is meritorious and stands a good chance of success as demonstrated in the Memorandum of Appeal filed.



3. Further the applicant stated that the respondent is 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.
4. Finally, the Applicants state that they are ready and willing to give security for the decretal sum 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. In the further affidavit, the appellant also stated that they are willing to pay the respondent a sum of Ksh 1,000,000/=, and the balance to await the outcome of the appeal, while noting that there is a statutory limit of Ksh 3,000,000/= on what the insurance could pay.
5. The Respondent did oppose this application by their Replying Affidavit dated March 23, 2023. He stated that the award was not excessive and therefore the appeal had zero chance of success. That the applicant had not demonstrated good faith by failing to release the undisputed sum as per their submission in the lower court. Further they submitted that the applicant has not satisfied the requirements set out in law to warrant grant of the orders sought and that the court had to exercise its discretionary powers judiciously by balancing the interest of both the appellant and the respondent.
6. The appellant final issue raised was that if the court was inclined to grant stay of execution, then the appellant should deposit half the decretal sum in a joint interest bearing account and pay out the other half to the respondent pending hearing and determination of this appeal.

### **NAnalysis & 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 Vs Rent Restriction Tribunal* (1982) KLR 417 and *James Wangalwa & Another Vs Agnes Nalika Chereto* (2012) eKLR)
9. In the case of *Masis Mwita vrs 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 from being heard.
  - 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 21, 2023. The appeal was filed on March 8, 2023 while this application filed on February 16, 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 Vs 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 Vs 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 persons 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 pay the respondents a sum of Ksh 1,000,000/= pending hearing of the appeal. Further they also state that the statutory limit of the insurance is Kshs 3,000,000/= 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 Vs Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008*; *Kenya Shell Ltd Vs Kibiru & another (Supreme)*; *Mukuma Vs 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 Gitabi Vs 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; I do grant stay of execution of the decree herein on condition that;
- a. The appellant do pay the Respondent’s a sum of Kenya shillings One Million Only (Ksh 1,000,000) only being part of the decretal sum of within the next 30 days from the date of this ruling.
  - b. The Appellant do deposit a further sum of Kenya shillings two million only (Ksh 2,000,000/=) in a joint interest earning account at a reputable commercial bank, which account is to be held in the joint names of both the appellant and the respondents counsel.
  - 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.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21<sup>ST</sup> DAY OF JUNE 2023.**

**RAYOLA FRANCIS OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 21<sup>st</sup> day of June 2023**

**In the presence of;**



.....For Appellant  
.....For Respondent  
.....Court Assistant

