



**Kalei & another v Mooke & another (Civil Appeal E003 of 2023)  
[2023] KEHC 19719 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19719 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E003 OF 2023**

**TM MATHEKA, J**

**JULY 3, 2023**

**BETWEEN**

**ANTHONY MUTUA KALEI ..... 1<sup>ST</sup> APPLICANT**

**ZACHARIA MWANGANGI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ANDREW KAKAYON MOOKE ..... 1<sup>ST</sup> RESPONDENT**

**KILUNGU SAFARIS SELF HELP GROUP ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application before me is dated 16/01/2023 brought under certificate of urgency under Sections 3A, 79G & 95 of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 & 3 of the *Civil Procedure Rules 2010* and all other enabling provisions of the law. It seeks the following orders;

- a) Spent.
- b) Spent .
- c) That this honorable Court be pleased to grant interim stay of execution of the judgment and/or delivered on 15/12/2022 by EM Muiru (PM) Kilungu PMCC No 23 of 2020 pending the hearing and determination of this appeal.
- d) That this honorable Court allow the applicant to furnish the Court with security in the form of a Bank Guarantee from a reputable Bank pending the hearing and determination of this appeal.
- e) That the costs of this application abide the outcome of the appeal.



2. The application is supported by the grounds on its face and the Affidavit of the 1<sup>st</sup> applicant sworn on the same day. He depones that the appeal has high chances of success and the judgment is of a substantial amount. The Memorandum of Appeal is exhibited as AK-1. That the respondent has not furnished Court with documentary evidence of his financial standing hence apprehensive that he will deal with the decretal sum in a prejudicial manner.
3. He depones that if the appeal succeeds, he may not be able to recover the same. That unless stay of execution is granted, the respondent will execute and the appeal will be rendered nugatory. Further, he depones that he is ready, willing and able to furnish the Court with a Bank Guarantee as security. A copy of Bank Guarantee is exhibited as AK-2. He depones that the application is made in good faith and will not occasion any prejudice to the respondent.
4. The application is opposed through the 1<sup>st</sup> respondent's replying affidavit sworn on March 22, 2023. He depones that the application fails to meet the threshold and requirements for the orders sought. That the respondents have not demonstrated the substantial loss which they will suffer if the orders are not granted. That if the court is persuaded to grant the same, half of the decretal sum should be released to the 1<sup>st</sup> respondent or his advocate and the remainder should be deposited in a joint interest earning account in the name of the parties' advocates
5. The application was canvassed through written submissions.

### **Applicant' Submissions**

6. The applicants submit that pertinent questions for determination in an application for stay of execution are;
  - a) Whether or not the Memorandum of Appeal raises arguable issues;
  - b) Whether the appellants/applicants have demonstrated that substantial loss will occur unless stay is granted;
  - c) Whether the defendants/applicants are ready to furnish such security as shall be sufficient to satisfy any decree that might ultimately be binding on the applicant.
7. On whether the applicant has arguable appeal they submit that the appeal is mainly on quantum as the same is excessive and not proportionate to the injuries suffered or evidence adduced before the trial court. They rely on *Kenya Revenue Authority v Sidney Keitany Changole & 3 Others* [2015] eKLR where the court stated;

“ This Court has further held that the applicant need only establish one arguable point noting that an arguable appeal is not necessarily one that will succeed but one that is not frivolous.”
8. On whether the applicant has demonstrated that he will suffer substantial loss if the application is not allowed, they submit that their affidavit specifically states that the respondent's means are unknown and it is highly unlikely that he will be capable of refunding the decretal award if the appeal succeeds



since he has not disclosed his financial standing. They rely on the case of *Edward Kamau & Anor v Hannah Mukui Gichuki & Anor* [2015] eKLR where the court (Aburili J) opined;

“I am in agreement with the applicants that in the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed.”

9. With regard to security, they submit that the insurer is ready and willing to provide a Bank Guarantee.

### **Respondent’s Submissions**

10. They have relied on Order 42 Rule 6(2) to submit that the applicants are obliged to satisfy the following conditions;

- a) That substantial loss may result to the applicant unless the order is made.
- b) That the application has been made without unreasonable delay, and;
- c) That such security as the court orders for the due performance of such decree.

11. With regard substantial loss, they submit that it is a relative term and more often than not, it is assessed by the totality of the consequences which an applicant is likely to suffer if stay is not granted. They rely on the case of *James Wangalwa & Anor v Agnes Naliaka Cheseto* [2012] eKLR where the Court observed;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss.... because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...”

12. They submit that the burden of proving inability to refund the decretal sum rests on the applicants. They rely on *Caneland Ltd & Others v Delphis Bank Ltd*; Civil Application No Nai 344 of 1999 for the submission that even if it were shown that a man is of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person’s right to enjoy the fruits of his success.

13. As to whether the application was filed without unreasonable delay, they submit that the same was filed 32 days after the trial court’s judgment. That statutory timelines are certainly important to ensure the due and efficient administration of justice.

14. As for security, they have relied *inter alia* on *Nobel Trading Co Ltd & 2 Others v Peter Odhiambo Marega* [2022] eKLR where the court stated;

“On the third condition of security, the applicant has offered a bank guarantee. There is an agreement exhibited between Diamond Trust Bank and the directors of Directline Assurance Company Ltd, who are the insurers of the applicants. The same is for a sum of Kshs 30 million. It is for a period of 12 months and it is expiring on November 30, 2021. This court takes note of the fact that the applicant is not a party to the said agreement and that there is no evidence that the said guarantee is for the benefit of this matter specifically.



Moreover, there is no evidence that as at the time of this ruling, the same had been renewed. In the premises, I find that the said bank guarantee is not viable for this matter and it could be available where it specifically stated how each party is to benefit instead. In essence, it is a general bank guarantee.”

15. They submit that the bank guarantee offered in this matter expired on February 18, 2023, that the applicants are not parties to the agreement and that there is no evidence that the guarantee is for this specific matter. Consequently, they contend that it is not viable.
16. Having looked at the application, the supporting affidavit, the replying affidavit and the rival submissions, the only issue for determination is whether the application is merited;

### **Whether stay of execution should be granted**

17. Order 42 Rule 6 of the *Civil Procedure Rules*, lays down the conditions to guide the Court when called upon to determine whether or not to grant stay pending appeal are; the applicant must demonstrate that substantial loss will occur if stay is not granted, that the application has been filed without unreasonable delay and that he is ready to furnish security for the due performance of the decree.
18. Herein Judgment by the trial court was delivered on December 15, 2022 and this application was filed on January 16, 2023. There was a delay which is not inordinate considering that there were Christmas and New Year festivities in between.
19. On substantial loss, the appellants are apprehensive that if the decretal amount is released to the respondent, they might not recover the same if the appeal succeeds. I have looked at the Memorandum of Appeal which is purely on quantum. The trial Magistrate awarded the respondent Kshs 400,000/= as general damages and Kshs 4,050/= as special damages. The respondent did not make any deposition on his financial position and did not file any affidavit of means. There is no evidence on his capacity to refund the decretal sum in the event the appeal succeeds.
20. On security, the exhibited Guarantee form from Family Bank is dated February 18, 2022 and its duration is indicated to be “12 months with an option to renew” ...the limit is 50 million and its purpose is indicated as “...for providing security for awards and or costs awarded in various Court cases/ claims pending before Court”. On its face it has expired and no evidence of renewal was provided.
21. In the interests of justice court, is duty bound to balance the competing interests of the parties; the appellant’s right of appeal and the right of the respondent to enjoy the fruits of his judgment.
22. In view of the foregoing it is only fair that some of the decretal sum be paid out to the respondent pending the appeal.

### **Determination**

23. The following orders issue:
  - i. An interim stay of execution of the judgment and/or delivered on December 15, 2022 by EM Muiro (PM) Kilungu PMCC No 23 of 2020 be and is hereby granted pending the hearing and determination of this appeal.
  - ii. Within 30 days hereof the sum of 150 000 out of the decretal award be paid to the 1<sup>st</sup> respondent and the balance of 250, 000 be deposited in a joint interest earning account in the names of both Advocates on record.
  - iii. The appellant to file and serve the Record of Appeal within 60 days hereof.



- iv. In default of order (ii) or (iii) above the stay order to lapse automatically.
- v. Costs to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED THIS 3RD JULY 2023**

.....

**MUMBUA T MATHEKA**

**JUDGE**

Court Assistant: Ochieng

**\*\*Applicants' Advocates: Mr. Ouko**

**Kimondo Gachoka & Co.\*\***

B.M Mung'ata & Co.

