



**Luka & another v Riungu (Civil Appeal E073 of 2023)  
[2023] KEHC 19960 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19960 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E073 OF 2023  
EM MURIITHI, J  
JULY 13, 2023**

**BETWEEN**

**ALBERT GITARI LUKA ..... 1<sup>ST</sup> APPELLANT**

**AL GINZA AUTOMOBILES LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ASHFORD GERRARD RIUNGU ..... RESPONDENT**

**RULING**

1. By a Notice of Motion under certificate of urgency dated May 18, 2023 brought under Section 3, 3A and 63 (e) of the [Civil Procedure Act](#), Orders 42 Rule 6 and 51 Rules 1, 3 and 4 of the [Civil Procedure Rules](#), and all the enabling provisions of the law, the applicants seek that:
  1. Spent
  2. Spent
  3. There be a stay of execution of the judgment of the trial court delivered on April 28, 2023 pending the hearing and determination of the appellants appeal in Meru High Court Civil Appeal No E073 OF 2023.
  4. Any other relief that this honorable court deems fit to grant.
  5. Costs be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Albert Gitari Luka, the 1<sup>st</sup> applicant herein, sworn on even date. Dissatisfied with the findings of the trial court that the suit motor vehicle belongs to the respondent, he instructed his advocate to file an appeal. He is apprehensive that the respondent may proceed to execute anytime, and therefore it is only fair that the orders sought are granted, because his appeal is meritorious and



has very high chances of success. The said appeal has been made in good faith and timeously within the prescribed time.

3. The 1<sup>st</sup> appellant swore a further replying affidavit on June 8, 2023 expressing his willingness to offer security for the due performance of the decree.
4. The respondent has opposed the application vide his replying affidavit sworn on May 29, 2023. He avers that his claim arose out of a trade in of several motor vehicles culminating into the exchange of Motor Vehicle Registration No KCH 121 X with KCL 689B, which vehicle has been in his possession since June 27, 2017. The said motor vehicle is registered in the name of the 2<sup>nd</sup> appellant and not the 1<sup>st</sup> appellant. Sometimes on April 14, 2021, the 1<sup>st</sup> appellant wrote to the 2<sup>nd</sup> appellant, directing it to transfer the said motor vehicle into his name. Since no demand has been made by the 2<sup>nd</sup> appellant for the payment of any balance of the purchase price, if any, for the said vehicle, the 1<sup>st</sup> appellant has not demonstrated if there is any balance of purchase price for the said vehicle that is payable to the 2<sup>nd</sup> appellant or the loss he stands to suffer if an order of stay is not issued. He verily believes that the 1<sup>st</sup> appellant has not met the set conditions for grant of stay and he urges the court to dismiss the application with costs.

### Submissions

5. The 1<sup>st</sup> appellant urges that he stands to suffer irreparable loss if the orders of stay are not issued, since the trial court's judgment is conclusive in nature and the appeal, which is arguable with high chances of success, ought to be heard on merits, and cites *Wachira Kareni v Bildad Wachira* (2016) eKLR, *Butt v Rent Restriction Tribunal* (1979) eKLR and *Gianfrance Manenthi & Another v Africa Merchant Assurance Company Ltd* (2019) eKLR. He urges that the 2<sup>nd</sup> appellant is rightfully a party and an appellant in this suit, since it was a party in the trial court, and cites *DT Dobie & Company Kenya Ltd v Joseph Mbaria Muchina* (1980) eKLR, *Belinda Mura v Amos Wainaina* (1979) eKLR and *Republic v Speaker City County Assembly & Another ex parte* (2017) eKLR. He prays that the application is allowed for the interest of justice and fair play because justice should not only be done but seen to have been done.
6. The respondent faults the 1<sup>st</sup> appellant for failing to demonstrate by way of evidence how he stands to suffer substantial loss if stay is not granted, and cites *Jessikay Enterprises Ltd v George Kahoto Mwiruri* (2021) eKLR. He urges that execution is a legal process, and prays for the dismissal of the application with costs.

### Determination

7. 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. No order 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.”
8. This court respectfully agrees with the Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 that the power to grant stay is discretionary and such discretion should be exercised in such a way as not to prevent an appeal.
9. This court notes that the application was filed timeously on May 18, 2023 while the decision sought to be appealed against was made on April 28, 2023.
10. Whereas the 1<sup>st</sup> appellant contends that he will suffer irreparable loss if stay is denied, the respondent faults the 1<sup>st</sup> appellant for failing to demonstrate what substantial loss he will suffer if stay is denied.
11. The court notes from the grounds of appeal as raised in the applicant’s memorandum of appeal, that the appeal is indeed arguable, which is not one which must necessarily succeed and neither is it for the court to go into the merits of the intended appeal.
12. The court notes that the decree herein is not a money decree but nonetheless appreciates the 1<sup>st</sup> appellant’s readiness to furnish security for its due performance. The appellant shall deposit into court within 14 days the sum equivalent to half the value, according to the appellant himself (see paragraph 5 of the Further Affidavit of the 1<sup>st</sup> appellant sworn on June 7, 2023), of the motor vehicle subject of the application at ksh 2,100,000/- as security for the due performance of the decree.

#### **Orders**

13. Accordingly, for the reasons set out above, the court allows the applicant’s application dated May 18, 2023 in the following terms:
  1. An order for stay of execution of the Judgment and Decree in Meru CMCC No E424 of 2021 is issued pending the hearing and determination of this appeal.
  2. The 1<sup>st</sup> Appellant/Applicant shall deposit into court the sum of Ksh 2,100,000/- into court within fourteen (14) days of this Order.
  3. In default of the deposit of the security in Order no 2 above the stay of execution shall lapse and be of no effect.
  4. The Record of Appeal to be filed within 60 days from the date hereof.
  5. The costs of the application shall abide the outcome of the Appeal.
14. Order accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES**



Ms. David Advocate for the Appellant/Applicant.

Mr. Mwirigi K. Advocate for Respondent.

