



**Mutua v Senge'ete (Civil Appeal E007 of 2023)
[2023] KEHC 20149 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E007 OF 2023
TM MATHEKA, J
JULY 10, 2023**

BETWEEN

JOANNES MUTUA APPELLANT

AND

CHARLES NZUKI SENGE'ETE RESPONDENT

RULING

1. The application for determination is dated 23/01/2023. It was filed under certificate of urgency and is brought under Sections 3A, 1A & 1B of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rules 1 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 there be interim orders of stay of execution of the judgment delivered on 16/12/2022 and the resultant decree and consequential orders therefrom pending the hearing and determination of this application.
 - d. That there be stay of execution pending the hearing and determination of the appeal.
 - e. That the costs of this application be in the cause.
2. The application is supported by the grounds on its face and the applicant's Affidavit sworn on the same day. He deposes that there is an imminent danger of execution which will occasion him irreparable loss and render the appeal nugatory. That the application has been presented without unreasonable delay. A copy of the judgment is exhibited as JM-1.



3. The application is opposed through the respondent's replying affidavit and supplementary affidavit sworn on 09/02/2023 and 17/04/2023 respectively. He deposes that the applicant did not call any witness at the trial court hence the issue of liability cannot be considered at this point. That from the history of the matter, the applicant is acting in bad faith and the award is not excessive in any way. That the applicant has not met the threshold for grant of stay and there are no legal issues for discussion in the appeal.
4. He deposes that the law mandates the insurer to settle a maximum of Kshs 3 million and the applicant has not demonstrated how he will settle the remainder of Kshs 2, 280, 900/ = plus costs and interest in order to safeguard the parties from engaging in an academic exercise. That the applicant has not demonstrated the loss he will suffer if he honors the judgment.
5. Further, he deposes that the accident occurred on 25/06/2015 and he sustained injuries amounting to amputation of his left leg. That he has been hospitalized for a while and has a medical recommendation for artificial leg that costs about Kshs 400,000/=.
6. The application was canvassed through written submissions.

The Applicant's Submissions

7. With regard to substantial loss, he submits that the respondent's means of income are unknown and that during the trial, he acknowledged that he is needy hence there is no guarantee that he will be in a position to refund the judgment sum plus costs and interest. Further, he submits that the respondent has not contradicted this position or supplied any evidence of his wealth. He relies inter alia on the case of *Stanley Karanja Wainaina & Anor -vs- Ridon Anyangu Mutubwa* (2016) eKLR where the court stated ;

“Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

8. He submits that the application was filed within the statutory period for filing appeals and has undertaken to comply with conditions which will be imposed by the court with regard to provision of security.

The Respondent's Submissions

9. The respondent submits that the mere fact that execution is commenced or likely to be commence does not amount to substantial loss because it is a lawful process to realize the judgment of a competent court.
10. He submits that the applicant has not proposed any form of security for due performance of the intended appeal and has urged this court to compel him to provide adequate security. He submits that he is in need of an artificial leg hence half of the amount should be released to him and the other half be deposited in a joint interest earning account. Further, he submits that the applicant's ability to furnish security should not give him an unfair advantage as *the Constitution* provides for equality of all persons before the law. He relies on the case of *Butt -vs- Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal gave directions as follows;
 - a. The power of the court to grant or refuse an application for stay is a discretionary power. The discretion should be exercised in such a way not to prevent an appeal.



- 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 be rendered nugatory should that appeal court reverse the judge's discretion.
 - c. A judge should not refuse a 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 its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the applicant had an undoubted right of appeal.
 - e. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.
11. 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

12. 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.
13. Herein Judgment by the trial court was delivered on 16/12/2022 and this application was filed on 23/01/2023. There was a delay which is not inordinate considering that there were Christmas and New Year festivities in between.
14. 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. From the exhibited judgment, the trial court found the applicant to be 100% liable and awarded the respondent general damages at Kshs 2,500,000/= loss of earning capacity at Kshs 2,430,900/= and future medical expenses at Ksh 350,000/=. The total award is Kshs 5,280,900/=. The award is quite substantial, 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. However, I have noted that the respondent is not so much opposed to grant of the orders as long as adequate security is provided.
15. As for security the applicant has undertaken to comply with the orders which the court will issue.
16. In the interests of justice court, the 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.
17. 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

18. The following orders issue:

- i. An interim stay of execution of the judgment and/or delivered on 15/12/2022 by E.M Muiru (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 1st 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 appellants 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 10TH JULY 2023

.....

MUMBUA T MATHEKA

JUDGE

Applicant's AdvocateS

J. Maluki & Co. Advocates

Respondent's Advocates

Wasolo & Co. Advocates

