



REPUBLIC OF KENYA



KENYA LAW
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**Makau v Musyoka & another (Civil Appeal E029 of 2023)
[2023] KEHC 22586 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E029 OF 2023
TM MATHEKA, J
SEPTEMBER 25, 2023**

BETWEEN

MUSILA MAKAU APPELLANT

AND

GRACE NDUNGE MUSYOKA 1ST RESPONDENT

ALPHA JIRA LTD 2ND RESPONDENT

RULING

1. Before me is the Notice of Motion dated 22/4/2023 brought under order 42 rule 6 among other provisions of the Civil Procedure Code and *Civil Procedure Act* seeking inter alia - an order for stay of execution of the judgement /decree in Tawa PMCC 19/2022 pending the hearing and determination of the appeal herein.
2. The application is supported by the affidavit of Musila Makau sworn on 22/4/2023 and opposed vide the replying affidavit of Grace Ndunge Musyoka.
3. Parties filed written submissions which I have considered.
4. From the pleadings the 1st respondent had filed suit seeking general damages for pain and suffering, loss amenities and future medical expenses, special damages of Kshs. 11,450 plus costs of the suit and interest.
5. By a judgment dated 30/3/2023, the learned trial court awarded the plaintiff liability against the defendant at 100% ,general damage of Kshs. 450,000 and special damage of Kshs. 11,450.
6. Aggrieved by the decision, the appellant filed Memorandum of appeal on 25/4/2022 dated 22/9/2023 against the award on quantum and not the award on liability.



7. The only issue for determination is whether the applicant has complied with the provisions of order 42 rule 6 which states;

Stay in case of appeal

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 subrule (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; and
- (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. The applicant's position is that he has complied with the requirements of order 42 rule 6 and that he is ready to provide a bank guarantee as security.
9. The respondent position is that she has the right to enjoy the fruits of her judgment and is opposed to a bank guarantee - she is willing to have the decretal sum deposited in a joint interest earning in the names of both advocates.
10. In for submissions the 1st respondent also suggest that $\frac{3}{4}$ of the decretal sum be deposited in court.
11. It is evident that there is no great opposition to the application for as long as the decretal sum is secured.
12. The bank guarantee offered by the applicant is insufficient as the document filed is incomplete and is not specific to this appeal.
13. In the circumstances I allow the application for stay of execution of the Judgment on the following conditions.
- a. That the entire decretal sum is deposited in a joint interest earning account in the names of both advocates within 30 days hereof.
- b. That the appeal be filed and served within 30 days hereof
- c. In default of (a) the application will stand dismissed and the respondent will be at liberty to execute.
- d. The respondent to have costs of this application

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF SEPT 2023

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MUMBUA T. MATHEKA

JUDGE

CA Nelima

Odero for Mutua Makau for the Respondent

N/A for the Applicant

Kimondo Gachoka & Company Advocates

Respondents' Counsel

J.A Makau & Co. Advocates

