



REPUBLIC OF KENYA



KENYA LAW
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**Mutua v Wambua (Civil Appeal E022 of 2023)
[2023] KEHC 22592 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22592 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E022 OF 2023
TM MATHEKA, J
SEPTEMBER 25, 2023**

BETWEEN

NICHOLAS KYALO MUTUA APPELLANT

AND

JULIUS MASAKU WAMBUA RESPONDENT

RULING

1. What is before me is the Notice of Motion dated 17/3/2023 brought substantively under Order 42 rule 4, 6, 7 of the Civil Procedure Rule - seeking orders *inter alia* - that there be stay of execution of the judgment of Hon JA Otieno RM in Makueni CMCC E064 of 2023.
2. The brief facts behind the application are that on 6/11/2021 there was a road traffic accident involving the respondent and the appellant's motor vehicle. Vide its Judgment dated February 20, 2023 the learned trial magistrate found in favour of the respondent against the appellant found the appellant 100% liable, awarded General Damage + Special Damage of Kshs 1,581,030 plus costs and interest.
3. The appellant aggrieved lodged this appeal against both liability and quantum and through this motion is seeking stay of execution of the said judgment pending the hearing and determination of the appeal.
4. The application is opposed through the replying affidavit of David Mirara advocate on record for the respondent on grounds mainly that the application is premature as there is no decree extracted and that the appeal is not merited as the trial court properly directed itself as to the merits of the case.
5. Parties chose to proceed by way of written submissions which were filed through their respective counsel.
6. I have carefully considered the application., rival submissions and the only issue is whether the order of stay of execution is warranted.



7. Order 42 rule 6(1) & (2) of the [Civil Procedure Rule](#) gives the parameters for the issuance of such an order. It provides

"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.
 - (3) Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."

Analysis

8. On timeliness the application was filed in good time and there was no delay.
9. On security the appellant's counsel has filed a copy of a bank guarantee which he submits provides sufficient security as for the performance of the decree should stay of execution be granted. However this is not specific to this case - and in any event that the document incomplete is itself incomplete. Going by [Michael Ntouthi Mitheu V Abraham Kivondo Musau](#) (2021) eKLR I am persuaded that the bank guarantee is not sufficient security
10. However from the submissions it is evident that the respondent is not averse to the order of stay of execution being granted for as long as the court balances the appellants right of appeal with the respondent's right to enjoy the fruits of his judgment. He has cited [Samvir Trustee Limited v Guardian Bank Ltd](#) Nrb Milimani HCCC 795/1997; [Kenya Shell Ltd v Kibiru](#) [1986] KLR 410.
11. The appellant is ready to give security of the bank guarantee but the same as I have said - is insufficient - and this court is not bound by their offer.
12. In the circumstances, balancing the interests of the appellant to his right of appeal, and the respondent to the right to enjoy the fruits of his judgment, I allow the application for stay of execution of the judgment pending the hearing and determination of the appeal on the following conditions;



- a. That the appellant/applicant will pay ½ the decretal sum to the respondent within 45 days hereof.
- b. That the other ½ together with costs and accruing interest shall be deposited in a joint interest earning account in the names of the counsel for both parties.
- c. The appellant will file the appeal within 45 days hereof
- d. In default of either a or b or both the application shall be deemed to have been dismissed with costs and the respondent shall be at liberty to execute.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 25TH SEPTEMBER 2023

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MUMBUA T. MATHEKA

JUDGE

CA Nelima

Macharia for respondent

N/A for Applicant

Kimondo Gachoka & Company Advocates

Respondent's Counsel

Mirara and Associate Advocates LLP

