



Gikunda & 2 others v Muguna (Suing as legal representative of Jesse Muriuki Mwiti (Deceased) (Civil Appeal E091 of 2023) [2023] KEHC 23325 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E091 OF 2023
TW CHERERE, J
OCTOBER 5, 2023**

BETWEEN

**KENNEDY BUNDI GIKUNDA 1ST APPELLANT
COUNTY GOVERNMENT OF MERU 2ND APPELLANT
MERU COUNTY GOVERNMENT 3RD APPELLANT**

AND

**SHADRACK MWITI MUGUNA (SUIING AS LEGAL REPRESENTATIVE OF
JESSE MURIUKI MWITI (DECEASED) RESPONDENT**

RULING

1. On 22nd May, 2023, the trial court entered judgment in Meru CMCC No. E006 of 2022 in favour of the Respondent as against the Applicants for KES. 2,558,036/- plus costs and interest.
2. By notice of motion dated and filed on 22nd June, 2023, Applicants seek orders stay of execution of judgment in Meru CMCC No. E006 of 2022 pending the hearing and determination of the appeal. The notice of motion is premised on grounds on its face and on the affidavit sworn by Sara Weru, a legal officer with MUA Insurance Kenya Ltd in which she avers that the Respondents are aggrieved by the judgment and have filed an appeal which has high chances of success.
3. Respondent was by an order dated 2th July, 2023 granted leave to file his response to the application but by the time of writing this ruling, the responxse had not been filed.

Analysis and Determination

4. I have considered the application in light of the supporting affidavit and the issue for determination is whether a case has been made for an order of stay of execution pending appeal.



5. Order 42 (6) of the *Civil Procedure Rules* provides that no order for stay of execution shall be made unless application has been made without unreasonable delay; substantial loss is demonstrated and security for the due performance of such decree or order is offered. (See *Endmor Steel Millers Ltd vs James Wakhulunya Makuto* [2016] eKLR).
6. The impugned judgment was delivered on 22nd May, 2023 and this application was filed timeously on 22nd June, 2023 exactly one month after the judgment was delivered.
7. I have considered the provisions of Order 42 (6) of the *Civil Procedure Rules* vis a vis whether Applicant has demonstrated that it is likely to suffer substantial loss if stay of execution is not granted. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. (See *Standard Assurance Co. Ltd V Alfred Mumea Komu* [2008] eKLR).
8. A party seeking an order of stay pending appeal bears a specific burden regarding proof of substantial loss. In this case, It has been averred on behalf of Applicants that Respondent is not in a position to refund the decretal sum in the event that the pending appeal was to succeed. Respondent having not filed a response has not discharged the evidential burden placed on him to demonstrate that he is in a position to refund the decretal sum in the event that the pending appeal succeeds. Consequently, I find that Applicants have demonstrate substantial loss.
9. The Respondent was awarded general damages in the sum of KES. 2,558,036/- plus costs and interest. Security is a legal requirement under 42 (6) (2) (c) of the *Civil Procedure Rules* and it has been averred on behalf of Applicants that they are ready and willing to comply with the order on security.
10. Whereas it is not my duty at this stage to determine if the Applicants have an arguable appeal, Appellants have met two conditions for grant of an order for stay of execution pending appeal.
11. In the end, notice of motion dated and filed on 22nd June, 2023 is allowed in the following terms:
 1. There shall Meru CMCC No. E006 of 2022 pending the hearing and determination of the appeal on condition that the Applicants shall deposit KES. 1,000,000/- (one million shillings) with the court within 30 days from today's date
 2. Appellants are directed to file and serve the record of appeal within 30 days from today's date
 3. Costs shall abide the outcome of the intended appeal
 4. Mention on 23rd November, 2023 to confirm compliance with these orders and for further directions

DATED IN MERU THIS 05TH DAY OF OCTOBER 2023

T.W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Applicant - Ms. Oteko for Kiruki & Kayika Advocates

For Respondent - Mr. Nyaga for Kiautha Arithi & Co. Advocates

