



Kitenye & another (Suing as the administrators and /personal representatives of the Estate of Gideon Muthama (Deceased)) v Two Way Communication Limited & another (Civil Appeal E042 of 2023) [2023] KEHC 23512 (KLR) (9 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23512 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E042 OF 2023
TM MATHEKA, J
OCTOBER 9, 2023**

BETWEEN

EUNICE MUMO KITENYE 1ST APPELLANT

SHADRACK MBUTA 2ND APPELLANT

**SUING AS THE ADMINISTRATORS AND /PERSONAL REPRESENTATIVES
OF THE ESTATE OF GIDEON MUTHAMA (DECEASED)**

AND

TWO WAY COMMUNICATION LIMITED 1ST RESPONDENT

THOMAS MUTISYA WAEMA 2ND RESPONDENT

RULING

1. The application before me is the Notice of Motion dated 26th June 2023 brought under sections 1A, 1B, and 3A of the [Civil Procedure Act](#) and Order 40 rule 1, Oder 42 rule 6(6), Order 51 rule 1 of the [Civil Procedure Rules](#), 2010.
2. It seeks an order for temporary injunction restraining the respondents from executing the party and party costs pending the hearing and determination of the appeal, and costs of the application.
3. The grounds for the application are set out on the face of the application and the supporting affidavit of Faith Mutio Mutuku: that the appeal arises out Kilungu CMCC 82 of 2022. The cause of action was an accident involving a motorcycle registration no. KMFE 392V and m/v registration no. KBV 406Y. That the deceased the subject of the claim was a pillion passenger on the m/cycle. That upon hearing the case, the trial magistrate by a Judgment dated 27th April 2023 dismissed the suit with costs to the defendants. The defendants filed party and party costs. The court assessed the costs and awarded the defendants the sum of Ksh 152, 100.



4. In the Memorandum of appeal, the appellant raises issue with the dismissal of the suit with costs despite the court finding that there was indeed an accident between the two m/vehicles.
5. The application is opposed vide the Replying Affidavit of Eric Kirimi Muriuki: That it is fatally defective, for want of form and law, incompetent and an abuse of the court process, and is devoid of merit.
6. That the affidavit in support of the application instead of addressing the application argues the appeal.
7. That the applicant has not established any of the conditions for grant of stay orders pending an appeal and in any event the respondent is entitled to the costs.
8. That the respondents are agreeable to the applicant depositing Ksh 152,100 as a condition for stay pending the hearing and determination of the appeal and also as security for costs, otherwise the application be dismissed for being an abuse of the court process.
9. The application was argued orally.
10. Ms Mutuku for the applicant cited Order 42 rule 6 on the conditions for stay pending appeal and argued that it gives the court the power to grant temporary injunction and relied on *Giella vs Cassman Brown*, that they have a *prima facie* case, they will suffer irreparable damage and the balance of convenience tilts in their favour. That the appeal is arguable as the deceased was neither the rider of the m/cycle nor the driver of the m/vehicle both of which were involved in the RTA. That on irreparable damage the applicants have already lost a child and execution of the costs may lead to their being put in civil jail affecting their right to own property/ right to liberty- leading to trauma and anguish, and on balance of convenience that the respondents will not suffer any prejudice. She relied on *Flesbia Wanja Cheru v Jamleck Kamau Mwaniki* [2021] eKLR. She also argues that the application for temporary injunction has not been opposed- as they have indicated that they have no problem with the application being allowed subject to costs. Ms Mutuku urged the court not to make the order for deposit of the costs.
11. Mr. Muriuki urged the court to look at his detailed response in opposition of the application. That the applicants have not set out any condition for stay or injunction, argued or satisfied. That counsel has argued the appeal instead of the application. That the applicant came under order 40 but now argues order 42 rule 6. That no security for costs has been offered. That the balance of convenience lies in the favour of the respondents who have a judgment in their favour.
12. I have carefully considered the submissions by counsel and the judgment of the lower court, and the issue is simply whether the application for stay is merited, and whether the applicants ought to be ordered to deposit security for costs.
13. On the 1st issue, the applicant has argued for the temporary injunction to support the stay of execution pending the appeal. That is a strange way of going about it because the issue before me is that the applicants would like to appeal the judgment of the lower court. For that Order 42, rule 6 provides
 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.

14. Order 40 provides for cases in which temporary injunction may be granted

Order 40, rule 1 Where in any suit it is proved by affidavit or otherwise— (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders

15. Counsel for the applicant has argued that the applicants risk losing their property if the respondent execute for their costs. I must agree with counsel for the respondents that Order 40 has no role in the application for stay pending appeal. Does that make the application fatally defective? I would say no, as the proper provision of the [Civil Procedure Rules](#) is cited.
16. Has applicant established that requirements of order 42 rule 6?
17. Counsel only argued the part about the substantial loss, and arguable appeal. There was nothing about the delay in filing the application and the security for the performance for the decree.
18. When the application was filed the party and party costs had not been assessed and it was in apprehension that upon the assessment the respondents would proceed to execute for the same. This is supported by the record as presented by the parties. The Judgment was delivered on 27th April 2023 and the application was filed on 27th June 2023, when the party and party bill of costs had not been filed. The replying affidavit was sworn on 21st July 2023 showing that the party and party costs had been assessed on 18th July 2023. The application was argued on 31st August 2023.
19. The respondent's arguments that the application was not merited at the time it was filed, with respect to the stay of execution of the party and party costs is correct. There was nothing from the lower court to show that there was anything that could be executed to the detriment of the applicant's appeal. In fact, that applicant was asking the court to speculate that the lower court was going to grant orders that would render their appeal nugatory. Up to the time the respondent filed their replying affidavit there was nothing. And the application for stay was not merited.
20. However, the respondents introduced the ruling in which the court had already assessed the costs giving flesh to the applicant's previous unfounded fear. The respondents have however made it easy for the court as counsel has deponed that they are not averse to the deposit of the costs in court as security for the performance of the decree.
21. The argument by the counsel for the applicants that they ought not to deposition the security is not tenable because the respondents should not be denied the fruits of their judgment



22. In the circumstances I am persuaded that the applicant's right to appeal ought to be given its place but the same be balanced with the interests of the successful respondents.
- a. The application for stay pending appeal is allowed on condition that the applicant deposits in court the entire sum of the costs of Ksh 152,100 within 30 days hereof. In default the application will stand dismissed with costs to the respondents and the respondents will be at liberty to execute.
 - b. The applicant to file and serve the record of appeal within 30 days here of.
Orders accordingly

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 9TH DAY OF OCTOBER 2023.

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MUMBUA T MATHEKA

JUDGE

CA Mwiwa

For the applicant

Mutuku Wambua & Associates

For the Respondent

M.W Muli & Co Advocates

