



REPUBLIC OF KENYA



KENYA LAW
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**Musyoka v Obuya (Civil Appeal E126 of 2023)
[2023] KEHC 23753 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23753 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E126 OF 2023**

FR OLEL, J

OCTOBER 19, 2023

BETWEEN

DAVID MUSYOKA APPELLANT

AND

CHRISTINE ADHIAMBO OBUYA RESPONDENT

RULING

A. Introduction

1. The application before this court for determination is the Notice of Motion application dated 7th July 2023 brought pursuant to provisions of Section 1A, 3A 79G & 95 of the *Civil Procedure Act*, Order 22 rule 22, Order 42 Rule 6(2), Order 50 Rule 6 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is that there be a stay of execution of the judgment/ decree delivered on 11th May 2023 in Mavoko CMCC No 181 of 2018 pending the hearing and determination of this appeal and that costs be provided for. The application is supported by a supporting affidavit of the applicant David Musyoka dated 7th July 2023. This application is opposed by The Respondent Christine Adhiambo Obuya who filed her Replying Affidavit dated 4th August 2023 in opposition to the said application.
2. The Appellant averred that he is aggrieved by the judgment and decree dated 11th May 2023 delivered in Mavoko CMCC No 181 of 2018 and had subsequently filed an appeal against the said judgment. He stated that he has an arguable appeal which has high chances of success and was meritorious as demonstrated in the grounds on the Memorandum of Appeal as filed. Further if stay is not granted, the respondent is likely to attach his property and thus he would suffer substantial loss and render this appeal nugatory.



3. Finally, the Applicants state that they are ready and willing to give security in the form of a Bank Guarantee. They also confirm that this appeal has been filed without undue delay and similarly this application too has been brought without undue delay.
4. The Respondent did oppose this application through her Replying Affidavit dated 6th December 2021. She states that the Appellants' appeal is a tactic to delay and frustrate the payment of the decretal sum which is proper and due to her. On the issue of security the respondent stated that, the appellant should deposit the entire decretal sum in a joint interest earning account held in the names of the two counsel for the parties herein.

B. Analysis & Determination

5. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit. The only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
6. Stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant
(see *Butt v Rent Restriction Tribunal* (1982) KLR 417 and *James Wangalwa & Another v Agnes Nalika Chereto* (2012) eKLR).
7. The Judgement/decree appealed against was delivered on 11th May 2023. The Appeal herein was filed on 7th June, 2023. It has obviously been filed on time. On the likelihood of suffering substantial loss, it is evident that the decretal sum together with costs is a tidy sum of money. The Appellant raises reasonable grounds that the Respondent's will not be able to refund the said sum without hardship if paid out to them. I note that the Respondent has not filed an affidavit of means, which the court can use as a basis of assessing if she can repay the decretal sum (if paid out).
8. In the case of *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another* (2010) eKLR the court states as follows;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”
9. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* (2006) eKLR the Court of Appeal held thus;

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”
10. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person's of means, I find that the Appellant has satisfied this court that he will suffer substantial



loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.

11. On the security, the Appellants have indicated that they are ready and willing to provide a bank guarantee. The Respondent on the other hand states that the same should be deposited in a joint interest earning account pending hearing and determination of the suit.
12. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of her judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of her judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & Another* (Supreme); *Mukuma v Abuoga* (1988) KLR 645.
13. The law is that where the Appellant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the Respondent who has a decree in her favour should not, if the appellant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.
14. This issue of adequacy of security was dealt with in the Court of Appeal in *Ndubiu Gitabi v Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100 where the Court of Appeal expressed itself as follows;

“The process of giving security is one which arises constantly so long as the opposite party can be adequately protected. It is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even handedly without prejudicing the issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even-handed manner, that there would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant so as to tempt him into settling the appeal nor will any party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”

C. Disposition

15. Taking all relevant factors into consideration. It would be just and proper to allow the appellant ventilated all issues raised in their appeal and have it determined on merit. I have perused the memorandum of Appeal and note that the decree is challenged mainly on quantum awarded. I do therefore grant stay of execution of the decree herein on condition that;
 - a. The Appellant/Applicant do pay half of the decretal being Ksh.351,550/=to the respondent within the next 45 days from the date hereof.



- b. The Appellant/Applicant to provide a bank guarantee for the balance of the decretal amount (Kshs 351,550/=). The said Bank guarantee is to be provided within the next 45 days from the date of this ruling, and it will be a Bank guarantee specific to this appeal and be valid for the entire appeal period.
- c. In default to comply with order (a) and (b) above, this application dated 7th July 2023 will be deemed dismissed and the Respondent will be at liberty to execute.
- d. The costs of this Application are awarded to the Respondent.

16. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 19th day of October, 2023.

