



**Mutuku v Juma (Civil Appeal E137 of 2023)
[2023] KEHC 23756 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23756 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E137 OF 2023**

FR OLEL, J

OCTOBER 16, 2023

BETWEEN

KISAVI MUTUKU APPELLANT

AND

ABDULKADIR HASSAN JUMA RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 9th June 2023 brought pursuant to provisions of section 1A, 3A & 79G of the [Civil Procedure Act](#), order 42 rule 6(2) 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 prayer 3, which seeks stay of execution of the decree issued in Kangundo CMCC No 148 of 2020. The application is supported by a supporting affidavit of Kisavi Mutuku dated 9th June 2023.
2. This application is opposed by the Respondents who filed a Grounds of opposition dated 2nd August 2023. The facts in this application are not in contention as there is a valid decree made in favour of the respondent and which remains unsettled. The applicant had sought stay of execution before the trial court and vide a ruling dated 10th May 2023 the same was dismissed.

Analysis & Determination

3. I have carefully considered the Application, Supporting Affidavit, the Respondent's Grounds of opposition and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
4. 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 Vs Rent Restriction Tribunal* (1982) KLR 417 and *James Wangalwa & Another Vs Agnes Nalika Chereto* (2012) eKLR)

5. In the case of *Masis Mwita vrs Damris Wanjiku Njeri* (2016) eKLR provided the guiding principles which the court should consider while determining an application of this nature. These were;
 - a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not to be rendered nugatory should that appeal court reverse the judge's discretion.
 - c. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 - d. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements.
6. The ruling as against which this appeal has been filed was delivered on 10th May 2023 and this appeal was lodged before this court on 15th June 2023, (when the filing fee was paid). It is obvious that this appeal has been file out of time and without leave of court contrary to provisions of section 79G of the *Civil Procedure Act*. There is no proper appeal before this court the basis upon which proceedings of stay of execution maybe considered
7. The application as filed therefore has no basis and the same is dismissed with costs to the Respondent.
8. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 16TH DAY OF OCTOBER, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

