



Mbalutwah v Ikuthi (Legal Representative of the Estate of Josephine Ndumi Charles - Deceased) (Civil Appeal 51 of 2022) [2023] KEHC 24205 (KLR) (9 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL 51 OF 2022
GMA DULU, J
OCTOBER 9, 2023**

BETWEEN

RICHARD KISAU MBALUTWAH APPLICANT

AND

CHARLES WAMBUA IKUTHI (LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPHINE NDUMI CHARLES - DECEASED) RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated 21st September 2022 filed by the appellant/applicant through counsel Kimondo Gachoka & Company Advocates.
2. The application was filed under Order 21 Rule 1B, Order 22 Rule 22, Order 40 Rule 6, Order 50 Rule 1 of the *Civil Procedure* Rules and Section 1A, 1B & 3A of the *Civil Procedure Act* (Cap.21) as well as Article 159(2) (a) and (d) of the *Constitution* of Kenya 2010, and seeks the following orders:-
 1. (Spent)
 2. (Spent)
 3. That the court be pleased to grant stay of execution of the judgment and/or decree issued by Hon. M. K. Mutegi Principal Magistrate dated and delivered on 17th August 2022 in Tawa Civil Suit No. 135 of 2021 pending full hearing and determination of this appeal.
 4. That the court allow the applicant to furnish the court with security in the form of a Bank Guarantee from a reputable bank pending full hearing and determination of this appeal.
 5. That the costs of the application abide the outcome of the appeal.
3. The application has grounds on the face of the Notice of Motion that judgment was entered against the Defendant and damages awarded plus costs and interest, that the applicant has appealed on the



- award for loss of dependency (Kshs. 1,386,000/=), that the appeal has high chances of success, that the respondent might not be able to repay the amount if it is paid presently and the appeal succeeds.
4. The application was filed with a supporting affidavit sworn by Richard Kisau Mbalutwah the appellant/applicant on 21st September 2022, which amplifies the grounds of the application.
 5. The application is opposed through a replying affidavit sworn on 12th October 2022 by Charles Wambua Ikuthi the respondent in which it was deponed that the application was filed in bad faith and that the respondent was employed by Samkya Company Ltd as caretaker and earning Kshs. 18,500/= a month and capable of repaying the decretal amount.
 6. The application was canvassed through written submissions. In this regard, I have perused and considered the written submissions filed by Kimondo Gachoka & Company Advocates for the applicant, and the submissions filed by A. K. Mutua advocate for the respondent. I have to acknowledge here that both sides cited decided court cases.
 7. This being an application for stay of execution of judgment or decree, it is governed by the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*. In particular Rule 6(2) provides as follows:-
6 (2) No order for stay of execution shall be made under sub rule (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.
 8. With regard to whether this application was made without unreasonable delay, I note that judgment was delivered on 17th August 2022 and the application filed on 21st September 2022. That being a period of slightly more than a month, I find that the application was filed without unreasonable delay.
 9. Will the applicant suffer substantial loss if the say orders sought herein are not granted. In this regard, I note that the appeal challenges the award for loss of dependency Kshs. 1,386,000/= as pleaded in the application. The other awards are not subject to challenge.
 10. The respondent has deponed in the replying affidavit that he has means to repay the decretal amount, as he is in wage employment earning Kshs. 18,500/= per month, while the appellant/applicant contends that the respondent has no means to repay.
 11. Considering the totality of the facts and evidence placed before me, in my view the applicant stands possibility of suffering substantial loss as the amount in contest is large, and may not be easily repaid by the respondent from his disclosed income. However, the justice of the matter herein in my view will be served only if stay is granted subject to the applicant paying the respondent part of the decretal amount, which I determine as Kshs. 700,000/= I will thus grant stay of execution orders subject to payment of part of the decretal sum to the respondent.
 12. With regard to provision of security by applicant, I note that the applicant has offered to provide a bank guarantee. In my view however, the part payment of the decretal sum will serve as sufficient security.
 13. Consequently and for the above reasons, I allow the application on the following terms:-
 - i. Stay of execution of judgment or decree herein is granted pending determination of appeal.



- ii. The stay of execution granted above is subject to the appellant/applicant paying the respondent through counsel part of the decretal amount Kshs. 700,000/= within 45 days from today.
- iii. In default of (ii) above, the stay orders herein granted will automatically lapse and be of no effect.
- iv. The costs of this application will abide the determination of the appeal.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF OCTOBER 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

No appearance for applicant

Mr. A. K. Mutua for respondent

