



REPUBLIC OF KENYA



KENYA LAW
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**Festus v Mukuru (Civil Appeal E015 of 2024)
[2024] KEHC 13692 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E015 OF 2024
LW GITARI, J
NOVEMBER 6, 2024**

BETWEEN

ALEX MUGENDI FESTUS APPELLANT

AND

MERCY MUTHONI MUKURU RESPONDENT

RULING

1. The respondent has filed a Notice of Motion dated 9/10/2024 brought under Section 1A,1B, 3A of the Civil Procedure Act, Article 159 of the Constitution and all enabling provisions of the law.
2. It seeks the following orders:-
 1. That the Memorandum of Appeal dated 31st May, 2024 and the amended Memorandum of Appeal dated 10th July, 2024 be struck out for being otherwise an abuse of the court process.
 2. That the Respondent be granted time to execute the decree dated 23rd May, 2024.
 3. That costs of this application be provided for.
3. The application is based on the following grounds:-
 - a. That on 1st July, 2024, the Honourable court granted a conditional stay of execution of the decree dated 23rd may, 2024.
 - b. That the Appellant was ordered to deposit 1/3 of the decretal sum within 21 days as a condition of the said stay of execution.
 - c. That the Appellant has since not deposited the decretal sum as ordered by the court.
 - d. That the Appellant did not seek extension of time to comply with the court orders.
 - e. That the Respondent herein was granted liberty to execute in case of noncompliance.



- f. That the Appellant does not seem to be keen in complying with the court orders and is not worthy of the exercise of the court's discretion.
 - g. That the Respondent is suffering great hardship and inconvenience owing to noncompliance on the part of the Appellant.
 - h. That this delay is a proper case for dismissing the Memorandum of Appeal dated 31st May, 2024 which is an abuse of the court process.
 - i. That it is in the interests of justice and fairness that the Respondent be allowed time to execute the decree dated 23rd May, 2024.
4. The application is supported by the affidavit of the Respondent, sworn on 9/10/2024 which has reiterated the above grounds.
 5. I have considered the application. The appeal was admitted on 26/6/2024. Thereafter, the appellant filed an application seeking an order for stay of execution pending the hearing and determination of the appeal.
 6. The court granted an order for stay of execution on the condition that the appellant deposits 1/3/ (a third) of the decretal sum with the counsel for the respondent within twenty (21) days. The court further directed that upon compliance, there shall be stay of execution pending the hearing and determination of the appeal. The court further directed that if there be none compliance the respondent be at liberty to execute. The respondent has deponed that the appellant did not comply with the order which gave conditional of stay of execution.
 7. I have considered the notice of motion. I note that it is duly served and is not opposed. Order 42 rule 6 of the Civil Procedure Rules provides as follows:
 - (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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.



- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
8. Thus it is well settled that an appeal does not operate as a stay, the court has to order stay of execution on such terms to prevent an appeal being rendered nugatory and substantial loss being suffered by the appellant. It is on that basis that his court ordered stay of execution with such terms and conditions. It has turned out that the appellant did not comply with the conditions for stay of execution. The court directed that if the order is not complied with the respondent would be at liberty to execute the Judgment. Court orders are not made in vain, they must be complied with in order to preserve the authority and the dignity of the court.
9. I note that the appellant has enjoyed the order for stay and has ignored the conditions ordered by this court. The applicant has made a case for the setting aside of the orders of stay of execution. I order that the order issued on 1/7/2024 is set aside.
10. The applicant is granted leave to execute the decree dated 23/5/2024 to recover the entire decretal sum.
11. On the prayer of striking out the appeal, I find that there is no good reason for such drastic action. Striking out of pleadings has been stated to be draconian and should be avoided. The court should seek to do substantive justice rather than rely on procedural technicalities. The applicant’s remedy is to execute the Judgment and decree. It is pre-mature to apply to strike out the memorandum of appeal.

Conclusion:

12. The respondent is granted leave to execute the decree. The prayer to strike out the appeal is declined.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 6TH DAY OF NOVEMBER 2024.

L.W. GITARI

JUDGE

6/11/2024

The Ruling has been read out in open court.

