



**Mbuvi v Katundu (Suing as the Legal Representative of the Estate of Jacob Katundu (Deceased))
(Civil Appeal E267 of 2024) [2024] KEHC 14002 (KLR) (11 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E267 OF 2024
FR OLEL, J
NOVEMBER 11, 2024**

BETWEEN

PIUS MUTUA MBUVI APPELLANT

AND

LAWRENCE MUTUKU KATUNDU RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JACOB
KATUNDU (DECEASED)**

RULING

1. The application before this court is the Notice of Motion application dated 7th October 2024 brought pursuant to provisions of Section 1A, 1B, 3, 3A of the [Civil Procedure Act](#), Order 42 Rule 6(2), & Order 51 Rule 1 of the [Civil Procedure Rules](#) and all other enabling provision of law. Prayers (1) and (2) of the said application are spent and the main prayers sought are prayers (3) and (4) for stay of execution of the Judgement/decree, issued in Machakos CMCC No 99 of 2020, and that the costs of and incidental to this Application do abide the results of the said Appeal.
2. This application is supported by the grounds on the face of the said application and the Supporting affidavit of Pius Mutua Mbuvi dated 7th October 2024, while the respondent opposed this application through the replying Affidavit of the respondent dated 22nd October 2024.

Analysis & Determination

3. I have carefully considered the Application, its Supporting Affidavit, and 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.
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 *Amal Hauliers Limited Vs Abdulnasi Abukar Hassan (2017) eKLR & Butt Vs Rent Tribunal* (1982) KLR 417

5. To the foregoing I would add that an order of stay of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the same, shall also consider the overriding objective stipulated under sections 1A and 1B of the *Civil Procedure Act*. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.
6. On the likelihood of suffering substantial loss, and security of the appeal, 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 his 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 his judgment. See *Attorney General Vs Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd Vs Kibiru & another (Supreme); Mukuma Vs Abuoga* (1988) KLR 645.
7. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back his money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in his intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. See Court of Appeal in *Nduhiu Gitahi Vs Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100.

Disposition

8. Considering all relevant factors, and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;
 - a. The Appellant/Applicant do pay the respondent half the decretal sum of Kshs.325,000/= and deposit the other half of the decretal sum of Kshs.325,000/= in court.
 - b. The said Amount is to be paid and deposited within the next 45 days from the date of this ruling and in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
9. The costs of this Application will be in the cause.
10. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 11TH DAY OF NOVEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 11TH DAY OF NOVEMBER, 2024.

In the presence of: -

Mr. Gathiru for Appellant

Mr. A.K Mutua for Respondent



Susan/Sam Court Assistant

