



**Musyoki & another v Muindi (Civil Appeal E096 of 2024)  
[2024] KEHC 16253 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16253 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E096 OF 2024  
MW MUIGAI, J  
DECEMBER 17, 2024**

**BETWEEN**

**ALPHONCE MBINDA MUSYOKI ..... 1<sup>ST</sup> APPELLANT**

**PHYLIS MUTHEU MBINDA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ELVIS ZAKAYO MUINDI ..... RESPONDENT**

**RULING**

**Notice Of Motion Application**

1. Vide application dated 29/04/2024 brought under section 1A,1B 3A of the *Civil procedure Act* Cap 21, Rules 1(2). 2(2) (a) & 3(1) of the High Court Practice Rules, Order 42 Rule 6, Order 50 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law the Applicant sought the following orders, that;
  - a. Spent
  - b. That pending the hearing and determination of the application, the Honourable Court be pleased to grant a stay of execution of the judgment/Decree in Machakos CMCC No. E0117 of 2023 delivered on 5<sup>th</sup> March 2024
  - c. That pending the hearing and determination of the appeal, the Honourable Court be pleased to grant a stay of execution of the judgment/Decree in Machakos CMCC No. E0117 of 2023 delivered on 5th March 2024
  - d. The costs of this Application be in the cause.
2. The Application is supported by an affidavit sworn by Kenneth Mwiti a Legal associate with M/S Britam General Insurance Company Limited sworn on 29<sup>th</sup> April , 2024 stating as follows; that the



judgment in the Trial Court was delivered against the appellants requiring payment to a tune of Kshs 2,880,728 plus cost and interest of the suit and being dissatisfied with the judgement they lodged an appeal which has a high chance of success and that the applicants are apprehensive that the respondent is likely to proceed with execution of the said judgement. That they were willing to abide by any conditions set by the honourable court for the grant of the orders sought

### **Replying Affidavit**

3. The Respondent through a Replying Affidavit sworn on 14/05/2024 deposed by Elvis Zakayo Muindi in which he stated as follows; that the appellants had failed to substantiate any substantial loss that they stand to suffer should they satisfy the decretal sum and that he stood to suffer real prejudice if the orders are granted demonstrated by the fact that he stands to lose the fruits of his judgement. That the appeal has no chance of success. That the application cannot succeed for want of security for due performance of the decree
4. The Application was canvassed by way of written submissions.

### **Submissions**

#### **Appellant's Submissions Dated 10.10.2024.**

5. The appellant submitted placed reliance on order 42 Rule 6 of the Civil Procedure Rules which gives the grounds for grant of stay of execution.
6. It was submitted that the appeal was arguable and raises triable issues based on the grounds set out in the memorandum of appeal.
7. On substantial loss, it was submitted that the respondent had not sufficiently proven his ability to repay the judgement sum if the appeal succeeds and the appellant will be unable to recover the contested sum from the respondent as a result suffer substantial loss. he relied on the case of Equity Bank limited vs West Link MBO Limited [2011] and the case of Henry Sakwa Maloba vs Boniface Papando Tsabuko [2020]
8. On security it was submitted that the appellants are not opposed to depositing half of the decretal sum in a joint interest earning account or in court.

#### **Respondent's Submissions Dated 26.09.2024**

6. On behalf of the Respondent, it is submitted that the only issue for determination was the form of security as a condition for stay of execution pending appeal . that it would be unfair for the respondent to wait for the determination of the appeal to enjoy some of the fruits of his success. He relied on the case of Nyatera vs Nyakundi[2023]
7. It was submitted that it was only fair that the appellants release half of the decretal sum to the respondent's advocates and the other half in a joint interest earning account in the names of both Advocates.
8. He relied on the case of Paul Nderitu Mwangi & another vs Jacinter Mbete Mutisya & another {suing as the legal representatives of the estate of William Mbithi Musonzo(deceased)}
9. It was prayed that the court be pleased to order payment of half of the decretal sum to the respondent's advocate and the other half with costs to be deposited in a joint interest earning account in the name of both advocates



## Determination

10. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.

11. The application is premised on Order 42 rule 6(2) of the Civil Procedure Rules, 2010 provides that:-

“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 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.

12. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.

13. The Court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

14. The only issue necessary for determination would be whether the application seeking stay of execution is merited.



## Substantial Loss

15. On the first condition, the court in *Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

16. In *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd vs. Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

17. In *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. We repeat that the decretal sum was awarded to the 1st respondent, not the 2nd respondent and all that the 2nd respondent is entitled to from the judgment are the costs of the applicant’s dismissed suit. The sum awarded to the 1st respondent was on a counter-claim. On the material before us, the means or resources of the 1st respondent remain wholly unknown and, in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back and in that case, if the applicant’s intended appeal were to succeed, that success would be rendered nugatory

18. Odunga J. in *George Kimotho Ilewe Annastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)* stated that:-

“It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant’s business.” See in *Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto and James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR.

Gichuhi, Ag.JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at 417 held:



“It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

19. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent, it was submitted that the respondent had not sufficiently proven his ability to repay the judgement sum if the appeal succeeds and the appellant will be unable to recover the contested sum from the respondent as a result suffer substantial loss. The court notes the concerns by the appellant as valid and thus has demonstrated the substantial loss likely to be suffered.

### **Unreasonable Delay**

20. On the second condition, the Applicant stated that his application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgement of the Trial Court was entered on 14.03.24 and the application was filed on April 2024 a month later is not unreasonable delay.
21. The Court finds that there is no undue delay in filing the application herein.

### **Furnish Security**

22. The Applicant stated that it was willing to abide with the conditions set by court for grant of the orders sought and that it was willing to deposit half of the decretal sum in a joint interest earning account.
23. The Court in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

24. It follows therefore that it is the discretion of the court to determine the security.

### **Disposition**

In the premises: -

1. There will be a stay of execution pending the said appeal on condition that the Applicant ½ of the decretal sum in favour of the respondent and deposits the other ½ decretal amount in a joint interest earning account of both Advocates on record within 90 days and in default, the application for stay shall stand dismissed.
2. The costs of this application abide the outcome of the appeal.

It so ordered.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT ON 17/12/2024 IN MACHAKOS HIGH COURT (VIRTUAL/ PHYSICAL CONFERENCE).**



**M.W. MUIGAI**  
**JUDGE**

