



REPUBLIC OF KENYA



KENYA LAW
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**Mutiso v Musau-Deceased (Civil Appeal E107 of 2021)
[2021] KEHC 357 (KLR) (14 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E107 OF 2021
MW MUIGAI, J
DECEMBER 14, 2021**

BETWEEN

ALFONCE MWALILI MUTISO APPELLANT

AND

**JANNEFFER MWANJUMA MUSA ANNASTACIA MWIKALI MUSAU (SUING
AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DIANA MBITHE
MUSAU-DECEASED RESPONDENT**

*(Being an Appeal from the Judgment on Quantum of the Honourable
Magistrate M.Opanga, Senior Resident Magistrate in Kangundo
CMCC NO. 191 of 2019 dated and delivered on 15th June, 2021)*

RULING

Court Record

1. By Notice of Motion dated 9th July 2021 filed under Certificate of Urgency on 15th July, 2021, the Applicant sought the following orders:-
 1. That the application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.
 2. That the Court be pleased to order stay of execution of the Judgment/ Decree issued by this Honourable Court 15th June, 2021 in Kangundo CMCC No. 191 of 2019 by the Honourable Magistrate M. Opanga, Senior Resident Magistrate pending the hearing and determination of this application.
 3. That the Court be pleased to stay the execution of the Judgment/Decree obtained herein pending the hearing and determination of the Appellant/



Applicant's appeal filed at the High Court of Kenya at Machakos as Civil Appeal No....of 2021.

4. That the application be heard inter parties on such date and time as this Honourable Court may direct.
 5. That the costs of this application be provided for.
2. The application is based on grounds that the Trial Magistrate in Kangundo CMCC No. 191 of 2019 on 15th June, 2021 apportioned 100% liability against the Defendant and awarded damages under the *Law Reform Act* and *Fatal Accident Act* in the sum of Kshs. 5,960,000/- and special damages of Kshs. 449,600/- in favour of the Plaintiff. According to the Applicant, the judgment sum is substantial hence if the Respondent is paid, the Applicant may be unable to recover back the amount in the event the appeal succeeds since the Respondent has not tendered any documentary evidence to show her financial standing.
 3. According to the Appellant, he is apprehensive that the Respondent may levy execution against him based on the judgment sum if the orders sought herein are not granted, he will suffer substantial loss and the appeal will be rendered nugatory. The Applicant states that the appeal has high chances of success.
 4. The Appellant states that he is ready and willing to provide a reasonable security in the form of a Bank Guarantee. According to the Applicant, the application was filed without unreasonable delay, in good faith and the Respondent will not suffer any prejudice.
 5. The application is supported by the Appellant's insurer, Direct Assurance Company Limited, Deputy Claims Manager Kelvin Ngure whose averments the court has considered. The supporting affidavit was sworn on 9th July, 2021.

Replying Affidavit

6. In opposition to the application dated 9th July, 2021, Janeffer Mwajuma Musau swore a replying affidavit on 27th July, 2021. Based on the advice of their advocate, she deposed that application is frivolous, vexatious, abuse of the court process and lacks merit hence should be dismissed. According to the Respondent, the grounds of the application and facts averred by Kelvin Ngure do not warrant the grant of the sought orders.
7. She deposed that upon perusal of the application it is clear as per annexure KN2 the Applicant is yet to file any appeal challenging the judgment herein. According to the Respondent, the Applicant has only prepared a draft memorandum of appeal. Based on the advice of their advocate, the time frame for filing the appeal lapsed hence the Applicant need to seek for extension of time within which to file the appeal. She deposed that there is therefore no appeal on record and subsequently there are no grounds to warrant the grant of the sought stay of execution orders.
8. Based on the advice of their advocates, the Applicant has not met the conditions for stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules. According to the Respondent, the Applicant has not offered any security to arrant the grant of the stay orders save for a Bank Guarantee. The Respondent has asserted that the Bank Guarantee dated 16th November, 2020 and the amount therein could very easily have been depleted in other matters whereby the Applicant were insured by the same insurer as the Applicant herein.



9. She deposed that the Applicant has been indolent. According to the Respondents, the Applicant has not demonstrated that he deserves the orders sought herein hence the application should be dismissed with costs.

Applicant's Submissions

10. In support of the application, it is submitted by Applicant's advocate that the Applicant in this case filed an application for stay of execution and leave to appeal out of time dated 19th June, 2021 under Certificate of Urgency. According to the advocate parties took direction to canvass the application by way of written submissions and the matter was set down for mention to confirm filing of written submissions on 14th October, 2021.
11. It is submitted that the Trial Court declined to grant stay of execution pending appeal under Order 42 Rule 6 CPR 2010 which has precipitated the filing of the application before this court.
12. According to the advocate, the right of appeal is a constitutional right guaranteed under Article 48 and 50(1) of the Constitution. It is submitted that the right to fair hearing under Article 50 (1) *Constitution of Kenya 2010* cannot be limited under Article 25 of the Constitution.
13. As to whether the Applicant has an arguable appeal, it is submitted that the appeal is against the quantum being excessive hence arguable and raises points of law to warrant this court's intervention. Reliance was placed on the case of *Kenya Revenue Authority vs. Sidney Keitany Changole & 3 Others (2015) eKLR*. It is submitted that the grounds of appeal have high chances of success hence the Applicant should be given an opportunity to ventilate their appeal on merit.
14. As regards whether the Applicant will suffer substantial loss in the event the orders sought are not granted, it is submitted that the Respondent has not tendered in court an Affidavit of Means. According to Applicant's advocate, it is the Respondent who can specifically show that she has means to repay the decretal amount. Reliance was placed on the case of *Edward Kamau & Another vs. Hannah Mukui Gichuki & Another (2015) eKLR* and in *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike, CA Civil Application No. 238 of 2005*. Further reliance is placed on Section 112 of the *Evidence Act*.
15. As to whether the application was filed without unreasonable delay, it is submitted that the Application was filed within time hence not an afterthought. It is submitted that this court has unfettered jurisdiction to hear and determine an application for stay pending appeal regardless of whether the application was granted or refused.
16. It is submitted that the Applicant is ready and willing to furnish security in the form of a Bank Guarantee pending the hearing and determination of the appeal. Reliance was placed on the case of *Selestica Limited vs. Global Rock Development (2015) eKLR*.
17. According to the Applicant, he has satisfied all the conditions set under Order 2 Rule 6 of the *Civil Procedure Rules, 2010* hence the application dated 29th June, 2021 should be allowed with costs to abide by the outcome of the appeal.

Determination

18. I have considered the application, affidavits in support and in opposition to and the written submissions.



19. Before into the merits of the application seeking stay orders, the court notes that Janeffer Majuma Musau a legal representative of the estate of Diana Mbithe Musau averred that the Applicant is yet to file any appeal challenging the judgment delivered on 15th June, 2021.
20. The court has been furnished with a filed Memorandum of Appeal hence the Respondent assertions fail. The Memorandum was filed on 6th July, 2021.
21. Order 42 rule 6(2) of the Civil Procedure Rules,2010 provides that:
- “(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.
22. 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...”
23. 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.”
24. However Odunga J. in *George Kimotho Ilewe Anastacia 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.
25. 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.”

26. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.

27. The court’s view is that the evidential burden then shifted to the Respondents once the Appellant’s insurer averred that they are apprehensive of the non-payment by the Respondents if the decretal sum is paid and the appeal is successful. The court notes that the Respondents chose to challenge lack of leave to file appeal and the insufficiency of the Bank Guarantee instead of satisfying the court of their capability to refund the decretal sum if the appeal succeeds. The Respondents did not aver whether they are capable of refunding the decretal sum.

28. 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.”

29. On the other hand the court notes that the Appellant’s insurer has not demonstrated the substantial loss that it would suffer if the decretal amount is paid to the Respondents. It has not been averred or submitted whether the insurance business will be ruined.

30. However despite the court noticing the lack of proof of the substantial loss, the court is called upon to strike a balance between the interests of parties in such applications.

31. It was held in the case of *Tabro Transporters Ltd. vs. Absalom Dova Lumbasi [2012] eKLR*, that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

32. On the second condition, the Trial Court Judgment was delivered on 15th June, 2021 while the application seeking stay of execution of the judgement was filed on 15th July, 2021. The court’s view is that a period of 1 month is not undue delay.



33. The Appellant has offered security for the due performance of the decree in the form of a Bank Guarantee of Kshs.30,000,000.00/-. A copy of the same dated 16th November, 2020 is attached as 'KN4'.

34. Indeed 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.”

35. Janeffer Mwajuma Musau contends that the guaranteed amount could be very easily have been depleted in other matters whereby the applicants were insured by their insurer herein. However no documentary evidence has been furnished to court by the Respondents. It is trite that he who alleges must prove. The court notes that the Respondent are no asking for payment of either half or full amount of the decretal sum.

36. On the other hand the court notes that the Bank Guarantee at Clause 3, its validity shall not exceed one (1) year from the date of issuance or until such time that the said guarantee is cancelled or becomes void. The Appellant's Deputy Claims Manager averred at paragraph 11 of his supporting affidavit that the insurance was ready and willing to furnish the court with a copy of the Bank Guarantee as and when required. Despite the court's discretion to determine the security, the court is in agreement that the Bank Guarantee may not be a suitable form of security in the circumstances.

37. The court in *Absalom Dova vs. Tarbo Transporters [2013] eKLR*, stated:-

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

38. The court's view that this is a case where a stay ought to be granted but on conditions.

Disposition

39. The commendable orders to issue shall be:-

- a. There be a stay of execution of the judgement and decree of the Senior Resident Magistrate Hon. Martha Opanga at Kangundo in SPMCC No. 191 of 2019 pending the hearing of the appeal on condition that;
- b. The Appellant to deposit within Sixty (60) days deposit ½ decretal sum of Kshs. 6,409,600/- in a joint earning interest account in the name of the advocates for the respective parties and the other half to be paid to the Respondent.



- c. In default of (b), the application shall stand dismissed.
- d. Costs shall abide in the appeal.

It so ordered.

RULING DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 14TH DAY OF DECEMBER 2021.

M.W MUIGAI

JUDGE

IN THE PRESENCE OF:

Mr. Mutia Holding Brief for Mose - for Applicant

Ms Achochi - for Respondent

Geoffrey - Court Assistant

