



Agha Khan University Hospital v Mugweru & another (Suing as next of kin and parents of minor FMW) (Civil Appeal E918 of 2024) [2025] KEHC 896 (KLR) (Civ) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E918 OF 2024

TW OUYA, J

JANUARY 30, 2025

BETWEEN

AGHA KHAN UNIVERSITY HOSPITAL APPELLANT

AND

KEVIN WAITHAKA MUGWERU 1ST RESPONDENT

JOAN JOY WANJIKU 2ND RESPONDENT

SUING AS NEXT OF KIN AND PARENTS OF MINOR FMW

(Being an appeal from the judgement of the chief magistrate court at Milimani Commercial courts at Nairobi in MCOMMSU E358 OF 2022 (Honourable C.K. Cheptoo (P.M) delivered on 18th July 2024)

RULING

1. Before the court is a Notice of Motion application dated 10th September 2024 by the Applicant seeking for orders inter alia, a temporary stay of execution pending the hearing and determination of an appeal against the judgement of hon C K Cheptoo delivered on 18th September 2024 in MCOMMSU E358 of 2022.
2. The application is further supported by affidavit sworn by Catherine Kabira on 10th September 2024 and annexures thereto for prayers that:
 - a. The applicant's application be certified as urgent and be heard ex-parte in the first instance.
 - b. The Honourable court be pleased to grant the appellant a temporary stay of execution of the judgement of the Chief Magistrate court at Milimani Commercial courts at Nairobi in



MCCOMMSU E358 of 2022 (honorable C.K Cheptoo (PM) delivered on 18th July 2024, pending inter-partes hearing and determination of this application.

- c. The honorable court be pleased to grant the applicant/appellant a temporary stay of execution of the judgement of the chief magistrate court at Milimani commercial courts at Nairobi in MCCOMMSU E358 of 20222 (Honourable C.K Cheptoo (PM) delivered on 18th July 2024 pending the hearing and determination of the appeal.
 - d. The Honourable court do grant any orders that it may deem fit to grant in the circumstances.
 - e. The application be allowed without costs.
3. The Application is premised on the following grounds inter alia; -
- a. The trial court (Honourable C.K Cheptoo) in MCCOMMSU E358 OF 2022 delivered a judgement in favour of the respondents on the 18th July 2024 whereof the court awarded the respondents a decretal sum of kshs. 2,877,749/= as outlined below;
 - i. General damages for pain and sufferings of kshs.2,000,000/=
 - ii. General damages for the minor's parents of kshs. 800,000/=
 - iii. Special damages kshs. 77,749/=
 - iv. Total awards kshs. 2,877,749/=
 - v. Interest on (a), (b) and (c) at court rates from the date of filing the suit until payment in full.
 - vi. Costs of the suit to be borne by the defendants.
 - b. The appellant/applicant herein being aggrieved by the judgement of the trial court has filed the appeal herein against the judgement of the Chief Magistrate Court at Milimani Commercial Courts at Nairobi in MCCOMMSU E358 OF 2022 (Honourable C.K Cheptoo (PM) delivered on 18th July 2024.
 - c. The appellant/applicant shall suffer substantial loss and irreparable damage if the respondents proceed with the execution of the said judgement.
 - d. The appellant/applicant engaged the respondents to have the decretal sum deposited in a joint interest earning account in the names of their respective advocates but they have now declined.
 - e. The appellant/applicant is ready and willing to deposit the decretal sum of kshs.2, 877,749/= in the court or in a joint interest earning account by the respondents' advocate and the applicant's Advocates pending the hearing and determination of the appeal.
 - f. Unless a stay of execution of the judgement of the chief Magistrate court at Milimani Commercial courts at Nairobi in MCCOMMSU E358 OF 2022 ((Honourable C.K Cheptoo (PM) delivered on 18TH July 2024 is granted, the appellant/applicant shall suffer substantial loss and irreparable damage and its appeal rendered nugatory.
4. The matter was canvassed by way written submissions by Counsel for both parties. The applicant has raised four key issues in their submissions. He refers to order 42 Rule 6 of the civil procedure rules



which lays down the conditions to be considered for granting stay of execution and as restated in the case of *Hamisi Juma Mbaya v Amakecho Mbaya* [2018] eKLR where it was held: -

“The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
 2. The application has been made without unreasonable delay, and
 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
5. Counsel submits that if the stay orders are not granted, the Applicant stands to suffer substantial loss and irreparable damage because the applicant does not know the financial position of the Respondent and their ability to pay back the decretal sum in the event that the appeal succeeds.
6. They urge the court that the applicant has met the required threshold having filed a memorandum of appeal dated 9th August 2024 and record of appeal dated 24th October 2024, which appeal he believes has got high chances of success. He has also furnished security for performance by depositing Kshs.2,877,749 in court on the 31st October 2024.
7. The Applicant submits that in order to preserve the substratum of the appeal this court should exercise its discretion and allow the appellant’s application by granting a stay of execution of the judgement of the chief Magistrates Stay of execution at Milimani delivered on 18th July 2024.
8. The Respondents on the other hand have raised three key issues in their submissions: Whether the conditions for grant of an order for stay of execution have been satisfied. They emphasize that the court should consider the three requirements: Justifiable cause, irreparable harm & security performance of the decree), Whether it is in the interests of justice for the order of stay of execution to be granted and Costs. The respondent submits that the court must be satisfied that an applicant has met all the three conditions before granting stay of execution orders.
9. Counsel relies on the authority as was stated in *Butt v Rent Restriction Tribunal* [1979] eKLR that the court considers the circumstances of each case before granting an order for stay of execution and emphasizes that the overarching principle guiding the court in deciding whether to grant stay is whether such an order would serve the ends of justice. They argue that the applicants do not have an arguable appeal to be preserved, going by the holding of the trial court at page 19 of the judgment which records an outright admission of liability.
10. It is their contention that their right as successful party’s desire to execute a judgment delivered by a competent court should not be used as a basis for grant of stay orders. It is trite law that a party that has for long waited for the courts to render judgment must be allowed to enjoy the fruits of the judgment. He relies on the decision of this court in *Joshua Kamoing v Simon Barchok & 3 others* [2021] eKLR where Justice M. C. Oundo court stated:
33. In an application of this nature, the Applicants were bound to show the damages they would suffer if the order for stay is not granted since by granting stay it would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant of the fruits of his judgment which should not be done if the Applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay see *Kenya Shell Ltd (Supra)*



The Respondents urge the court to dismiss this Application as the balance of convenience tilts in favour of granting the Respondents a chance to enjoy the fruits of the judgment

11. It is the respondent's contention that the Applicant has not demonstrated that he is likely to suffer substantial harm which has been interpreted by the courts to mean harm that cannot be repaired or made up for by damages. This has been used interchangeably with the term irreparable harm in decisions of the courts. They rely on the decision of Mogeni J in dismissing a similar application in Wamaitha (Suing as the Legal Representative as Litem of the Estate of Esther Wamaitha Mbugua (Deceased) v Chutha & 2 others; Family Bank (Third party) (Environment & Land Case 537 of 2008) [2022] KEELC 2812 (KLR) (29 June 2022) (Ruling) where the question of substantial harm, borrowing from precedent, was held to be the cornerstone of the court's jurisdiction in the case of an application such as the instant one. The court dismissed the Application and stated thus:

“Has the applicant demonstrated that unless the order of stay is granted, he may otherwise suffer substantial loss? To justify the grant of an order of stay, the applicant must show or establish facts to satisfy the Court that if execution is allowed to proceed, it will result in a state of affairs that will substantially affect or negate the very essential core of the applicant's case as the successful party in the appeal – see *Silverstein Vs Chesoni* 20002 1 K.L.R 867 and also *Mukuma Vs Abuoga* 1988 K.L.R 645. In the *Mukuma* case (*supra*) the Court emphasized the centrality of substantial loss by stating that it is the cornerstone of the jurisdiction for stay since that is what has to be prevented. It is important to observe that under Order 42 Rule 6 (2) of the Civil Procedure Rules, it is not a requirement that the Court considers the merits or otherwise of the appeal. This Court cannot therefore look at the strength or otherwise of the applicant's appeal as the law does not require it to do so. This Court must therefore only confine itself to whether or not the applicant has established that he will suffer substantial loss.

The Applicant has not demonstrated in clear terms the nature of substantial loss he is likely to suffer should execution of the decree herein proceed. These are damages that will not compensate for the loss because the loss cannot be measured in monetary terms.”

12. They argue that aside from the fact that the appeal cannot be sustained, the Applicant has not clearly identified any harm they will suffer and rely on the *Halsbury's Laws of England* [*Halsbury's Laws of England*, Third Edition, Volume 21, paragraph 739, page 352.] which explains *inter alia* that:

“In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. (Emphasis added)

13. The respondents argue further that the Applicant has come to court on a money decree, that does not meet the threshold for grant of a stay of execution.
14. I have considered the application, grounds, affidavit and annexures together with the submissions by Counsel. The issues for determination are whether the application meets the threshold for grant of stay of execution under the provisions of order 42 rule 6 of the civil procedure code and; whether it will serve the interests of justice to grant stay in the circumstances. From the record, it is discernable that this application was brought on 10th September 2024 while the judgement in issue was delivered on 18th July 2024.
15. The applicant had obtained stay of execution for 30 days and engaged the respondent on issues of deposit of the decretal sum. It is my view that this application is therefore brought without undue delay. The Applicant has gone ahead of time and engaged the respondent and furnished security for



performance, deposited the entire decretal amount totaling, kshs. 2,877,749 in court as at 31st October 2024.

It is now for this court to consider whether the applicant has demonstrated the likelihood to suffer substantial loss if the orders of stay are not granted. The Applicant has stated that they do not know the financial position of the Respondents nor that the respondents demonstrated their financial capability to pay back the decretal sum if the appeal succeeds. In *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & another* (2006) Eklr, the 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.”

16. Be that as it may, the issue of likelihood to suffer substantial loss cannot be addressed in isolation from the issue of protection of the substratum of an appeal. In *RWW v EKW* (2019) eklr the court laid down the principle that:

“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.”

17. It is in my view that it is in the interest of justice to grant this application for stay in order to preserve the substratum of the appeal and to ensure that the appeal is not rendered nugatory.

Based on the above, this court exercises its discretion grants the orders for stay. It is hereby ordered that:

- i. Temporary orders for Stay of execution of Judgement of Chief Magistrate Court at Milimani Nairobi Min MCCOMMSU E 358 OF 2022 delivered on 18th July is hereby granted pending hearing and determination of the appeal herein.
- ii. That the costs of this application be in cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30th DAY OF JANUARY 2025

R.O.A

HON. T. W. OUYA

JUDGE

FOR the Applicant: Aguti H/B for Kiongera

FOR Respondent: Mutembei

Court Assistant: Martin

