



REPUBLIC OF KENYA



KENYA LAW
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**Musundi v Faida (Civil Appeal E195 of 2024)
[2025] KEHC 3906 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E195 OF 2024
E OMINDE, J
MARCH 26, 2025**

BETWEEN

BERNARD KHAMALA MUSUNDI APPELLANT

AND

GEOFFREY OUMA FAIDA RESPONDENT

RULING

1. The Application before this court is the Notice of Motion dated 17/09/2024. The brief background of the application is that the Respondent instituted a suit against the Applicant in the Small Claims Court being SCCC No. E464 of 2024 – Godfrey Ouma Faida vs Benard Khamala Musundi vide a Statement of claim dated 23/04/2024. The Respondent herein was seeking judgment for a sum of Kshs. 403,000/-, costs and interest at court rates. The trial court entered judgement against the Applicant herein on 05/08/2024 for a sum of Kshs. 130,000/- and the Respondent consequently filed an application for review of judgment. The trial court considered the application and set aside its initial judgment and substituted it with judgment in favour of the Respondent, for the sum of Kshs. 403,000/-, costs of the suit and interest.
2. The appellant then filed a memorandum of Appeal dated 16/09/2024 as he was dissatisfied with the decision of the trial court. Additionally, he filed the present application dated 17/09/2024 seeking the following orders;
 - a. Spent
 - b. That pending the hearing and determination of this Application, this honourable court be pleased to issue orders of stay of execution of the ruling delivered on 13th September 2024 by Hon T. Mbugua in Eldoret Small Claims Commercial Case No. E 464 of 2024. Godfrey Puma Faida Vs Benard Khamala Musundi together with all consequential orders.



- c. That this honourable court be pleased to issue orders of stay of execution of the ruling delivered on 13th September 2024 by Hon T. Mbugua in Eldoret Small Claims Commercial Case No. E 464 of 2024, Godfrey Puma Faida Vs Benard Khamala Musundi together with all consequential orders pending the hearing and determination of the main appeal.
3. The application is premised on the grounds on the face of it and the contents of the affidavit sworn by the applicant, Bernard Khamala Musundi. In his affidavit, he deponed that the claimant is in the process of obtaining a decree and might start the process of execution at any time. Further, that he instructed his advocate to appeal the ruling delivered on 13/09/2024 and is willing to furnish security as the court may direct. He urged that the court ruling was harsh and oppressive as he was ordered to pay 30% interest on the loan which is too high.

Replying affidavit

4. The Respondent filed a Replying Affidavit in response to the application, sworn through the firm of Messrs Kipkorir Rono & Co Advocates and filed on 01/10/2024. The deponent stated that the application lacks proper basis for appeal, is bad in law and abuse of the court process. He intimated to the court that he and the appellant wilfully entered into a memorandum of understanding on the 29/08/2023 for a friendly loan of Kshs 130,000/-. That the appellant failed to repay and the respondent then instructed his lawyers to institute a civil claim vide the Eldoret Small Claim Commercial No. E464 of 2024. The trial court heard the parties on merit by way of Section 30 of the Small Claims Act, 2016 and the pronounced its judgment dated 05/08/2024 and a subsequent ruling on 13/09/2024.
5. The deponent stated that the appellant has not shown how oppressive the ruling of the trial court is in enforcing the memorandum of understanding signed between the parties herein That he did not demonstrate whether he was coerced or was under duress when he entered into the memorandum of understanding. Additionally, he stated that the intended appeal by the appellant is only meant to delay enjoying the fruits of the judgment. The deponent averred that orders for stay of execution are given at the court's discretion and in so granting, the orders ought not to cause undue suffering to any of the parties involved. He urged that the present application is not based on any point of pure law save only for lamentations by the appellant who has never denied the existence of the memorandum of understanding. The deponent urged the court to dismiss the application with costs to the respondent.

Hearing of the application

6. The application was canvassed by way of written submissions. The appellant filed submissions dated 14/01/2025 whereas the respondent filed submissions dated 30/11/2024.

Applicants' submissions

7. Learned counsel for the applicant submitted that the principles guiding grant of an order for stay of execution pending hearing and determination of an appeal are settled under Order 42 Rule 6(2) of the Civil Procedure Rules 2010. Further, that in *Matata & another v Rono & another (Civil Appeal E014 of 2024)* [2024] KEHC 2799 (KLR), the court summarized the conditions for granting an order for stay of execution.
8. On the issue of substantial loss, counsel cited the findings of Kimaru, J (as he then was) in Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCM *CA No. 1561 of 2007* and urged that the appeal is yet to be heard and there is high likelihood that the Respondent will execute the Ruling delivered on the 13th September, 2024 which will render the appeal nugatory. Additionally, he expressed doubts that the Respondent will refund the amounts paid if the appeal succeeds. He urged



that the Respondent has not provided evidence that he will be able to refund the decretal amount and that he did not file any affidavit of means in this regard.

9. Counsel cited the case of National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR on the burden of proof once one expresses fear that the decretal amount shall not be refunded. He urged that in the absence of the requisite proof from the Respondent that he is a person of means, the Applicant will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined.
10. On the timeliness of the application, counsel submitted that the ruling herein was delivered on 13/09/2024 and the Memorandum of Appeal was filed on 16/09/2024, and subsequently, this application was filed on 17/09/2024 all of which were done within one week. He urged that the application was made without undue delay.
11. As regards deposit of security, counsel referred to the findings in the case of *Matata & another v Rono & another (Civil Appeal E034 of 2024)* [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling) and submitted that the applicant is ready to abide by any reasonable conditions and terms as to security as the court may direct. Urging that he has met the threshold for grant for an order of stay of execution, counsel urged the court to allow the application with costs.

Respondents' submissions

12. Learned counsel for the Respondent filed submissions dated 30/11/2024. Counsel submitted that the principles for grant of a stay of execution pending appeal are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provide that stay of execution pending appeal should only be granted when the court is satisfied that (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. That these principles were echoed in the case of Antoine Ndiaye v African Virtual University [2015] eKLR and he urged the court to be guided by this authority when making its determination.
13. Counsel for the respondent submitted that in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, the court held that the above stated three conditions for granting stay of execution pending appeal provided must be met simultaneously, they are conjunctive and not disjunctive. That the applicant has failed to demonstrate before this court that he stands to suffer substantial loss if the application is not allowed; he has also failed to furnish security as stipulated by the law.
14. He urged that the applicant merely stating that the appeal has high chances of success without elaboration is not enough, and further, that only stating that if executed, the appeal would be rendered nugatory is also not enough. He stated that the application is merely meant to frustrate the respondent from enjoying the fruits of judgment as he is disputing the memorandum of understanding dated 29/08/2023 which formed the substratum of the contract between the parties herein.
15. Counsel urged that in the event this court allows the application as prayed, the applicant be compelled to deposit the decretal amount before the court as security. Further, that the applicant having failed to satisfy the three conditions set out under Order 42 rule 6(2) of the Civil Procedure Rules the application should be dismissed with costs.



Analysis & Determination

16. Having considered the pleadings and the submissions by Counsel, it is my considered opinion that the only issue for determination is Whether orders for stay of execution should issue
17. The principles applicable in the determination of Applications for stay of execution pending Appeal are well settled and are as set out in Order 42 Rule 6(2) of the Civil Procedure Rules as follows:

“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.
18. Courts have over time rendered themselves on the provisions of the said Order 42 in various decisions and I will herein lay out a few of such renditions which I will be guided by in reaching my determination. What would amount to substantial loss was explained in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, by Gikonyo J in the following terms:

“...The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
19. In the instant case, I have considered the Memorandum of Appeal filed and without going into the merits or demerits of the grounds therein raised, I note that the main area of contestation is the interest rate at which the Hon Magistrate computed her final award which award the Applicant protests is too high based on the interest applied. The final award may not be a substantial amount given the financial situation prevailing in the country today. However, when compared the principal amount lent, once the impugned interest rate is applied, the difference is considerable. In this regard the court is satisfied that based on this ground, the Applicant has sufficiently demonstrated the requirement on substantial loss.
20. On the issue of delay, the Court of Appeal stated thus in the case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
21. In this case, the impugned judgement was delivered on 13/09/2024, the Memorandum of Appeal was filed on 16/09/2024, and subsequently, this application was filed on 17/09/2024. In considering these timelines, I am satisfied that the Applicant proceeded very swiftly in filing the Memorandum of Appeal as well as this Application and there has been no delay at all.
22. in addressing this issue on the ability of the refund of the decretal sum by a Respondent in the event that an Applicant to whom orders of stay ere not granted is successful on appeal, the Court of Appeal,



in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, expressed itself as follows:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. 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”

23. In considering this requirement with respect to this case, I note that the Respondent has not addressed himself to this issue at all, even with the deposition and subsequent submission by the Applicant that he may not be able to refund the decretal sum in the event that this appeal is successful. In this regard on a balance of probabilities, I find in favour of the Applicant.

24. And on the requirement that an Applicant furnishes security, the purpose of security was stated in the case of *Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, to be as follows:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

25. The Applicant herein has demonstrated that he is willing to deposit security as the Court will direct. Counsel for the Respondents submits that if the court finds it fit to make this order, then it should order that the entire decretal amount be deposited in an interest earning account in the joint names of the Advocates for the parties. Having addressed my mind to all the issues raised I now hereby direct that the Applicant deposits half the decretal amount in an interest earning account in the joint names of the Advocates for the parties.

26. In light of my conclusions herein, the upshot is that I am satisfied that the Applicants Application has merit and the same is allowed as follows:

- a. That orders of stay of execution of the ruling delivered on 13th September 2024 by Hon T. Mbugua in Eldoret SCCC No. E 464 of 2024 *Godfrey Puma Faida v Benard Khamala Musundi*, together with all consequential orders be and is now hereby issued pending the hearing and determination of the Appeal herein filed.
- b. That the Applicant is to deposit half the decretal amount in an interest earning account in the joint names of the Advocates for the parties within the next 30 days from the date of this ruling failure to which the orders of stay herein granted shall be deemed to have lapsed.
- c. That costs of the Application shall be borne by the Respondent.

READ DATED AND SIGNED AT ELDORET ON 26TH MARCH 2025

E. OMINDE



JUDGE

