



REPUBLIC OF KENYA



**Nyangaresa v Muli (Civil Appeal 308 of 2023)
[2024] KEHC 578 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 308 OF 2023**

FR OLEL, J

JANUARY 30, 2024

BETWEEN

RICHARD MWEBI NYANGARESA APPELLANT

AND

DORCAS TABITHA MULI RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 5th December 2023 brought pursuant to provisions of Section 3A of the [Civil Procedure Act](#), order 42 rule 6 and 7 of the [Civil Procedure Rules](#) and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is prayer 3 & 4 that there be a stay of execution of the judgment/decree of Honourable A. Nyoike Senior Principal Magistrate delivered on 2nd November 2023 and they be allowed to furnish court with a bank guarantee from a reputable bank as security pending the hearing and determination of the appeal filed herein and that costs be provided for. The application is supported by a supporting affidavit of the appellant Richard Mwebi Nyangaresa dated 5th December 2023.
2. This application is opposed by the Respondent who filed Replying Affidavit's dated 11th January 2023 sworn by the respondent Dorcas Tabitha Muli, who maintained that the said application was misconceived and the applicant had not met the conditions for granting stay under Order 42 rule 6(2) (b) of the [Civil Procedure Rules](#), 2010 and thus the said application should be dismissed

Analysis & Determination

3. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issue which arise for determination is whether this court should grant stay of execution of the Judgment/Decree dated 2nd November 2023 issued in Machakos CMCC No 121 of 2020.



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 *Butt v Rent Restriction Tribunal* [1982] KLR 417 and *James Wangalwa & Another v Agnes Nalika Chereto* [2012] eKLR)
5. The judgment appealed against was delivered on 2nd November 2023. The Appeal herein was filed on 27th November, 2023 and this application was also filed on 6th December 2023. Thus, it can be said that this appeal and application for stay of execution have been filed timeously.
6. On the likelihood of suffering substantial loss, It was sufficient if an applicant seeking stay of execution demonstrated that he/she would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful. See *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another* [2010] eKLR, *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR
7. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person of means, I find that the Appellant have satisfied this court that he would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
8. On the security, the Appellants have indicated that they are ready and willing to abide by this court's orders as to security for due performance of the decree. In particular they have offered to provide court with a bank guarantee to cover for the said decretal amount. The respondent has averred that the said bank guarantee is worthless and has been used in different cases and it is likely that the funds with respect to the said guarantee has been depleted.
9. 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 v Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another (Supreme); Mukuma v Abuoga* [1988] KLR 645.

Disposition

10. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, and since based on the grounds of appeal, the same is as against quantum awarded, 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 and deposit the other half of the decretal sum in a joint interest earning account in the joint names of advocate for the appellant and advocate for the respondent at a reputable financial bank for the whole duration of this appeal.
 - b. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.



11. The costs of this Application will be in the cause.

12. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 30TH DAY OF JANUARY, 2024.

In the presence of;

.....for Applicant

.....for Respondent

.....Court assistant

