



**M’Imunya v Muroko (Suing on behalf of the Estate of Alex Muriki Kaiyongi)
(Civil Appeal E198 of 2023) [2024] KEHC 327 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 327 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E198 OF 2023
TW CHERERE, J
JANUARY 25, 2024**

BETWEEN

ALIAS PAUL M’IMUNYA APPLICANT

AND

**DAVID KAIYONGI MUROKO (SUING ON BEHALF OF THE ESTATE OF ALEX
MURIKI KAIYONGI) RESPONDENT**

RULING

1. On 16th October, 2022, the trial court entered judgment in Maua CMCC No. 192A of 2015 in favour of the Respondent as against the Applicant for KES. 2,076,740/-, costs of the suit and interest.
2. Subsequently on 10th November, 2023, the Applicant filed a memorandum of appeal challenging the impugned judgment. On 14th November, 2023, the Applicant moved the court by a notice of motion dated 07th November, 2023 seeking stay of execution of the impugned judgment pending the hearing and determination of the appeal.
3. The application is based on grounds on its face and is also supported by an affidavit sworn Frankline Nyaga, a legal Officer with Old Mutual Insurance Company, the Respondent’s insurer in which he reiterates the grounds on the face of the application. Additionally, he avers that Applicant has an arguable appeal with high probabilities of success, is likely to suffer substantial loss if stay of execution is not granted and finally that Applicant is ready to deposit security for the due performance of the decree.
4. Respondent opposed the application by way of a preliminary objection filed on 15th January, 2024 and by a replying affidavit sworn on 13th January, 2024 by one Muroko M’Mwambia who deposes that he is the Respondent on the grounds that the supporting affidavit is not sworn by the Applicant and further on the ground that the deponent has not disclosed his source of information. Applicant is also faulted for not demonstrating substantial loss and for his failure to deposit security as ordered by the court.



Analysis and Determination

5. I have considered the application in light of the affidavits on record, the notice of preliminary objection, and the parties' submissions and cited authorities and the issue for determination is whether a case has been made for an order of stay of execution pending appeal.
6. Order 42 (6) of the Civil Procedure Rules provides that no order for stay of execution shall be made unless application has been made without unreasonable delay; substantial loss is demonstrated and security for the due performance of such decree or order is offered. (See *Endmor Steel Millers Ltd vs James Wakbulunya Makuto [2016]* eKLR).
7. Concerning stay of execution pending appeal, the supporting affidavit is sworn by a legal officer of the Applicant's insurer and I have no doubt that the information contained in the supporting affidavit is either within his knowledge nor has been communicated by the Applicant.
8. Even as the Respondent complains about the competence of the supporting affidavit, I equally notice that the replying affidavit is sworn by one Muroko M'Mwambia who deposes that he is the Respondent'
9. Be as it may, this court is obligated not to sacrifice substantial justice at the altar of procedural technicalities and I shall therefore consider the affidavit as though they are properly sworn by the parties herein.
10. A party seeking an order of stay pending appeal bears a specific burden regarding proof of substantial loss.
11. The Respondent was awarded general damages in the sum of KES. 2,076,740/-, costs of the suit and interest. Whereas this is a money decree, there is no evidence that the Respondent is in a position to refund the decretal sum in the event that the appeal succeeds and that is persuasive evidence that Applicant is likely to suffer substantial loss if orders sought are not granted.
12. Security is a legal requirement under 42 (6) (2) (c) of the Civil Procedure Rules. On 14th November, 2023, this court issued a temporary stay of execution on condition that the Applicant deposits KES. 1,000,000/- with the court as security. There is no evidence that the order was complied with and Respondent should not be heard to complain for it had the option to execute the Applicant having failed to fulfil the conditions set by the court.
13. Whereas it is not my duty at this stage to determine if the Applicants have an arguable appeal, I am minded, in the interest of justice to exercise this court's discretion under section 3A of the Act to afford the Appellant an opportunity to prosecute the appeal.
14. In the end, the notice of motion dated and filed on 07th November, 2023 allowed in the following terms:
 1. There shall Maua CMCC No. 192A of 2015 pending the hearing and determination of the intended appeal on condition that the Applicant shall deposit KES. 1,000,000/- (one million) with the court within 14 days from today's date
 2. Applicant shall file and serve the record of appeal in the next 45 days from today's date
 3. Costs shall abide the outcome of the intended appeal
 4. Mention on 29th April, 2024 to confirm compliance with these orders and for direction concerning the disposal of the appeal

DATED IN MERU THIS 25TH DAY OF JANUARY 2024



T.W. CHERERE
JUDGE

