



Muthoni v Kinyua(Suing for the Estate Of Susan Kanana alias Susan Kanana - (Deceased)) & 5 others (Civil Appeal E133 of 2022) [2024] KEHC 2236 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E133 OF 2022
TW CHERERE, J
FEBRUARY 29, 2024**

BETWEEN

FLORENCE MUTHONI APPELLANT

AND

**JOSPHAT MUTHURI KINYUA(SUING FOR THE ESTATE OF
SUSAN KANANA ALIAS SUSAN KANANA - (DECEASED)) & 5
OTHERS RESPONDENT**

RULING

1. By a ruling dated 01st December, 2022, this court dismissed the Notice of Motion dated and filed on 28th October, 2022 on the grounds that the impugned decrees had not been annexed to the supporting affidavit and further directed the Appellant files an appeal in respect of each of the alleged decrees.
2. The Applicant in total defiance of the said orders has yet again filed a single application dated 01st December, 2023 against the 7 Respondents notwithstanding the pleading clearly demonstrate that the issues complained off arise 7 different lower court files.
3. The foregoing notwithstanding, I notice that to the supporting affidavit is annexed warrants of attachment and proclamation in respect of Githongo PMCC No. 6 of 2018. The application for stay of execution pending appeal is based on the grounds among others that the Appellant has appealed, that there is eminent danger of execution and Respondent is not in a position to refund the decretal sum in the vent the appeal succeeds.
4. In opposing the Application, Isaac Kimathi Ncebere in an affidavit sworn on 07th December, 2023 on his own behalf and on behalf of the other 5 Respondents avers that this application is meant to delay the Respondents from enjoying the fruits of their judgments that have been pending for over 7 years.



Analysis and Determination

5. I have considered the notice of motion in the light of affidavits on record and submissions filed on behalf of the parties and the issue for determination is whether an order for stay of execution of judgment in Githongo PMCC No. 6 of 2018, being the only judgment supported by documents as stated at paragraph 3 of this ruling, ought to be stayed.
6. Order 42 (6) of the *Civil Procedure Rules* provides:
 - (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
 - b. That the application has been made without unreasonable delay; and
 - c. 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.
7. The impugned judgment in Githongo PMCC No. 6 of 2018 was delivered on 31st August, 2022. The Applicant/Petitioner first moved the court on 31st October, 2022 which was two months after the judgment and the application was therefore filed timeously.
8. I have considered whether Applicant has demonstrated that it is likely to suffer substantial loss if stay of execution is not granted.
9. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. There is a myriad of cases on what constitutes substantial loss. In *Standard Assurance Co. Ltd v Alfred Mumea Komu* [2008] eKLR, the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”
10. Similarly, in Civil Case No. 41 of 1995 *United Builders & Contractors (Africa) Limited v Standard Chartered Bank Ltd* the Court stated-

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”
11. From the annexed warrants of attachment, Respondent in Githongo PMCC No. 6 of 2018 was awarded the sum of KES. 2,66,660/- plus costs and interest.
12. 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 Appellant is likely to suffer substantial loss if orders sought are not granted.
13. Security is a legal requirement under 42 (6) (2) (c) of the *Civil Procedure Rules*. The Appellants have offered to furnish a bank guarantee for due performance of the decree herein pending the hearing and determination of the appeal.



14. Although 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 Appellants an opportunity to prosecute their appeal.
15. In the end, the notice of motion dated 01st December, 2023 is allowed in the following terms:
 1. This file shall be the appeal file for the matter arising out of Githongo PMCC No. 6 of 2018
 2. There shall be a stay of execution of judgment in Githongo PMCC No. 6 of 2018 pending the hearing and determination of this appeal on condition that the Appellant/Applicant Shall:
 - a. Deposit KES. 1,000,000/- (one million) with the court within 14 days from today's date
 3. The record of appeal be filed and served within 60 days from today's date
 4. Costs shall abide the outcome of the intended appeal
 5. Appellants'/Applicants' counsel is once again reminded that court orders are not issued in vain and appeals arising from Githongo PMCC No. 7, 8, 9 10 and 11 of 2018 ought to be filed separately as directed by an order dated 01st December, 2022

DATED IN MERU THIS 29TH DAY OF FEBRUARY 2024

T.W. CHERERE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Appearances

Court Assistants - Kinoti/Munene

For Appellant - Mr. Mukami for Munene, Wambugu & Kiplagat Advocates

For Respondents - Ms. Asuma for Mutembei & Kimathi Advocates

