



REPUBLIC OF KENYA



**Kimaile v Musyimi (Suing as the sister and personal representative of Estate of Joseph Musyoki Musyimi (Deceased) & 2 others (Civil Appeal E125 of 2023) [2024] KEHC 1775 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1775 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E125 OF 2023  
MW MUIGAI, J  
FEBRUARY 22, 2024**

**BETWEEN**

**BENJAMIN MUISYO KIMAILE ..... APPLICANT**

**AND**

**ELIZABETH NDINDA MUSYIMI (SUING AS THE SISTER AND PERSONAL REPRESENTATIVE OF ESTATE OF JOSEPH MUSYOKI MUSYIMI (DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**MAKINDU MOTORS LTD ..... 2<sup>ND</sup> RESPONDENT**

**PETER MULEI T/A MULLEY'S SUPERMARKET LTD ..... 3<sup>RD</sup> RESPONDENT**

*(Judgment/Decree delivered on 25th May, 2023 by Honorable M. Opanga (P.M) sitting at Kangundo in Civil Suit No. 26 of 2019)*

**RULING**

**Background**

**Notice of Motion**

1. Vide a Notice of Motion under certificate of urgency dated 6th June, 2023 and filed in court on 9<sup>th</sup> June, 2023 brought under Section 3A, 79G and 95 of the *Civil Procedure Act* Cap 21 and Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010.
2. The applicant seeks orders that:
  1. Spent.
  2. Spent



3. This Court to stay the execution of the Judgment/Decree delivered on 25<sup>th</sup> May,2023 by Honorable M. Opanga (P.M) sitting at Kangundo in Civil Suit No. 26 of 2019 pending the hearing and determination of the Appellant's Appeal filed at the High Court of Kenya at Machakos.
  4. This Court allows the Applicant to furnish the Court with Security in the form of a Bank Guarantee from a Reputable Bank pending the full hearing and determination of this Appeal.
  5. The Application be heard inter- partes on such date and time as this Honorable Court may Direct.
  6. The costs of this Application abide the outcome of the Appeal.
3. The grounds upon which the application is premised are on the face of the said Application.

### **Supporting affidavit**

4. The application is supported by the affidavit sworn by Benjamin Muisyo Kimaile, who deposed that he is informed by their Insurance Company that on 25<sup>th</sup> May, 2023 the Court entered judgment against him and was held 100% liable. The Plaintiff was awarded pain and suffering: the deceased died on the same day and the court awarded 30,000; loss of dependency at 130,000 and Loss of expectation of Kshs. 1,720,000/= and Special Damages of Kshs. 16,650/= plus costs and interest at court rates.
5. Deposing that the Appellant was dissatisfied with the said whole judgment, their Insurance Company instructed M/S Kimondo Gachoka & Co. Advocates to Appeal against the said Judgment (annexed and marked was a Memorandum of Appeal).
6. He deposed that he is informed by their Advocate on record that the intended appeal is merited, arguable and it raises pertinent points of law thus it has overwhelming chance of success.
7. He lamented that they are reasonably apprehensive that the Respondent, as Decree Holder, may proceed and levy execution against them should the 30 days stay granted by the Trial court lapse. (annexed was a letter threatening execution and decree).
8. Lamenting further that he is informed by his advocate on record that the judgment is of substantial amount and they are apprehensive that if the Respondent is paid he may deal with the same in a manner prejudicial to him and if the Appeal is successful, they might not be able to recover the same from the Respondent.
9. Further, he deposed that he is advised by his Advocate on record that the Respondent has not disclosed nor furnished the court with any documentary evidence to prove his financial standing.
10. It was deposed that their Insurance Company is ready, willing and able to furnish the Court with a Bank Guarantee as Security to the Court. (annexed and marked copy of the bank guarantee from Family Bank).
11. That they stand to suffer great prejudice and irreparable substantial loss as there is a likelihood that they will not recover the decretal amount if it is paid over to the Respondents, before the determination of the Appeal already filed.

### **Grounds of Opposition**

12. The application was opposed by the grounds of opposition dated and filed in court on 22<sup>nd</sup> June,2023 wherein the following grounds were raised that:



1. The Applicant's application is frivolous incompetent and vexatious, bad in law, incurably defective, an abuse of the court process, an afterthought and brought in bad faith and brought after inordinate delay.
  2. The Appellant has not offered any meaningful security for costs as required in law and should be ordered to release to the Plaintiff/ 1<sup>st</sup> Respondent half of the decretal sum amounting to Kshs. 474,140/= and deposit the balance of Kshs. 474,140/= in a joint interest earning account within (14) fourteen days from the date of ruling of this application to demonstrate his seriousness as is the normal practice in the courts so that the interests of both parties is protected.
  3. The 1<sup>st</sup> Respondent objects to the bank guarantee security being proposed by the Appellant as it only protects the interests of the Appellant and not hers.
  4. The Respondent is a person of means and is a business lady and can refund the same in the event the appeal herein is successful.
13. The matter was disposed vide written submissions.

## **Submissions**

### **The applicant's written submissions**

14. The Applicant in his submissions dated 3<sup>rd</sup> July,2023 and filed in court on 5<sup>th</sup> July,2023, wherein counsel for the Applicant raised the following issues:
  - a. Whether the Defendant/Applicants have demonstrated that substantial loss will occur unless stay is granted.
  - b. Whether the application has been made without unreasonable delay;
  - c. Whether the Defendants/Applicants are ready to furnish such security as shall be sufficient to satisfy any decree that might ultimately be binding on the Applicant
15. As to Whether the Defendant/Applicants have demonstrated that substantial loss will occur unless stay is granted, counsel submitted that Benjamin Muisyo Kimaile in his Affidavit filed, in Paragraph 10 herein specifically stated that his Insurer is ready and willing to issue security in the form of a Bank Guarantee for 50% of the Judgment amount to be held by this Court pending the determination of the intended Appeal to enable the Applicants pursue their Appeal. The Insurer went ahead and provided the Bank Guarantee.
16. It was submitted that the Respondent has not disclosed his financial status and thus his means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicants' Appeal succeeds since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing. To buttress his position Counsel relied on the case of Edward Kamau & Another Vs Hannah Mukui Gichuki & Another [2015] eKLR and submitted that the in the absence of an affidavit of means, it may be construed that the Respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the Appeal succeed. To buttress this limb counsel relied on the cases of National Industrial Credit Bank Ltd Vs Aquinans Francis Wasike Court of Appeal Civil Application No. 238/2005 and Tabro Transporters Ltd Vs Absalom Dova Lumbasi [2012] eKLR.



17. On delay in filing Application, Counsel contended that there has been no inordinate delay on the part of the Applicant in appealing the matter as the same according to Counsel has been stated by Benjamin Muisyo Kimaile in his supporting affidavit.
18. As regards the Applicant's readiness to furnish security, it was submitted that the Applicant's Insurer is ready and willing to provide a bank guarantee as a security for stay of execution pending Appeal as stated in the Supporting Affidavit Paragraph 10. To buttress this limb Counsel placed reliance on the case of Empower Installations Limited Vs Eswari Electricals (pvt) Limited Interested Party Kenya Electricity Generating Co. Ltd [2016] eKLR.
19. Counsel prayed that they be granted an order of stay of execution pending the hearing and determination of aforesaid appeal.

### **Respondent's Submissions**

20. The Respondent in her submissions dated and filed in court on 12<sup>th</sup> July, 2023, wherein Counsel for the Respondent submitted that Respondent wished to rely on the grounds of opposition wholly except to add that no good and convincing reasons have been given by the Appellant to warrant the granting of the orders sought.
21. It was submitted that the Appellant has not offered any security for costs as required in law and should the unlikely event this application is allowed be ordered to release to the Plaintiff half of the decretal sum of Kshs. 474,140/= and deposit the balance of Kshs. 474,140/= in court account within thirty (30) days from the date of ruling of this application to demonstrate his seriousness as is the normal practice in the courts so that the interests of both parties is protected.
22. Contending that the Respondent objects to the Bank Guarantee security being proposed by the Appellant as both parties interest are not protected by it. Opining that the Respondent is a person of means and is a business lady and can refund the same in the event the Appeal herein is successful. Counsel requested this Honorable Court to dismiss the Appellant's Application dated 6<sup>th</sup> June, 2023 with costs to the Respondent. Counsel relied on the following cases *Ainushamsi Multiple Hauliers Agencies Limited Vs Francis Ndengwa & Another HCCA Misc, Application No. 59 of 2020*, *Victor Mwanja Robert & Another Vs Agnes Wambui Koigi HCCA Misc. Application No. 82 of 2020*, *Peter Kioko & Another Vs Elizabeth Wanza Musyoki HCCA Misc. Application No. E004 of 2021* and *Beatrice Munene Vs Molly Wangui Gitahi HCCA No. 249 of 2013*.

### **Determination/analysis**

23. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.
24. The issue that commends itself for determination is whether the applicant has demonstrated that the orders for stay of execution pending appeal are merited.
25. The guiding principles for grant of execution pending appeal are well established. These principles are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which is to the effect that:

“No order for stay of execution shall be made under subrule (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.”

26. The overriding objective espoused under Section 1A and 1B of the Civil Procedure Rules is enjoined to give effect to the exercise of Court’s powers under *Civil Procedure Act* or in the interpretation of any of its Provisions.
27. According to Section 1A(2) of the *Civil Procedure Act*, “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B, some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.” (Emphasis added)
28. In the case of Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal observed thus:

“whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. According to section 1A (2) of the *Civil Procedure Act*:

“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.” (Emphasis added)

29. It is therefore trite that an Applicant for stay of execution of Decree or any consequential orders thereto pending Appeal must demonstrate/and or satisfy the conditions set out under Order 42 Rule 6(2), aforementioned namely:
- 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.

### **Substantial Loss**

30. In James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, it was observed that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR.



This is so because execution is a lawful process. 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." (Emphasis added)

31. In the case before this Court, the Applicant submitted that the Respondent has not disclosed his financial status and thus his means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicants' Appeal succeeds since the Respondent has not disclosed nor furnished the court with any documentary evidence to prove his financial standing. On the other hand, the Respondent while relying on the grounds of opposition opined that the Respondent is a person of means and is a business lady and can refund the same in the event the Appeal herein is successful.
32. Platt, Ag. JA (as he then was) in case of Kenya Shell Limited vs. Kibiru [1986] KLR 410, at page 416 wherein he expressed himself as follows:

"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. 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 event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money." (Emphasis added)
33. Similarly, Gachuhi, Ag. JA (as he then was) at 417 held thus:

"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be" In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding" On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."
34. Regarding the contention that there was no evidence that the 1st Respondent would be able to refund the decretal sum if paid over to the Respondent, Hancox, JA (as he then was) in the above cited case expressed himself as follows:

"I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age." (Emphasis added).
35. From the foregoing case, the three Judges of Court of Appeal (as they then were) ably distilled the import of substantial loss noting that it is not sufficient to state the sum is a lot of money and the



Applicant will suffer loss if the money is paid. The Applicant must establish what loss it would be. Therefore, an allegation that a decree holder is a person of unknown means does not rob and/or deny the said decree holder from the enjoyment of the fruits of a judgement. The doctrine is and has been that courts are enjoined not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.

36. More importantly, suffice to say as was held in *Stephen Wanjohi vs. Central Glass Industries Ltd.* Nairobi HCCC No. 6726 of 1991, that

“Financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income”

37. In the present case, Applicant’s apprehension that the Respondent will not be able to refund the decretal sum if paid over to her and the appeal succeeds, is based on the fact that the Respondent’s financial means is unknown. In my considered view, where the sum involved is a large amount the court may have regard that the payment of such a sum may hinder the Applicant’s ability to pursue his appeal which may as well render the said appeal nugatory. In the instant case the amount involved is more than Kshs 1million. However, it has not been alleged by the Applicant that payment of the said sum may adversely affect the financial position of the Applicant or his insurer. Accordingly, it is my considered view that the Applicant will not suffer substantial loss in the event that the decretal sum is paid to the Respondent.

38. On the issue of security, it is a requirement under Order 42 Rule 6 Civil Procedure Rules aforesaid, that the applicant is to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder

39. In the case of *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.” (Emphasis added)

40. Further *Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, the court stated that:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered



the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.” (emphasis added).

41. The Court of Appeal in *Nduhiu Gitahi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

42. In the instant case the Applicant is ready, willing and able to furnish the court with a bank guarantee as security provided by his Insurer, Directline Insurance. The Bank Guarantee given is from the Family Bank. As to the appeal being brought without unreasonable delay, I find no delay occasioned in bringing the appeal herein.

### **Disposition**

1. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff I grant a stay of execution of the decree herein in the following terms:
  - a. The Applicant pays to the Respondent through the advocate on record half of the decretal sum and give a bankers guarantee to pay the remaining half.
  - b. The said conditions (a) to be met within 90 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.



- c. The Appeal is deemed as filed as per Memorandum of appeal filed on 9/6/2023
- d. The Lower Court File and typed proceedings are enclosed and availed.
- e. The Appeal shall be prosecuted within 90 days in default it shall stand dismissed.
- f. The costs of the application abide the outcome of the Appeal.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

In the presence of:

No appearance - for the Applicant

No appearance - for the Respondent

Geoffrey/Patrick - Court Assistant(s)

