



**Matravic General Supplies v Masika (Civil Appeal E169 of 2023)
[2024] KEHC 5329 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E169 OF 2023
MW MUIGAI, J
APRIL 30, 2024**

BETWEEN

MATRAVIC GENERAL SUPPLIES APPELLANT

AND

ANNIE MBAIKA MASIKA RESPONDENT

*(Being an Appeal from the judgment of Hon. Martha Opanga (Principal Magistrate)
in Kangundo CMCC No. E016 of 2021 dated and delivered on 23rd June, 2023)*

RULING

Notice Of Motion Application

1. Vide application dated July 18, 2023 brought under section 1A, 1B, 3A and 95 of the [Civil Procedure Act](#), order 50 rule 6 and order 51 of the [Civil Procedure Rules, 2010](#) the appellant/
2. Applicant seeks the following orders, that;
 - a. Spent
 - b. Spent
 - c. The Court to stay the execution of the judgment delivered by the Trial Court on 23/06/2023 in Kangundo Chief Magistrate Court Civil Suit No. E16 of 2021 pending the hearing and determination of the Appellant's Appeal.
 - d. The costs of and incidental to this Application be provided for.
3. The Application is supported by an affidavit sworn by Peter Makau a Principal Legal Associate of the Appellant/Applicant herein sworn on July 18, 2023 stating that the Appellant/Applicant being dissatisfied with the judgment of the Trial Court intends to appeal the decision and has in this regard lodged a Memorandum of Appeal to that effect. It was deposed that the intended Appeal has high



chances of success and the stay of execution lapses on August 23, 2023 wherein after the Respondent shall be at liberty to execute hence subvert the ends of justice. In addition, the appellant/applicant undertakes to lodge its record of appeal expeditiously and comply with the conditions set by the court

Replying Affidavit

4. The Respondent opposed the application through a replying affidavit sworn on August 10, 2023 deposed by Annie Mbaika Masika in which she stated that the instant matter proceeded for hearing on merit on 23/08/2022 and 14/03/2023 before the Trial Court whereupon both parties were represented by their counsels on record and thereafter the Trial court based on the evidence tendered entered judgment in favour of the Respondent in the ratio of 100% liability and awarded the Respondent Kshs.161,550/- plus costs and interests. It was deposed that the award was just and not excessive and further that the Applicant had not fulfilled any proof of security and finally that the memorandum of appeal does not raise any reasonable grounds of appeal hence this appeal is merely meant to frustrate the Respondent's efforts of reaping the fruits of the judgment.
5. The Application was canvassed by way of written submissions.

Appellant's/applicant's Submissions Dated December 4, 2023

6. On the issue of whether the Appeal herein is arguable it is submitted that the Respondent herein failed to prove its case on a balance of probabilities. In addition the Trial Magistrate failed to consider the Appellant's written submissions, there was no concrete evidence placed before court to determine how the accident occurred and who is to blame for causing the said accident. It was submitted that the Appellant/Applicant stands to suffer loss and whether the intended appeal will be rendered nugatory if stay is not granted.
7. Secondly, it was submitted that the Respondent herein failed to provide her financial ability sufficiently hence may not be able to repay the contested sum of kshs.161,550/- the Appellant in event the Appeal succeeds. Reliance was made on the case of *Dickson Muricho Muriuki v Timothy Kagonda Muriuki & 6 others* [2013]
8. The Appellant/Applicant also submitted that it is willing to deposit the decretal sum into a joint interest account or with the Court.

Respondent's Submissions Dated February 7, 2022

9. On behalf of the Respondent, it is submitted that the Appellant/Applicant has not demonstrated any substantial loss that he may suffer if stay of execution is not granted as prayed.
10. On the issue of proof of security it is submitted that in the instant case the appellant/applicant has not demonstrated how they will furnish security what they have stated only remains a statement with no sufficient proof of the same.
11. On the issue of irreparable loss the Appellant/Applicant has not stated the prejudice he will suffer if the application is not granted as prayed and therefore he should be ordered to pay half the decretal sum to the Respondent and deposit half to the joint interest earning account pending the determination of this appeal. Reliance is made in the cases of *Elena Doudoladova Korir vs Kenyatta University* [2014] e KLR, *Antoiye Ndiaye vs African Virtual University* [2015] e KLR and *Amal Hauliers ltd vs Abdulnasir Abukar Hassan* [2017] eKLR



Determination

12. I have considered the Application, the corresponding affidavits and the submissions of parties on record and I find that the issue for determination is whether the court should issue an order of stay of execution pending the hearing and determination of the appeal.
13. Order 42 rule 6(1) and (2) of the [Civil Procedure Rules, 2010](#) is a proviso on stay of execution, it provides as follows:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the Court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) 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.”
14. The first issue is whether the application has been filed without unreasonable delay. I note that the judgment was delivered on 23.6.2023 in the presence of advocates for parties and the court granted stay of execution for 30 days. This application was filed on July 20, 2023 and the memorandum of appeal on July 20, 2023. There is no appeal and this Application has been filed about 27 days after the judgment was delivered. I find that there was no inordinate delay and therefore this ground succeeds.
15. Secondly, the Applicant has stated that he stands to suffer loss if the orders sought are not granted but has not demonstrated how exactly it will suffer. It was contended that he was apprehensive that the Respondent will proceed to execute at any time. On the other hand, the Respondent contends that substantial loss has not been demonstrated.
16. Substantial loss was discussed in the case of [James Wangalwa & another vs. Agnes Naliaka Cheseto](#) [2012] eKLR, as:

“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.”



17. Similarly in the case of *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.”

18. On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted as submitted by the Applicant, I beg to differ. The onus of proving the Respondent’s inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in *Stephen Wanjohi vs. Central Glass Industries Ltd.* Nairobi HCCC No. 6726 of 1991, 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.

19. On the issue of security, furnishing of security is key in getting orders of stay pending appeal. The Applicant not indicated what kind of security he is willing to furnish the court with and has only indicated that he is willing to comply with the order of the court.

20. In *Machira T/A Machira & Co Advocates vs. East African Standard* (No 2) [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

Disposition

1. In the circumstances, I hereby grant stay pending the hearing and determination of the Appeal on condition that the Applicant pay the Respondent half the decretal sum within 90 days and;
2. Deposit the other half in a Bank Guarantee.

It is so ordered.



RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT MACHAKOS THIS 30TH DAY OF APRIL, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M. W. MUIGAI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the Presence of:

Mr. Maina - For the Applicant

No Appearance - For the Respondent

Geoffrey - Court Assistant(s)

