



REPUBLIC OF KENYA



KENYA LAW
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**Mutuku v Kiamba (Civil Appeal E206 of 2023)
[2024] KEHC 5330 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E206 OF 2023**

**MW MUIGAI, J
APRIL 30, 2024**

BETWEEN

JAMES MULAKO MUTUKU APPELLANT

AND

MARY NDUKU KIAMBA RESPONDENT

RULING

Notice of Motion Application

1. Vide application dated 29/09/2023 brought under Section 3A, 79G and 95 of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and order 51 Rule 1 and 3 of the [Civil Procedure Rules, 2010](#) the 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 3rd August 2023 in Kithimani SPM's Court Civil Suit No 14 of 2022 pending the hearing and determination of the Appellant's Appeal.
 - d. Spent
 - e. This Court allows the Appellant Applicant to furnish the Court with Bank Guarantee as security pending the full hearing and determination of this Appeal and instant application.
 - f. The costs of this Application abide the outcome of this Appeal.
2. The Application is supported by an affidavit sworn by James Mulako Mutuku on 29.09.2023 in which he stated that he is aware that judgment in Kithimani Civil suit Number 14 of 2022 was delivered on 3/08/2023 in favour of the Respondent herein in the following terms; liability 100%, general damages



Kshs.200,000/- and special damages Kshs.7,550/ plus costs and interest. The Applicant contends that the said judgment on quantum was excessive and the appeal has a high chance of success if the appeal is upheld. It was contended that he is apprehensive that the Respondent may commence executing at the lapse of 30 days hence rendering this appeal nugatory and he stands to suffer irreparable loss and damage.

3. The Applicant contends that this application has been presented without inordinate delay, the underwriter is ready, willing and able to give bank guarantee as security for the entire judgment award. It was contended that the Respondent had not disclosed nor furnished the Court with any documentary evidence to prove his financial standing hence may not be able to refund the amount.

Replying Affidavit

4. The Respondent opposed the Application through a Replying Affidavit sworn on 18.10.2023 deposed by Mary Nduku Kiamba in which she stated that the Appellant/Applicant has come to Court with unclean hands and does not deserve the exercise of the Court's discretion as he has not fulfilled all the requirements for stay of execution but he is only aim is to deny the Respondent her fruits of justice that are rightly deserved. Further that the Appellant/Applicant's opinion that the award is excessive does not in any way demonstrate substantial loss.
5. The Respondent contends that he is able and willing to refund the decretal amount to the Appellants as she is a renowned business lady at Sofia market near Matuu running a wholesale shop and that the Appellant/Applicant herein had been given ample time from the date of the Trial Court Judgment to settle the decretal amount but he has not taken any steps to indulge the Respondent's Advocates on any form of settlement and/or payment plan.
6. As regards the bank guarantee attached, it was deposed that its validity is only 12 months from 6/07/2023 and there is no guarantee that the same will be renewed yet no party knows how long the Appeal will take before it is heard and determine and finally the Appellant/Applicant should be compelled to pay half of the decretal amount being Kshs.145,625 as per tabulation dated 7/08/2023 which was served upon the Appellant/Applicant and the balance be deposited in an interest earning account in the joint names of the Advocates on record.
7. The Application was canvassed by way of written submissions.

Submissions

8. The Appellant did not file submissions.
9. The Respondent filed submissions dated 13.02.2023 and submitted that the Appellant/applicant has not demonstrated any substantial loss that he may suffer if stay of execution is not granted as prayed. Reliance is made in the case of *Century Oil Trading Co. ltd v Kenya Shell limited* Nairobi (Milimani) HCMA No. 1561 of 2007, *Kenya Shell Limited v Benjamin Karuga Kibiru* [1986] KLR 410
10. Secondly, it was submitted that the mere allegation that the Respondent is not of means does not necessarily justify her being barred from benefiting from the fruits of her judgment. Reliance is made in the cases of *Machira t/a Machira & Co. advocates v East African Standard (No.2)* [2002] KLR 63 and *Victory Construction v BM (a minor suing thro' next friend on PMM)* [2019] eKLR.



11. On the issue of proof of security it is submitted that in the instant case no security has been offered for the entire decretal amount. Reliance is made in the case of *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR where 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.”

12. On the issue of whether the application has been made without unreasonable delay, the application herein was filed on 3rd October, 2023, 2 months after the Trial Court Judgment was delivered. The Appellant/Applicant has not stated the reason for delay in filing this application therefore the application should be dismissed.

Determination

13. I have considered the Application, the grounds of opposition and the submissions on record and I find that the issue for determination is whether this court should issue orders of stay of execution.

14. Stay of execution is espoused under Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules, 2010* which 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.”

15. The principles drawn from the above section can be summarized into three. The first issue is whether the application has been filed without unreasonable delay. I note that Judgment in Kithimani in CMCC No 14 of 2022 was delivered on 03.8.2023 while the current application was filed on 03.10.2023, two months later. I find that there was a delay but it was not inordinate.



16. Secondly, the Applicant has stated that he stands to suffer loss if the orders sought are not granted but I agree with the Respondent to the extent that the Applicant has not demonstrated how exactly it will suffer. Substantial loss was discussed in the case of *James Wangalwa & Another v 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. On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted, I am inclined to agree with the Respondent. 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 Wanjobi 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.

18. On the issue of security, furnishing of security is key in getting orders of stay pending appeal. The purpose of security was clearly enunciated in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

19. The Applicant has indicated that he is insurer is willing to deposit security on his behalf in the form of a bank guarantee. The Court has a duty to balance the rights of both parties. The Bank guarantee between Family bank and the Applicant’s insurance company, Directline Assurance Company Limited is for a period of 12 months from 6th July 2023, there is no guarantee for renewal and realistically speaking, the appeal and execution process will not be complete. There is thus no guarantee that the interests of the Respondents will be catered for.

20. In in *Mwaura Karuga T/A Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where it was said:

“... 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, HCCA E050.21 Page 19 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.”

21. I associate myself with the finding in the case of *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, observed thus:-

“... 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 decree 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 ... Thus 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. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

22. The decretal amount in this case was Kshs.200,000 being general , Kshs. 7,550 of special damages, costs and interests.

Disposition

1. In the circumstances, I hereby grant stay pending the hearing and determination of the Appeal on condition that the Applicant Deposit the full amount in the form of a Bank Guarantee within 90 days failure to which the order of stay lapses.

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

JUDGE

In the presence of:

Mr.Musyimi h/b Mwilhia - for the Respondent

Mr. Kimondo - for the Respondent

Geoffrey/patrick - Court Assistant(s)

