



REPUBLIC OF KENYA



**Mwanzia v Kimanzi (Civil Appeal E145 of 2023)
[2024] KEHC 4545 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E145 OF 2023**

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

BETWEEN

SYLVIA MUNEE MWANZIA APPELLANT

AND

**FLORENCE MUTUA MWELU KIMANZI ALIAS FLORENCE
MUTANU RESPONDENT**

*(Being an Appeal from the judgment on quantum of the Hon. A. Nyoike (SPM)
at Machakos CMCC No. 103 of 2023 dated and delivered on 24/05/2023)*

RULING

Notice of Motion Application

1. Vide application dated 27/06/2023 brought under Section 3A, 79G and 95 of the [Civil Procedure Act](#) (Cap 21) Order 22 Rule 22, Order 42 Rule 4, 6 & 7, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the [Civil Procedure Rules, 2010](#) and all enabling provisions of the law the Applicant sought the following orders, that;
 - a. (Spent)
 - b. (Spent)
 - c. The Court to grant stay of execution of the judgment in Machakos CMCC No E103 of 2021 delivered on 24/05/2023 by Hon. A. Nyoike (SPM) pending the hearing and determination of the Appellant's Appeal.
 - d. (Spent)
 - e. That the Appellant/Applicant be allowed to furnish the Court with Bank Guarantee as security pending the hearing and determination of the intended appeal.



- f. The costs of this Application abide the outcome of the Appeal.
2. The Application is supported by an affidavit sworn by Sylvia Munee Mwanzia the Appellant herein sworn on 27th June 2023 stating as follows; that the judgment in the Trial Court was delivered on 24/05/2023 in favour of the Respondent and the Respondent was awarded general damages of Kshs 1,134,550/- plus costs and interest; the said judgment on quantum is excessive and has a high chance of success if the appeal is upheld; there is imminent threat of execution by the Respondent to execute the judgment; the Appellant being dissatisfied with the judgment of the Trial Court has in this regard lodged a Memorandum of Appeal to that effect; the application has been presented without inordinate delay; the Appellant's underwriter is ready, willing and able to give bank guarantee as security pending hearing and determination of the intended appeal; the Respondent is a person of unknown means hence if the decretal sum is paid out, the appeal will be rendered an academic exercise; that the intended Appeal has high chances of success; if stay of execution is not granted the Appellant will suffer irreparable loss and damages; the Appellant's underwriter Ms Directline Assurance Company Ltd herein is willing to provide security in form of a Bank Guarantee as a security from Family Bank pending the entire period of stay.

Replying Affidavit

3. The Respondent filed a Replying Affidavit sworn on 13/07/2023 by Munyoki Muthangya in which he stated that he is an Advocate of the High Court and in personal conduct of this matter on behalf of the Respondent herein; the Appellant do not oppose the Application but sought the following stay conditions that; (a) the Appellant to pay half of the judgment sum together with costs of the suit to the Respondent being Kshs 657,597.50 and (b) the balance of Kshs 657,597.50 be deposited in a joint – interest earning account in the names of both Advocates and (c) in default of compliance execution to issue without reference; the Appellant was served with a draft decree but has not raised any objection to the same and the same has been filed in Court for endorsement and lastly the Respondent is opposed to issuance of a Bank Guarantee as security since the guarantee does not provide security of interests which is part of the decree of the Court.
4. The Application was canvassed by way of written submissions.

Appellant's Submissions dated 13.10.2023

5. On behalf of the Appellant it is submitted that the Decretal amount awarded to the Respondent should await the outcome of the Appeal.
6. It is further submitted that this Court to make determination on stay conditions.

Respondent's Submissions dated 14.02.2024

7. On behalf of the Respondent, it is submitted that the Bank guarantee proposed by the Appellant denies the Respondent the right to enjoy full fruits of her judgment of the Trial Court.
8. The Appellant will suffer no prejudice if the money guaranteed by the Bank is deposited in a joint interest earning account.

Determination/Analysis

9. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.



10. The application is premised on Order 42 rule 6(2) of the [Civil Procedure Rules, 2010](#) provides that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings 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 sub rule (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.

11. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See [Vishram Ravji Halai v Thornton & Turpin](#) Civil Application No Nairobi 15 of 1990 [1990] KLR 365.

12. The court, in [RWW v EKW](#) [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

13. The only issue necessary for determination would be whether the application seeking stay of execution is merited.

Substantial Loss

14. On the first condition, the court in [Tropical Commodities Suppliers Ltd and others v International Credit Bank Limited \(in liquidation\)](#) (2004) EALR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”



15. In *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -
- “...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”
16. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:
- “Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”
17. The Applicant’s contention is that there was an imminent threat of execution by the respondent unless the court issues an order of stay of execution, the Applicant will suffer substantial loss and the appeal will be rendered nugatory.
18. Odunga J. in *George Kimotho Ilewe Anastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)* stated that:-
- “It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant’s business.” See in Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR.
19. Gichuhi, Ag.JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at 417 held:
- “It is not sufficient by merely stating that the sum of Kshs 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.”
20. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.
21. The Court notes that despite the Respondent not stating in his affidavit whether he is capable of refunding the decretal amount or furnishing the court with documentary evidence if paid to him, the Applicant has not demonstrated what substantial loss she will suffer. The Applicant has simply stated that there was an imminent threat of execution which will render the appeal an academic exercise.
22. The Court is of the view the Applicant/Appellant has not demonstrated the substantial and/or irreparable damage and loss they will suffer. The ground thus fails.



Unreasonable Delay

23. On the second condition, the Applicant stated that her application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgement of the Trial Court was entered on 24.05.23 and the application was filed On 30. 06.23. A month and some few days later is not unreasonable delay.
24. The court finds that there is no undue delay in filing the application herein.

Furnish Security

25. The Applicant stated that her underwriter was ready, willing and able to give a bank guarantee as security pending the hearing and determination of the application and intended appeal, the Respondent in his replying affidavit that she was opposed to issuance of a bank guarantee as security as it was insufficient security to the decretal sum meant to prejudice the respondent's award
26. The Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

27. It follows therefore that it is the discretion of the court to determine the security.

Disposition

In the premises: -

- a. There will be a stay of execution pending the appeal on condition that the Applicant remits to the Respondent half of the decretal sum and balance of the decretal sum be secured by a valid bank guarantee issued within 90 days from the date hereof and in default, the application for stay shall stand dismissed.
- b. The costs of this application abide the outcome of the appeal.

It 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

