



Conken Freighter Limited & another v Mutungi (Suing as Administrators of the Estate of Sila Mutiso - Deceased) (Civil Appeal E173 of 2024) [2024] KEHC 9373 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E173 OF 2024**

**FR OLEL, J
JULY 30, 2024**

BETWEEN

CONKEN FREIGHTER LIMITED 1ST APPELLANT

MOHAMMED KATANA 2ND APPELLANT

AND

JAMES MUTISO MUTUNGI (SUING AS ADMINISTRATORS OF THE ESTATE OF SILA MUTISO - DECEASED) RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 2nd July 2024 brought pursuant to provisions of Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law and the main prayer sought is prayer (2) that this court be pleased to issue an order of stay of execution of the judgment/decree issued in MAVOKO SRMCC NO E838 OF 2021 pending the hearing and determination of the appeal filed herein. The application is supported by a supporting affidavit dated 2nd July 2024, sworn by one Abdul Mutwalib About Abdalla.
2. This application is opposed by the Respondent who filed Replying Affidavit's dated 16th July 2024. He maintained that the said application was misconceived and the applicant had not met the conditions for granting stay under Order 42 Rule 6(2)(b) of the *Civil Procedure Rules, 2010*. The Appellant took part in the proceedings before the trial court and never raised any issue regarding jurisdiction of the court. This application was therefore brought in bad faith to deny him freedom to enjoy the fruits of his judgement.



Analysis & Determination

3. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issue which arise for determination is whether this court should grant stay of execution of the Judgment/Decree dated 27th September 2023 issued in Mavoko CMCC No E838 of 2021.
4. Stay of Execution is provided under Order 42 Rule 6 of the [Civil Procedure Rules 2010](#) 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.”
5. The three conditions to be fulfilled can therefore be summarized as follows;
 - a. that substantial loss may result to the applicant unless the order is made
 - b. application has been made without unreasonable delay
 - c. security as the court orders for the due performance
6. These principles were enunciated in [Butt v Rent Restriction Tribunal](#) [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
 - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
7. To the foregoing I would add that an order of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay shall also consider the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, to enable court give effect to the overriding objective, while in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman v. Amboseli Resort Limited [2004] 2 KLR 589.
8. The judgment before the trial Magistrate was delivered on 27th September 2023, the Appellant applied to have it set aside on grounds that the court lacked jurisdiction, based on the provisions of the work injury Benefits Act and their application was dismissed on 26th June 2024, hence this Appeal, which was filed on 3rd July 2024. Thus, it can be said that this appeal and application for stay of execution have been file timeously.
9. On the likelihood of suffering substantial loss, it was sufficient if an applicant seeking a stay of execution demonstrated that he/she would have to go through hardship to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful. See G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another (2010) eKLR , National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another (2006) eKLR.
10. Guided by the above authorities and in the absence of the requisite proof from the Respondent that he is a person of means, I find that the Appellant has satisfied this court that they would suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
11. On the security, the Appellant has indicated that he is ready and willing to abide by this courts orders as to security for due performance of the decree. In particular they stated that they had deposited Kshs.500,000/= as security before the lower court. This averment is not denied by the respondent.
12. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See Attorney General v Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008; Kenya Shell Ltd v Kibiru & another (Supreme); Mukuma v Abuoga (1988) KLR 645.

Disposition

13. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, I do grant stay of execution of the decree herein on condition that;
- a. The Appellant security deposited in the primary matter (Mavoko CMCC No E838/2021) being the sum of Kshs.500,000/= shall be retained as security for this Appeal.
14. The costs of this Application will be in the cause.



15. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF JULY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 30TH DAY OF JULY, 2024.

In the presence of: -

Mr Kenzi for Appellant

Mr. Mulandi for Respondent

Susan/Sam Court Assistant

