



REPUBLIC OF KENYA



KENYA LAW
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**Company v Ashiundu (Civil Appeal E138 of 2024)
[2024] KEHC 13211 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E138 OF 2024
S MBUNGI, J
OCTOBER 31, 2024**

BETWEEN

MADISON INSURANCE COMPANY APPELLANT

AND

WINSTONE LIHANDA ASHIUNDU RESPONDENT

RULING

1. The appellant filed a motion dated 15.08.2024 under Certificate of Urgency seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. There be an order of stay of execution in Mumias SPMCC number E61 of 2022 pending the hearing of this application inter parties.
 - e. There be an order of stay of execution of the decree in Mumias SPMCC number E61 of 2022 pending the hearing and determination of this appeal.
 - f. The costs of this application be in the cause.
2. The application was premised on the following grounds: -
 - i. The lower court entered judgment for the Respondent against the Appellant on 11th of July 2024.
 - ii. The Appellant being dissatisfied with the judgment preferred an appeal before this Honorable court.



- iii. The appeal filed has merits, raises triable issues and has high chances of success.
 - iv. There are no orders of stay of execution in place and the Appellant is apprehensive that the Respondent may resort to executing the decree anytime now.
 - v. In the event that execution is levied against the Appellant the appeal filed will be rendered nugatory and the Appellant will suffer irreparable loss.
 - vi. It is therefore in the interest of justice that orders sought by the Appellant be granted.
3. The application was supported by an affidavit sworn by one Moses Barasa where he stated that the appellant was ready and willing to give an insurance bond or a bank guarantee as a condition for the grant for the orders of stay of execution pending appeal.
 4. The appeal was canvassed by way of written submissions.

Appellant's Case.

5. Vide submissions dated 17.09.2024, the appellant submitted that the grounds raised in the memorandum of appeal were sufficient to prove that the appellant had an arguable appeal and grant the orders sought; citing the case of *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others*(2013)eKLR and *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*(2016)eKLR among other citations.
6. It was the appellant's submission that as per Order 42 Rule 6 of the *Civil Procedure Rules*, there was no inordinate delay on the appellant's part in filing the application, further submitting that the lower court judgment was delivered on 11.07.2024, the memorandum of appeal filed on 06.08.2024 and as thirty days stay of execution was granted by the lower court, the instant application was filed on 15.08.2024.
7. Further, the appellant reiterated as was deponed in the supporting affidavit that they would suffer irreparable loss if the appeal would be rendered nugatory.
8. On the issue of security as per the requirements of Order 42 rule 6(2), the appellant submitted that they were willing and ready to abide by the court orders should the Honorable Court deem it fit to order the same.

Respondent's Case.

9. The respondent filed submissions and a replying affidavit dated 18.09.2024 where he stated that the appellant ought to have given an offer of depositing decretal sum in court pending hearing of appeal, or approached the respondent's counsel over the insurance bond.
10. The respondent highlighted two main issues for determination.
11. On whether there should be stay of execution of decree pending hearing of appeal, the respondent submitted that the appellant had not demonstrated what substantial loss he stands to suffer, or that he is willing to offer security for due performance of the decree as per Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules*.
12. The respondent further submitted that the stay ought not be granted as there was no justification in holding that there is likelihood that the appellant would be able to repay the decretal sum in the event the appeal succeeds.



13. On the issue of costs, the respondent submitted that the costs of the suit should be granted to the respondent, citing Section 27 of the [Civil Procedure Act](#).
14. The respondent stated that the application lacks merit and should be dismissed.

Analysis and Determination.

15. I have looked at the application and submissions by both parties. The main issue for determination is whether this court should issue stay of execution to the applicant.
16. Order 42 rule 6 of the [Civil Procedure Rules](#) states as follows: -
Stay in case of appeal [Order 42, rule 6.]
 1. 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 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.
 3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 5. An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 6. Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
17. The power of a court to grant stay of execution is discretionary as correctly submitted by the Respondents. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court’s decision. (see [Butt v. Rent Restriction Tribunal](#) [1979]).
18. From the parties’ submissions, the judgment in the trial court was delivered on 11.07.2024. The appellant filed a memorandum of appeal in this court on 06.08.2024 and this application filed on 15.08.2024 thus I find that there was no inordinate delay in filing.



19. Secondly, the applicant has stated that they stand to suffer loss if the orders sought are not granted, but has not demonstrated how exactly it will suffer. In the case of *Good News Church of Africa v Board of Management Eldoret Secondary School* [2021] eKLR the court stated as follows :-
- “Substantial loss is a key consideration in an application for stay of execution and stay of proceedings. The applicant must establish the loss which he/she will suffer if such orders are not granted.”
20. On the issue of security, the applicant has also submitted their willingness and readiness to comply with the directions to be given by this honorable court. In the case of Joseph Schmaderer (*supra*), the court stated as follows with regard to security: - “... On the other hand, the Applicant's in their Supporting Affidavit at paragraph 8 have stated that they are ready to furnish such reasonable security as shall be ordered by court. 33. The offer of security by the Applicant is bona fides that the stay application is not a mere exercise to deny the Respondent the fruits of its judgments. The offer for security therefore satisfies a ground for stay. This is as was held in the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* (2018] eKLR...”
21. The court in the case of Richard Muthusi (*supra*), stated as follows on the issue: “...It is deposed in supporting Affidavit that applicants are ready and willing to offer such security as the court may deem fit, proper and just in the circumstances, including depositing the decretal sum in a joint interest earning account by the corresponding firm of advocates pending the outcome of the present appeal. 19. This will secure the interests of both parties without and bias. The Defendants/Applicants have satisfied the threshold required for an application to be allowed.”
22. The above analysis makes me find that the applicant has made out a case to warrant this court to exercise its discretion in its favor. I will allow the application in terms of prayer (e) on condition that the appellant/applicant deposits the decretal amount awarded in the lower court in a joint interest earning account in the names of the advocates representing the parties pending the outcome of the appeal. The decretal amount to be deposited within the next 60 days from this date of the ruling.
23. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 31ST DAY OF OCTOBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Appellant/applicant – absent

Respondent - absent

Court Assistant – Elizabeth Ang’onga

