



**Wambua v Jumer Metal Fabricators Ltd (Civil Appeal E182 of 2022)
[2023] KEHC 1739 (KLR) (Commercial and Tax) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E182 OF 2022
JWW MONG'ARE, J
FEBRUARY 27, 2023**

BETWEEN

MARY KALUKI WAMBUA APPELLANT

AND

JUMER METAL FABRICATORS LTD RESPONDENT

*(An appeal from the judgement of Honourable Mr. M. Mutua delivered on
11th November, 2022 in Nairobi Milimani Small Claims NO. 962 OF 2022)*

JUDGMENT

1. Before the court is the appellant's notice of motion application dated 24th January 2023 brought under section 3, 3A & 63 of the [Civil Procedure Act](#), Order 42, Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010.
2. The Appellant prayed for a stay of execution of the decree ensuing from the judgement delivered on November 11, 2022 in Small Claim Number 962 of 2022 pending the inter parte hearing of this application and pending the determination of this appeal.
3. The grounds of the application are found in its body and the supporting affidavit sworn by the appellant on January 24, 2023.
4. The grounds included that judgment was entered on November 11, 2022 in favour of the respondent for the sum of Ksh.364,500 which the Appellant has now appealed against.
5. As can be discerned from the record of Appeal, the dispute arose from a contract for the supply metallic doors, windows and gates for a total price of Ksh.330, 500/-; by the respondent to the appellant.



6. Subsequently there appears to have been a change of mind by the appellant who confirms that she made part payment of the contract sum and took partial delivery of the goods under the contract to the tune of Ksh.139, 500.
7. The Small Claims Court having heard both parties ordered the appellant to pay for the entire agreed price and entered Judgment in favour of the respondent against the appellant. It is from the above judgment that the appeal herein was lodged. The Appeal is opposed.
8. Both parties have filed their written submission and argued the application for stay pending appeal before me. Having considered the submissions and all the documents and authorities in support thereof, I find that one issue emergence for determination, to wit; whether the appellant has met the threshold for the grant of a stay of execution.
9. The Civil Procedure Rules under Order 42 Rule 6 of the Civil Procedure Rules, the element for which a court must consider before a grant of stay of execution pending appeal is provided as follows: -
 - “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.”
10. A party seeking an order for stay of execution pending appeal must prove the conditions set out above: -
 - i. That he/she will suffer substantial loss unless a stay is granted.
 - ii. That the application has been made without unreasonable delay and;
 - iii. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
11. The judgement entered by the Small Claims Court was delivered on November 11, 2022 and the present application is dated January 24, 2023. A period of about 2 months lapsed before this application was filed, I find that there was no inordinate delay in doing so.
12. The second consideration is whether the appellants have illustrated that they will suffer substantial loss if the stay is not granted.
13. The appellant submitted that she stands to be adversely prejudiced unless the orders sought are granted and that a denial of these orders would mean that the appellant is condemned to pay for goods that were not supplied to her.
14. On the other hand, the respondent submitted that the applicant did not adduce any evidence or set out factual circumstances to demonstrate that she would suffer substantial loss if the appeal succeeded and that she only made a generalised statement that it would suffer substantial loss.
15. In the case of *Mukoma v Abuoga* (1998) KLR 645 it was held:
 - “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”



16. The case of *Antoine Ndiaye v African Virtual University* [2015] eKLR, described what should be illustrated to prove substantial loss. It held:

“So the applicant must show that he will be totally ruined in relation to the appeal if he pays over the decretal sum to the respondent. in other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back.”

17. I am further guided by the decision of the Court of Appeal in the case of *Housing Finance Company of Kenya v Sharok Kber Mohamed Ali Hirji & another* [2015] eKLR it was stated: -

“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgement in their favour and their rights are safeguarded.”

18. In seeking to balance the interests of the appellant, who has a right of appeal, and the respondent who has the right to execute a favourable decree, I am of the view that the balance tilts in favour of the respondent as the appellant has not demonstrated how it will suffer substantial loss in the event the stay is granted.

19. I also find that this being a contractual dispute whose value is quantifiable therefore in the event that the appellant’s appeal is successful, damages can be a sufficient remedy to the appellant.

20. The third limb for a grant of stay of execution is the provision of security by the applicant for the due performance of a decree that may be binding on it. Due to the circumstances of this case, the court finds no reason to order the payment of security of any amount by the appellant.

24. Having considered all factors in the application before me and evaluated the parties’ pleadings and their submission I am persuaded that the application dated January 24, 2023 brought under a certificate of urgency is not merited and is hereby dismissed with costs to the respondent.

25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF FEBRUARY 2023

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J.W.W.MONGARE

JUDGE

In the presence of:-

Mr. Okello for the applicant.

Mr. Owiti for the respondent

