



**Diani Road Developers Limited v Maharage (Civil Appeal E741 of 2022)  
[2023] KEHC 1296 (KLR) (Civ) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1296 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E741 OF 2022**

**JK SERGON, J**

**FEBRUARY 23, 2023**

**BETWEEN**

**DIANI ROAD DEVELOPERS LIMITED ..... APPELLANT**

**AND**

**CHANDE MAHARAGE ..... RESPONDENT**

**RULING**

1. This ruling is premised on the notice of motion dated November 3, 2022 taken out by the appellant/ applicant and supported by the grounds laid out on its face and the facts stated in the affidavit of Nasser Nyambane Nyamweya, director of the applicant. The applicant sought for an order for a stay of execution of the judgment delivered by the Small Claims Court in Nairobi SCCCOM No 932 of 2021 on August 23, 2022 pending the hearing and determination of the appeal.
2. In retort to the said motion, the respondent filed the grounds of opposition dated December 13, 2022 featuring seven (7) grounds.
3. At the interparties hearing of the motion, this court directed the parties to put in written submissions. Nevertheless, at the time of writing this ruling, none of the parties' submissions had been availed for this court's reference and hence this court could only rely on the material which was placed before it.
4. I have considered the grounds laid out on the body of the motion; the facts deponed to in the supporting affidavit; and the grounds of opposition.
5. Before I consider the merits of the motion, I note from a reading of the grounds of opposition that the respondent contends that this court is *functus officio* by virtue of a ruling which was delivered by the subordinate court on October 31, 2022 and which ruling has not been challenged by way of a review or appeal.



6. From my perusal of the record, I observed that none of the parties availed a copy of the abovementioned ruling for this court's reference.
7. Be that as it may, it is apparent from the averments made in the instant motion that the ruling was triggered by an application which was filed by the applicant and seeking for an order for a stay of execution.
8. As a matter of principle, nothing precludes a party who had previously sought for an order for a stay of execution before the subordinate court from seeking similar orders before the High Court.
9. In the circumstances, I see no reason to make a determination that this court is *functus officio* to consider the instant motion.
10. Onto the merits of the motion, the order sought is for a stay of execution of the decree pending appeal, for which the guiding provision is order 42, rule 6(2) of the [Civil Procedure Rules](#) and which sets out the conditions to be satisfied for such an order to be granted.
11. The first condition is that the application must have been brought without unreasonable delay. None of the parties commented on this condition.
12. Suffice it to say that going by the averments made by the parties, it is apparent that the impugned judgment was delivered on August 23, 2022 whereas the motion was brought less than three (3) months later. In my view, the motion has been brought within a reasonable time.
13. The second condition touches on substantial loss to be suffered by an applicant.
14. The applicant on its part states that unless an order for a stay of execution is granted, the respondent will proceed to execute the decree, thereby causing it to suffer irreparable loss and rendering the appeal nugatory.
15. Nasser Nyambane Nyamweya through his supporting affidavit further conveyed the applicant's apprehension that if the decretal amount is paid to the respondent, the likelihood of recovering the amount from the respondent should the appeal succeed is slim, since the respondent is a Tanzanian national with no known assets in Kenya.
16. On his part, the respondent is of the view that the applicant has not demonstrated the substantial loss it stands to suffer in the event that the decretal sum is paid to him.
17. It is the ordinary course of principle for a successful party to be granted the privilege of enjoying the fruits of his or her judgment.
18. Suffice it to say that, the question on who has the burden of proof on the issue of refund of the decretal sum was discussed by the Court of Appeal in the case of [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) [2006] eKLR 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...”
19. In the absence of anything to ascertain the respondent's financial capacity to refund the decretal sum, I am satisfied that the applicant has reasonably demonstrated the manner in which it stands to suffer substantial loss if the order for a stay of execution is not granted.



- 20. Under the final condition which is the provision of security for the due performance of the decree or order, the applicant gave no suggestions on the manner in which it intends to provide security. The respondent on his part proposes that half of the decretal sum be deposited in court and the remaining half be deposited in a joint interest earning account.
- 21. Upon my consideration of the foregoing circumstances, I see no reason to make separate orders on the manner of depositing the security.
- 22. In the end therefore, the notice of motion dated November 3, 2022 is found to be meritorious and hence it is allowed on the following terms:
  - i. There be an order for a stay of execution of the judgment and decree issued by the Small Claims Court in Nairobi SCCCOM No 932 of 2021 on August 23, 2022 pending the hearing and determination of the intended appeal on condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates for the parties herein within 45 days from the date of this ruling. In default the stay order shall automatically lapse.
  - ii. Costs of the motion shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023.**

.....  
**J. K. SERGON**  
**JUDGE**

**In the presence of:**  
..... for the Appellant/Applicant  
..... for the Respondent