



**Kenya Wildlife Service v Maingi (Suing as the Legal Representative
of the Estate of Haron Mutethia - Deceased) (Civil Appeal
E073 of 2022) [2023] KEHC 1340 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E073 OF 2022
TW CHERERE, J
FEBRUARY 23, 2023**

BETWEEN

KENYA WILDLIFE SERVICE APPELLANT

AND

**MARTIN MAINGI (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF HARON MUTETHIA - DECEASED) RESPONDENT**

(Arising from the judgment dated May 12, 2022 in Tigania PMCC 50 of 2021.)

RULING

1. By a judgment dated May 12, 2022, the court in Tigania PMCC 50 of 2021 entered judgment for the 1st Respondent as against the Appellant/Applicant for KES 4,653,000/- plus costs and interest.
2. By a notice of motion dated December 8, 2022, supported by an affidavit sworn on even dated by Derrick Karinga, Applicant seeks orders for stay of execution pending the hearing and determination of the appeal and offered to provide a bank guarantee as security for the decretal sum. The application is based on the grounds that Applicant has filed an appeal which has high chances of success and is unlikely to recover the decretal sum of it is paid to the Respondent.
3. Respondent opposed the application vide a replying affidavit sworn dated February 6, 2023. He states that after judgment was delivered in his favor on May 12, 2022, Applicant/Appellant by application dated August 17, 2022 applied for stay pending appeal and the application was allowed on November 3, 2022 with an order the whole decretal sum be deposited in a joint interest earning account of both advocates within 21 days. Respondent goes on to say that instead of complying with those orders, Applicant moved to this court and again applied for stay of execution and was on and was on December 13, 2022 an order of stay of execution on condition that KES 500,000/- be released to the Respondent within 14 days and the KES 1,000,000/- be deposited with the court within 14 days. Respondent



avers that Applicant has not complied with any of the stay orders and prays that the application be disallowed.

Analysis and Determination

4. I have considered the notice of motion in the light of affidavits on record and submissions filed on behalf of the respondent.
5. Concerning stay of execution, order 42 (6) of the *Civil Procedure Rules* provides:
 - (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
 - b. That the application has been made without unreasonable delay; and
 - c. 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.
6. The impugned judgment was delivered on May 12, 2022. This application was filed without delay on December 8, 2022 about 7 months and the delay has not been explained. Other than that, Applicant appears to me to be abusing the court process by seeking orders which it appears it is not ready to comply with.
7. The foregoing notwithstanding, I have considered whether Applicant has demonstrated that it is likely to suffer substantial loss if stay of execution is not granted.
8. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. There is a myriad of cases on what constitutes substantial loss. In Civil Appeal No 186 of 2007 *Standard Assurance Co Ltd v Alfred Mumea Komu* the court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”
9. Similarly, in Civil Case No 41 of 1995 *United Builders & Contractors (Africa) Limited v Standard Chartered Bank Ltd* the court stated-

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”
10. Additionally, the court in *ABN Amro Bank NV v Le Monde Foods Ltd* Civil Application No Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to



succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

11. Respondent was awarded the sum of KES 4,653,000/- plus costs and interest. Whereas this is a money decree, there is no evidence that the Respondent is in a position to refund the decretal sum in the event that the appeal succeeds and that is persuasive evidence that Appellant is likely to suffer substantial loss if an orders sought are not granted.
12. Security is a legal requirement under 42 (6) (2) (c) of the *Civil Procedure Rules*. The Appellants have offered to furnish a bank guarantee for due performance of the decree herein pending the hearing and determination of the appeal.
13. Whereas it is not my duty at this stage to determine if the applicants have an arguable appeal, I am minded, in the interest of justice to exercise this court’s discretion under section 3A of the *Act* to afford the Appellants an opportunity to prosecute their appeal.
14. In the end, the Notice of motion dated December 16, 2022 is allowed in the following terms:
 1. There shall be a stay of execution of judgment in Tigania PMCC 50 of 2021 pending the hearing and determination of this appeal on condition that the appellant/applicant shall:
 - a. Pay the Respondent KES 500,000/- (Five hundred thousand) within 7 days from today’s date.
 - b. Deposit KES 1,000,000/- (one million) with the court within 14 days from today’s date.
 2. The record of appeal be filed and served within 30 days from today’s date.
 3. Mention on July 3, 2023 to confirm compliance and for further orders.
 4. Costs shall abide the outcome of the intended appeal.

DATED AT MERU THIS 23RD DAY OF FEBRUARY, 2023.

WAMAE TW CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Appellant/Applicant - Mr Karinga for Benta Musima Advocates

For Respondent - Mr Ondieki for JO Ondieki & Co Advocates

