



**Lesame & another v Lin-Cap Investment Limited (Civil Appeal  
E144 of 2022) [2023] KEHC 1121 (KLR) (Civ) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1121 (KLR)

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

**CIVIL  
CIVIL APPEAL E144 OF 2022**

**JN MULWA, J**

**FEBRUARY 23, 2023**

**BETWEEN**

**SARAH LESAME ..... 1<sup>ST</sup> APPELLANT**

**NICHOLAS OKUKU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LIN-CAP INVESTMENT LIMITED ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the application dated 18<sup>th</sup> March 2022 brought by the Appellants under provisions of Orders 22 Rule 22 & 25, and Order 12 Rule 7 of the *Civil Procedure Rules*. The Applicants seek orders of stay of execution of judgment and decree of the trial court delivered on 24<sup>th</sup> February 2022; and a further order that the said judgment be set aside, together with costs.
2. The supporting affidavit is sworn by the 1<sup>st</sup> Appellant Sarah Lesame, and on grounds stated at the face of the application; and a further affidavit sworn on the 19<sup>th</sup> of July 2022 by leave of court. In opposing the application, a replying affidavit sworn on 7<sup>th</sup> June 2022 by one John Njogu an employee of the Respondent. The parties have also filed submissions, which have been considered.
3. The issues for determination are whether the Applicants ought to be granted – stay of execution orders and setting aside of the Judgment of the trial court. Looking at the 2<sup>nd</sup> prayer for setting aside the trial court’s judgment, I find it misplaced because there is already this appeal filed against the same judgment. That prayer lies with the judgment on the appeal and cannot be granted at this interlocutory stage. I shall therefore not interrogate the same. That leaves this court with one issue; stay of execution pending hearing and determination of the appeal.



4. The decretal sum from the small claims court is Kshs 400,471/-. By the Memorandum of Appeal filed on the 15<sup>th</sup> of March 2022, a perusal of the same shows that the quantum is disputed and that the Applicant was not allowed to testify before the Adjudicator. Indeed, these are issues that are arguable and with chances of success.
5. An order for stay of execution pending appeal is pegged upon provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules*; not under Order 22 of the Rules that deals with stay of execution where no appeal has been lodged. For such an order to be granted, the Applicant must satisfy the court that:
  - a. Substantial loss may result to the Applicant unless the order is made,
  - b. The Applicant must offer such security for the due performance of the decree that would ultimately be binding on him.
6. The court in *Halal & another v Thornton & Timpin* (1963) eKLR, (1990) eKLR held that an order of stay is not automatic, but upon court's discretion and within the confines of the law.
7. The purpose for stay of execution pending appeal is to preserve the subject matter in dispute so that the Appellants' rights of appeal are safeguarded should the appeal succeed and is not rendered nugatory as stated in the case *RWW v EKW* (2009) eKLR. The decretal sum arose from an admitted loan facility advanced to the 1<sup>st</sup> Appellant by the Respondent which was not paid as per the agreement for reasons stated, and related to Covid-19 pandemic. Whether or not that amount was owing or admitted, is a matter for interrogation during the hearing of the appeal. It has therefore to be preserved so as not to render the appeal nugatory.
8. The court in the case *Mobamed Salim trading as Choice Butchery v Nasserpria Memon Jamat* (2013) eKLR held that:
 

“The right of appeal must be balanced against an equally weighty right; that of the Plaintiff to enjoy the fruit of judgment delivered in his favour. There must be a just cause for depriving the Plaintiff that right...”
9. That therefore poses the question whether or not the Applicant has offered security for the due performance of the decree, and what prejudice granting the orders sought would be occasioned to the Respondent who has a Judgment in its hands, and by grant of the order would be deprived enjoyment of its fruits.
10. In *National Industry Credit Bank Limited v Aquinos Francis Wasike & another* (2006) eKLR, the court held that it is upon the Applicant to prove substantial loss either through difficulty in satisfying the decree of loss occasioned by the adverse party to refund, if the appeal succeeds.
11. In her affidavits, the Applicant has not offered any security to secure the decretal sum should her appeal not be successful nor has she stated what substantial loss she would suffer if the orders sought are not granted. Stating to the court that she would suffer irreparable damage is not enough. Prove of substantial loss in an application for stay is paramount. It is the cornerstone in such an application. Without satisfactory prove, the court cannot grant an order of stay.



12. In Bungoma High Court Misc. Application No. 42 of 2011 – *James Wangalwa & another v Agnes Naliaka Chesto* held that:

“The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.

13. Having interrogated the interests and rights by the parties, I find that despite the Applicant falling short of prove of what substantial loss she would suffer if stay is not granted, and upon the exercise of inherent powers bestowed to the court by provisions of Section 1A, 1B, and 3A of the *Civil Procedure Act* - to do substantive justice, and upon the exercise of my Judicial discretion, I shall allow the application, but upon conditions that appear here below:

14. The upshot is that: -

1. The application dated 18<sup>th</sup> March 2022 is allowed subject to the Applicant (1<sup>st</sup> Appellant) depositing 50% of the Judgment Sum, being Kshs 200,000/- into court within a period of 45 days, of this ruling. That in default, the stay orders shall lapse automatically.
2. Costs of the application shall abide the outcome of the appeal.

Orders accordingly

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

**J. N. MULWA**

**JUDGE**

