



**Kenya Wildlife Service v Hassan (Civil Appeal E007 of 2023)
[2023] KEHC 2872 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2872 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E007 OF 2023
TW CHERERE, J
MARCH 30, 2023**

BETWEEN

KENYA WILDLIFE SERVICE APPELLANT

AND

ALI ABDI HASSAN RESPONDENT

RULING

1. By a judgment dated November 8, 2022, the court in Meru CMCC No E080 of 2021 entered judgment for the respondent as against the appellant/applicant for KES 3,011,250/- plus costs and interest.
2. By a notice of motion dated February 1, 2023 and filed on February 2, 2023 supported by an affidavit sworn on even dated sworn by Gideon Mutai, appellant/applicant legal officer, appellant/applicant seeks leave to appeal and orders for stay of execution pending the hearing and determination of the appeal. The application is based on the grounds that applicant intends to file an appeal, has applied for proceedings and is likely to be prejudiced if the orders sought are not granted.
3. Respondent opposed the application vide a replying affidavit filed on February 17, 2023 stated that he was willing to concede the application for leave to appeal on condition that $\frac{1}{2}$ decretal sum be paid to him the other $\frac{1}{2}$ be deposited in an interest earning account of advocates for both parties.
4. On February 6, 2023, this court granted a temporary order for stay of execution on condition that KES 500,000/- was deposited with the court but that was never to be.

Analysis and Determination

5. I have considered the notice of motion in the light of affidavit and grounds of opposition on record and submissions filed on behalf of the respondent.



6. Order 42 (6) of the Civil Procedure Rules provides that no order for stay of execution shall be made unless application has been made without unreasonable delay; substantial loss is demonstrated and security for the due performance of such decree or order is offered. (See *Endmor Steel Millers Ltd v James Wakbulunya Makuto* [2016] eKLR).
7. The impugned judgment was delivered on November 8, 2022. This application was filed timeously on February 2, 2023 about 3 months after the judgment was delivered. The delay in filing the appeal, on the part of the applicant has not been explained to the satisfaction of the court or at all.
8. I have considered whether applicant has demonstrated that it is likely to suffer substantial loss if stay of execution is not granted. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. (See *Standard Assurance Co Ltd v Alfred Mumea Komu* [2008] eKLR).
9. A party seeking an order of stay pending appeal bears a specific burden regarding proof of substantial loss. In this case, applicant avers that respondent is not 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 evidential burden shifts to the respondent to show that she would be in a position to refund the decretal sum if it is paid out to her if the pending appeal were to succeed. Other than state that she is in a position to refund the decretal sum if the appeal succeeds, respondent has discharged the evidential burden to prove that she has the means to refund the decretal sum in the event she loses the appeal.
10. Appellant has not offered to furnish any security for due performance of the decree herein pending the hearing and determination of the appeal.
11. Whereas it is not my duty at this stage to determine if the applicant has an arguable appeal, I find that it would be in the interest of justice to afford the appellant an opportunity to prosecute its appeal.
12. In the end, the notice of motion dated February 1, 2023 and filed on February 2, 2023 is allowed in the following terms:
 1. Applicant/Appellant is granted leave to file an appeal against the judgment in Meru CMCC No E080 Of 2021 within 30 days from today's date
 2. There shall be a stay of execution of judgment in in Meru CMCC No E080 OF 2021 pending the hearing and determination of this appeal on condition that the appellant/applicant shall:
 - a. Deposit KES 500,000/- (Five hundred thousand) with the court within 14 days from today's date
 3. The record of appeal be filed and served within 30 days from today's date
 4. Thereafter parties shall file and serve submissions with each party having 30 days
 5. Mention July 20, 2023 to confirm compliance and for further orders
 6. Costs shall abide the outcome of the intended appeal

DATED AT MERU THIS 30th DAY OF March 2023

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Appellant/Applicant - Mr Kariga Advocate



For Respondent - Mr. Amule for Khan & Associates Advocates

