



**Embu Gaturi Housing Cooperative Societies Limited v Jinsing Enterprises Limited
(Civil Appeal E763 of 2022) [2023] KEHC 2871 (KLR) (Civ) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2871 (KLR)

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

CIVIL

CIVIL APPEAL E763 OF 2022

JK SERGON, J

MARCH 29, 2023

BETWEEN

**EMBU GATURI HOUSING COOPERATIVE SOCIETIES
LIMITED APPELLANT**

AND

JINSING ENTERPRISES LIMITED RESPONDENT

RULING

1. This ruling is premised on the Notice of Motion dated September 28, 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 Jacob Nyaga Gachau, Secretary Manager 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 E1987 of 2022 on August 31, 2022 pending the hearing and determination of the appeal.
2. In retort to the said Motion, the respondent put in the replying affidavit sworn by its administrator, Carolyne Muthue on October 12, 2022, to which the applicant rejoined with the further affidavit sworn by Jacob Nyaga Gachau on November 24, 2022.
3. At the interparties hearing of the Motion, the parties' advocates made brief oral arguments echoing the averments made in the respective documents filed.
4. I have considered the grounds laid out on the body of the Motion; the facts deponed to in the affidavits supporting and opposing the Motion.
5. As earlier mentioned, the order sought therein 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.



6. The first condition is that the application must have been brought without unreasonable delay. Here, the applicant states that the instant Motion has been timeously filed, while the respondent did not make comments on this condition.
7. Going by the averments made by the parties and from my perusal of a copy of the impugned judgment which is annexed to the Motion, it is clear that the impugned judgment was delivered on August 31, 2022 whereas the Motion was brought less than one (1) month later. In my view, the Motion has been brought within a reasonable time.
8. The second condition touches on substantial loss to be suffered by an applicant.
9. 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 which constitutes a substantial amount, thereby causing it to suffer grave financial loss/difficulties and rendering the appeal nugatory.
10. Jacob Nyaga Gachau through his supporting and further affidavits further conveyed the applicant's apprehension that if the decretal amount is paid to the respondent, the chances of recovering the amount from the respondent should the appeal succeed are uncertain, since the respondent's financial assets or capabilities are unknown.
11. On behalf of the respondent, Carolyne Muthue states that the applicant has not demonstrated the substantial loss it stands to suffer in the event that the decretal sum is paid to the respondent and further, that the applicant has not demonstrated that the respondent will not be in a position to refund the decretal sum upon payment.
12. 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.
13. 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...”
14. In the absence of anything to ascertain the respondent's financial capacity to refund the decretal sum which constitutes a fairly substantial amount, 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.
15. Under the final condition which is the provision of security for the due performance of the decree or order, the respondent states that the applicant has not indicated its willingness to provide security, to which the applicant has retorted with the proposal that it be allowed to deposit part of the decretal sum namely the sum of Kshs 200,000/=.
16. From my reading of the proviso of Order 42, Rule 6(2) (supra), it is clear that the provision of security ought to constitute an amount which is commensurate to the decretal sum in question.
17. In the end therefore, the Notice of Motion dated September 28, 2022 is found to be meritorious and hence it is allowed on the following terms:



- i. There shall be an order for a stay of execution of the judgment and decree issued by the Small Claims Court in Nairobi SCCCOM No E1987 of 2022 on August 31, 2022 pending the hearing and determination of the appeal on the condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocates or firms of advocates for the parties herein within 30 days from the date of this ruling, in default of which the stay order shall lapse.
- ii. Costs of the Motion shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 29TH DAY OF MARCH, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent

