



REPUBLIC OF KENYA



**Newtons Premiums Auto v Kathurima (Civil Appeal E793 of 2022)  
[2023] KEHC 2924 (KLR) (Civ) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2924 (KLR)

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

**CIVIL  
CIVIL APPEAL E793 OF 2022**

**JK SERGON, J  
MARCH 29, 2023**

**BETWEEN**

**NEWTONS PREMIUMS AUTO ..... APPLICANT**

**AND**

**ELSY KATHURIMA ..... RESPONDENT**

**RULING**

1. The subject matter of this ruling is the notice of motion dated October 5, 2022 taken out by the appellant/applicant herein, in which it sought for an order for stay of execution of the ruling on the applicant's notice of motion application dated August 29, 2022 delivered on September 30, 2022 in Milimani Small Claim Court in SCCOMM No E3604 of 2022 and all consequent orders, pending the hearing and determination of the appeal.
2. The respondent opposed the motion by filing the replying affidavit sworn on November 23, 2022.
3. When the motion came up for interparties hearing the parties' respective advocates chose to rely on the averments made in their respective affidavits.
4. A brief background of the matter is that the respondent instituted a suit against the applicant vide a statement of claim dated June 15, 2022 and sought for recovery of a liquidated sum of Kshs 400,000/= together with costs of the suit and interest on the same.
5. On July 13, 2022, judgment in default of defense was granted in favour of the respondent since the appellant failed to enter appearance and submit their statements of defense within the required statutory time frames. Being aggrieved by the aforementioned decision the applicant appealed to this court against the lower court judgment.



6. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing it; and the brief oral arguments.
7. The guiding provision in considering an application seeking an order for a stay of execution is order 42, rule 6(2) of the [Civil Procedure Rules](#) which sets out the following conditions in determining an application for stay:
  - i. The application should have been brought without unreasonable delay;
  - ii. The applicant must demonstrate the substantial loss to be suffered; and
  - iii. There must be provision of security for the due performance of the decree or order being appealed against.
8. The above conditions were similarly laid out in the case of [GN Muema P/A \(Sic\) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another](#) [2018] eKLR.
9. On the first condition, from my study of the record and the impugned ruling, I note that it was delivered on September 30, 2022 which is barely 6 days prior to the filing of the instant Motion. I therefore find that there has been no unreasonable delay in bringing the motion.
10. Under the second condition on substantial loss, it is apparent from the Motion that the applicant avers that the moveable properties itemized in the proclamation letter belong to third parties who are not parties to this suit and should execution be allowed to proceed the applicant stands to suffer irreparable and irredeemable injury that cannot be compensated by way of damages. The applicant is apprehensive that the appeal will consequently be rendered nugatory.
11. The applicant avers that the respondent is not a person of means and as such should the execution proceed the appeal would be rendered nugatory as it would be impossible to recover the decretal amount from the respondent should the appeal succeed.
12. On his part, the respondent is of the view that the applicant has failed to demonstrate that it is going to suffer irreparable harm that cannot be remedied by way of damages in the event the stay orders are not granted.
13. The respondent avers that the movable properties listed in the proclamation letter by the auctioneers belong to third parties is not a matter for determination by this court and that it is an admission that he won't suffer any loss or damage.
14. The respondent further states that he is not a man of straw as alleged as he works as a Senior Officer of the Kenya Revenue Authority and would be able to refund the decretal sum of the appeal in the unlikely event that the instant appeal succeeds.
15. In the case of [Masisi Mwita v Damaris Wanjiku Njeri](#) [2016] eKLR in which the court reasoned that:

“The corner stone of the jurisdiction of the court under Order 42 of the [Civil Procedure Rules](#) is that substantial loss would result to the applicant unless a stay of execution is granted... 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.”
16. The courts have time and time again discussed the question on who has the burden of proof on the issue of refund of the decretal sum. I am both guided and bound by the Court of Appeal's analysis in



the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where it held 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...”

17. In the absence of anything to indicate or ascertain the respondent’s financial capacity therefore, I am satisfied that the applicant has reasonably demonstrated the manner in which it stands to suffer substantial loss.
18. In respect to the final condition on the provision of security for the due performance of such decree or order, the applicant on the one hand indicates its readiness and willingness to comply with any conditions that will be set by this court on the provision of security. On the other hand, the respondent is of the view that should an order for a stay of execution be granted, then the applicant should be ordered to deposit the decretal sum in court.
19. In the end, the motion dated October 5, 2022 is found to be meritorious and it is allowed, therefore giving rise to a grant of the following orders:
  - i. An order for stay of execution of the ruling delivered on September 30, 2022 is granted on condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties’ advocates and firm of advocates within 45 days from today, failing which the order for stay shall automatically lapse.
  - ii. Costs of the application to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 29<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**J. K. SERGON**

**JUDGE**

**In the presence of:**

..... for the Appellant/Applicant

..... for the Respondent

