



REPUBLIC OF KENYA



**KENYA LAW**  
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**Zehyle v Mathias Mboya Maithaya t/a Yambo Merchants & Auctioneers (Civil Appeal E908 of 2022) [2023] KEHC 2869 (KLR) (Civ) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2869 (KLR)

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

**CIVIL**

**CIVIL APPEAL E908 OF 2022**

**JK SERGON, J**

**MARCH 28, 2023**

**BETWEEN**

**EBERHARD ZEHYLE ..... APPELLANT**

**AND**

**MATHIAS MBOYA MAITHAYA T/A YAMBO MERCHANTS &  
AUCTIONEERS ..... RESPONDENT**

**RULING**

1. The subject matter of this ruling is the Notice of Motion dated November 4, 2022 taken out by the appellant/applicant herein, in which it sought for an order for stay of execution of the orders of Honourable C Maundu made on September 22, 2022 vide CMCC no 6145 of 2015 pending the hearing and determination of the appeal.
2. The respondent put in a replying affidavit sworn on December 5, 2022, to oppose the Motion.
3. When the Motion came up for interparties hearing before the court on December 14, 2022 the parties were directed to file and exchange written submissions.
4. I have considered the grounds laid out on the face of the Motion plus the facts deponed in the rival and the contending written submissions and authorities relied upon.
5. A brief background of the matter is that the respondent herein filed an application dated June 22, 2021 at the lower court that the applicant's herein statement of defence be struck out and judgment entered against the applicant.
6. That on September 22, 2022 the trial court was not sitting and the matter was rescheduled to September 29, 2022 for ruling and the matter was listed on September 29 as coming up for ruling.



7. The respondent's advocate on October 25, 2022 served the applicant with a decree issued on the October 19, 2022 and that the said decree appears to indicate that the ruling was delivered on September 22, 2022 where the court made findings that the defendants were liable to pay the plaintiff's claim of Kshs 1,750,130/= together with interest from July 21, 2009 when the respondent first tendered his bill of costs for taxation against the applicant.
8. Being aggrieved by the aforementioned decision the applicants appealed to this court against the lower court's decision.
9. The guiding principles in determining an application for stay of execution are set out under Order 42, Rule 6(2) of the Civil Procedure Rules as follows:
  - a. The application should have been brought without unreasonable delay;
  - b. The applicant must demonstrate the substantial loss to be suffered; and
  - c. There must be provision of security for the due performance of the decree or order being appealed against.
10. 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.
11. On the first condition, from my study of the record and the impugned judgment, I note that it was delivered on September 22, 2022 which is barely a month prior to the filing of the instant Motion. I therefore find that there has been no unreasonable delay in bringing the Motion.
12. Under the second condition on substantial loss, it is apparent from the Motion that the applicant states and submits that if the respondent proceeds with execution of the orders it will prejudice the applicant herein and he stands to suffer substantial financial loss.
13. On his part, the respondent submits that the applicant has not demonstrated any substantial loss to be suffered and that the applicant's aim is to curtail him from enjoying the fruits of justice that he rightly deserves.
14. 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.”
15. 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...”



16. 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.
17. In making an order for the provision of security, this court must balance the interest of the parties. In the present instance, it is noteworthy that the respondent has not shown any pressing need that would require payment of part of the decretal amount to him at this stage. It is also noteworthy that the respondent stated that the court orders the applicant to release the sum of Kshs.3,500,000/= and the balance be deposited in a joint account of the counsels on record and that the appeal be fast tracked.
18. In the end, the Motion dated November 4, 2022 is found to be meritorious and it is allowed giving rise to a grant of the following orders:
  - i. An order for stay of execution of the order and decree delivered on November 4, 2022<sup>{^}</sup> 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 or firms 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 virtually via Microsoft Teams this 28<sup>th</sup> day of March, 2023.**

.....

**J. K. SERGON**

**JUDGE**

**In the presence of:**

..... for the Appellant/Applicant

..... for the Respondent

..... for the 2<sup>nd</sup> Defendant

