



REPUBLIC OF KENYA



KENYA LAW
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**Express Connections Ltd & another v Njau (Civil Appeal E276 of 2022)
[2023] KEHC 3794 (KLR) (Civ) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3794 (KLR)

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

CIVIL

CIVIL APPEAL E276 OF 2022

AA VISRAM, J

APRIL 28, 2023

BETWEEN

EXPRESS CONNECTIONS LTD 1ST APPELLANT

DAVID CHOLI 2ND APPELLANT

AND

HENRY MWANGI NJAU RESPONDENT

RULING

1. This ruling relates to the applicants' Notice of Motion dated 26th May, 2021 seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this application interparties and pending the hearing of this suit, there be a temporary stay of execution of the ruling issued on 23rd April, 2021 and consequential orders thereof including the judgment delivered on the 8th November, 2019.
 - d. That the Honourable court be pleased to set aside the judgment against the defendant/applicant and the appellant be allowed to challenge the decision of the Honourable Magistrate D.O Mbeja in the Chief Magistrate court case No.425 of 2018.



2. The application is premised on the grounds on the face of the application and the further grounds in the supporting affidavit of Ms. Mary Mwangi, the director of the 1st applicant herein, sworn on 26th May, 2021.
3. The applicant deponed that if the judgment is not set aside, the appellants will suffer injustice, irreparable harm, and damages.
4. The applicants submitted that the judgment had failed to consider material information that was presented in court. In particular, that the respondent had not contested its evidence showing that he was an employee of the first applicant/appellant and not a fare-paying passenger.
5. The applicants submitted that they are prepared to provide appropriate security as the court may order, including depositing half the decretal sum in a joint interest-earning account in the names of the advocates for the duration of the appeal.
6. The respondent filed a replying affidavit sworn by Mr. Henry Mwangi Njau on 31st August, 2021. Mr. Njau deponed that any stay, if granted by the court ought to be on condition that the decretal sum be deposited in a joint interest account pending the hearing and determination of the appeal.
7. The respondent further deponed that he was aware that the applicants were in the process of selling their assets.
8. I have considered the application, grounds thereof, supporting affidavit and submissions. I have also considered the replying affidavit and submissions in opposition.
9. It is imperative for both parties to understand in what instances a court of law will grant a Stay of Orders/Decree. The principles are well laid and must be followed otherwise it would be akin to denying the successful litigant the fruits of judgment.

Order 42 Rule 6 is succinct:

“(2)” No order for stay of execution shall be made under sub rule (1) unless –

- a. the court is satisfied that substantial loss shall/may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court order for the due performance of such decree or order as may ultimately be binding upon him has been given by the applicant.”
10. The applicant’s affidavit is sworn by the appellant but has not sufficiently shown the loss that the applicants will suffer if the stay is not granted.
 11. Moreover, the ruling dated 25th April, 2021, which the applicants seek to stay amounts to a negative order. I say this because the said ruling by the lower court dismissed the appellants’ application to set aside the ex-parte judgment delivered on 8th November, 2019. The appellant is now urging this court to stay that ruling. There is simply nothing to stay.
 12. Further to the above, the judgment dated 8th November, 2019, which the appellant seeks to set aside has not been availed, nor is the lower court file available to this court at present. Moreover, I note that the lower court has already ruled on that issue, which ruling, is the subject of an appeal by the applicants. Accordingly, I am of the view that the process relating to the said appeal ought to run its natural course and be determined in the ordinary manner.



13. Further to the above, the applicants have not shown the substantial loss that they will suffer if the application is not granted.
14. This is not acceptable. As my Learned Brother Ringera, J. (as he then was) said on the same issue said:

“Substantial loss said to be likely to result from a refusal of a stay must be demonstrated as a matter of fact; and not by a mere flat statement in an affidavit or at the Bar.”
15. To show that there is indeed an arguable appeal or imminent loss is a vital prerequisite in such an application and the applicant has not done so. See generally, *J. T. Inamdar & 2 others v Postal Corporation of Kenya* Nairobi H.C.C.C No 1629 of 2000 and *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* (1982 -88) KAR 1018.
16. The application was also filed with delay, several years after the judgment from which a stay is sought.
17. The court is simply not satisfied that the requirements for grant of a stay have been met.
18. I therefore dismiss this application with costs to the respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 28TH DAY OF APRIL 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....for the Appellant.

.....for the Respondent.

