



**Waynays Africa Limited v Bewa Farmcare Ltd (Civil Appeal  
E086 of 2022) [2023] KEHC 18112 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18112 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E086 OF 2022**

**PM MULWA, J  
MAY 30, 2023**

**BETWEEN**

**WAYNAYS AFRICA LIMITED ..... APPELLANT**

**AND**

**BEWA FARMCARE LTD ..... RESPONDENT**

**RULING**

1. The court is called upon to make a determination in respect of the Notice of Motion dated July 15, 2022, seeking a stay of execution of the judgment/ decree of the subordinate court Thika CMCC No E027 of 2021. The application is brought under Order 22 Rule 22, Order 42 Rule 6 of the [Civil Procedure Rules](#), section 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law.
2. The application is supported by the annexed affidavit of Stephen Wainaina Kamondia, the director of the Appellant company, sworn on July 15, 2022. He depones that the Appellant is aggrieved by the judgment of the trial court and has preferred an appeal. The appeal has a high chance of success and the appellant is apprehensive the Respondent will proceed with the execution of the judgment
3. In opposing the Application for stay pending appeal, the Respondent through its counsel filed a Replying affidavit sworn by Michael Mbugua Wanyoike sworn on November 10, 2022 wherein he states the application is premature as no decree has been extracted. That the appeal lacks merit and the Respondent is entitled to the fruits of its judgment. It is further deponed that no prejudice will be suffered by the Appellant if the decretal amount is paid. The court is urged, in the event the application is allowed, to direct the decretal amount to be deposited in a joint interest-earning account held in the names of both advocates.
4. The application was heard by way of written submissions. Only the appellant's submissions have been filed and the respondent chose to rely on its replying affidavit.



5. Mr Kamau, counsel for the appellant submits the discretion of the court in granting stay or injunction is wide and unfettered. An arguable appeal is not one which must succeed but one which ought to be argued before the court makes a final determination. He submits the current appeal has triable legal issues that call for the orders of the trial court to stay until the appeal is heard and determined.

### **Analysis and Determination**

6. In due consideration of the application, the replying affidavit and the submissions filed, the only issue for determination is whether the application meets the threshold as per Order 42 Rule 6 of the Civil Procedure Rules.

7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

'No order for stay of execution shall be made under sub-rule (1) unless—

- (a) The court is satisfied that substantial loss 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 orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
8. It follows that an application for stay of execution of a decree or order pending appeal must satisfy the conditions as set out in Order 42 Rule 6(2) namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
  9. The purpose of an application for stay of execution is to preserve the subject matter as was stated in the case of *Consolidated Marine vs Nampijja & Another, Civil App No 93 of 1989 (Nairobi)*, the court held that: -

' The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory'

10. The appellant was the plaintiff in the trial court where the trial court found it was in default of Kshs 421,294/= to the Respondent which it was ordered to pay. Being aggrieved by the trial court's judgment, it filed the current appeal. The applicant submits that it will suffer substantial loss unless the orders of stay of execution are granted. The Respondent submits that no prejudice will be suffered if the decretal amount is paid and urged the court in the circumstance it allows the application for stay, to direct the decretal amount that the same be deposited in a joint interest-earning account in the name of both advocates.
11. I note the current application has been brought without unreasonable delay. The impugned judgment was delivered on April 28, 2022 and the application for stay is dated July 15, 2022.
12. The applicant submits the appeal has a high chance of success. I will not devolve on the merits of the appeal at this juncture as the same will be addressed at the hearing of the appeal.
13. As to the issue of security the applicant has not furnished any security but submits it was willing to abide by the conditions set by the court. The purpose of the security is to ensure it serves the purpose



of due performance of the decree as stated in the case of *Arun C Sharma vs Asbana Raikundalia t/a Rairundalia & Co Advocates & 2 others [2014] eKLR*, where the court stated: -

' The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor. Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.'

14. In sum, therefore, I find that the applicant has met the threshold for granting stay orders.
15. In the upshot, this court finds the Notice of Motion dated July 15, 2022 is meritorious and the application is allowed.
16. Final Orders
  - i. An order for stay of execution of the judgment/decreed of the subordinate court Thika CMCC No E027 of 2021 be and is hereby issued pending appeal.
  - ii. The applicant is to deposit the decretal sum of Kshs 421,294/= in a joint interest-earning account in the names of both advocates within 30 days from the date hereof.

Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 30<sup>TH</sup> DAY OF MAY, 2023.**

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**P.M. MULWA**

**JUDGE**

**In the Presence of:**

Kinyua/Duale – Court Assistants

Ms. Kiruthi h/b for Mr Kamau for the appellant/applicant

Mr. Mburu for the Respondent

