



REPUBLIC OF KENYA



**KENYA LAW**  
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**TSS Transporters Ltd v Waiyaki (Civil Appeal 23 of 2023)  
[2023] KEHC 24455 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24455 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 23 OF 2023  
SM GITHINJI, J  
OCTOBER 25, 2023**

**BETWEEN**

**TSS TRANSPORTERS LTD ..... APPELLANT**

**AND**

**HELLEN MUTHONI WAIYAKI ..... RESPONDENT**

*(Being an Appeal of the Judgment of Honourable N.C.Adalo delivered  
in SRM No.300 of 2017 Mariakani on 25th January, 2022)*

**RULING**

Coram: Hon. Justice S. M. Githinji

Kimondo Gachoka & Co. Advocates for the Appellant.

George Wakahiu & Co. Advocates for the Respondent.

1. On the 13<sup>th</sup> day of April, 2023, this court directed that the applications dated 7<sup>th</sup> March, 2023 and the one dated 30<sup>th</sup> March, 2023 be heard simultaneously. The 1<sup>st</sup> application was filed by the Appellant under Certificate of Urgency dated 7<sup>th</sup> March, 2023 seeking the following orders;
  1. Spent.
  2. That this Honourable Court be pleased to grant a stay of execution of the Judgment of Honourable Olga Onalo given on 31<sup>st</sup> January, 2023 in CMCC 114 of 2019 pending the hearing and determination of this Application.
  3. That this Honourable Court be pleased to grant a stay of execution of the Judgment of Honourable Olga Onalo given on 31<sup>st</sup> January, 2023 in CMCC 114 of 2019 pending the full hearing and determination of this Appeal in Malindi HCCA 23 of 2023.



4. That this Honourable Court allow the applicant to furnish the Court with security in the form of a Bank Guarantee from Family Bank for the entire judgment sum.
  5. Spent.
  6. That the costs of this Application abide the outcome of the Appeal.
  7. That this Honourable Court be pleased to issue any other order and/or direction it deems fit to grant in the circumstances.
2. The application was supported by the grounds on the face of it and the affidavit of Awadh Abubakar Simba sworn on the same day. He deposed that the judgment in the trial court dated 28<sup>th</sup> November, 2022 held the appellant 100% liable and that the Respondent was awarded 2,536,781/- in general damages with costs and interests. He also deposed that the respondent has extracted warrants of execution and is intending to execute against the appellant which action will render the appeal nugatory. In addition, that the insurer is ready, willing and able to furnish the court with a Bank Guarantee from Family Bank as security to the court. Further, that unless stay of execution is granted herein, they are likely to suffer injustice and irreparable loss.
  3. In Response, the Respondent filed a Replying affidavit sworn on the 20<sup>th</sup> day of March, 2023. She stated that the appellant's appeal has zero chances of success as it is an appeal against quantum only and that there was no evidence led in court to rebut the plaintiff's evidence on liability. She also stated that she is not a lady of straw and she has livestock worth Kshs. 4,000,000/- which she can dispose off and liquidate to repay the decretal amount in the unlikely event that the appellate judgment is delivered against her.
  4. Further, that the appellant has not provided any security as the bank guarantee alluded to by Awadh Abubakar Simba is neither attached nor can it have any bearing in this case and finally, that the appellant has not demonstrated that it stands to suffer prejudice if the stay orders are not granted since the alleged execution is only imaginary as this court can only grant orders for stay where there is eminent execution.
  5. In the application dated 30<sup>th</sup> March, 2023, filed by the Respondent the following orders were sought;
    1. Spent.
    2. That the Honourable Court be pleased to vacate and or set aside the stay of execution order issued on 8.3.2023.
    3. That in the alternative, the honourable court be pleased to vary the stay of execution order issued on 8.3.2023 in terms that the appellant be ordered to release the sums of Kshs. 800,000/- to the applicant for immediate mediation and the balance of the decretal sum be deposited in a joint interest-bearing account in the names of counsel for the appellant and counsel for the respondent pending the hearing and final disposal of the appeal herein.
    4. That the costs of this application be borne by the respondent in any event.
  6. The application was supported by the grounds on the face it and the sworn affidavit of the respondent. The respondent reiterated the contents of her replying affidavit and alluded to the fact that she consulted her doctor who has indicated that her arm can be saved by undergoing an operation which will cost Kshs. 800,000/-. She further stated that she has suffered immense prejudice as a result of the stay order granted on 8.3.2023 and as such, she implored the court to vacate or vary the stay order.
  7. On the 1<sup>st</sup> application, what this court is being called upon to determine is whether this court should issue an order for stay of execution of the Judgment in Malindi Civil Suit No. 114 of 2019.



8. The principles upon which the above prayer can be allowed are now well settled from the authorities from this court and other superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides as follows:

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- (1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the Court Appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the Court Appealed from, the Court to which such Appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court appealed from whose decision the Appeal is preferred may apply to the appellate Court to have such order set aside.
- (2) 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 undue 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.”

9. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

10. On whether the applicant will suffer substantial loss, the applicant has only stated that unless stay of execution is granted, they are likely to suffer injustice and irreparable loss which they have not explained. In my view, the applicant is apprehensive since they have stated in their application that the respondents have extracted warrants of execution. I note that this is a money decree for a specific amount that has been determined by court. It is also my view that the applicant has failed to demonstrate that they stand to suffer prejudice if the stay orders are not granted but since the appeal is on quantum, the respondent will suffer prejudice if no amount is paid in the meantime. I am persuaded that stay ought to be granted but part of the decretal sum be paid to the respondent.

11. In the same regard, this Court has taken into account the competing interests of the Applicant as against those of the Respondent and the need to allow the Respondent to enjoy partly the fruits of the judgment. In the circumstances and in exercise of this court’s discretion, stay of execution be and is hereby granted on condition that the Appellant pays to the respondent 800,000/= out of the decretal sum and deposits the balance within 30 days from the date hereof, in a joint advocates interest earning account; failure to which the stay order lapses.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**

In the presence of; -

1. Mr Arasa for the Applicant
2. Advocate for Respondent absent

