



**Sam- Con Limited v National Bank of Kenya Limited & 2 others (Civil Case 174 of 2003)  
[2023] KEHC 26502 (KLR) (Commercial and Tax) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26502 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 174 OF 2003  
A MABEYA, J  
DECEMBER 18, 2023**

**BETWEEN**

**SAM- CON LIMITED ..... PLAINTIFF**

**AND**

**NATIONAL BANK OF KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ANDREW DOUGLAS GREGORY ..... 2<sup>ND</sup> DEFENDANT**

**ABDUL ZAHIR SHEIKH ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before Court is the application dated 26/6/2023 brought under Order 42 rule 6,7, and 9, Order 51 Rule 1 of the Civil Procedure Rules, section 3A of the Civil Procedure Act CAP 21 of the Laws of Kenya. The application seeks a stay of execution of the judgment delivered by this Court on 16/6/2023 pending appeal.
2. The application is based on the grounds on the face of it and supported by the affidavit of Samuel Mundia sworn on 26/6/2023. The applicant contended that it wished to appeal against the judgment of 16/6/2023 to the Court of Appeal. That unless a stay of execution is granted, the appeal would be rendered an academic exercise and the applicant would suffer substantial loss. The applicant stated that it was willing to provide security by way of a banking guarantee and the applicant was a banking institution capable of paying the decretal sum if the appeal does not succeed. That the plaintiff would not be prejudiced if the orders sought were granted.
3. The respondent opposed the application vide a replying affidavit of Paramjit Singh Bhogal sworn on 4/8/2023. He averred that the Court awarded the plaintiff damages in the sum of Kshs 585197,561.50 for the wrongful act of the defendant. That the plaintiff wished to use the said proceeds to commence



trading and regain the lost reputation and generate profits and would be in a position to satisfy the orders of the Court of Appeal in the event the appeal is successful.

4. The application was canvassed by way of written submissions. The applicant submitted that the plaintiff was not in a position to refund the decretal sum if the intended appeal was successful. That the respondent wished to utilize the decretal sum and therefore the applicant would be unable to recover it in the event the appeal was successful. Counsel submitted that the applicants would suffer substantial loss that would not be compensated by damages.
5. The plaintiff submitted that the defendant had not demonstrated how it would suffer substantial loss. Counsel submitted that a bank guarantee was not good security and the applicant ought to pay part of the decretal amount.
6. I have carefully considered the rival arguments, the authorities relied on and the submissions of learned Counsel. This is an application for stay pending appeal. Order 42 rule 6 of the [Civil Procedure Rules](#) provides: -

“ 1. No appeal or a 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders 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 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.”

7. In an application of stay of execution pending appeal, the applicant should demonstrate that the application was brought without unreasonable delay, that it would suffer substantial loss and that it is ready and willing to abide by the security for the performance of the decree that may ultimately be binding on him.
8. In [Butt vs. Rent Restriction Tribunal](#) [1979], the Court of Appeal set out what ought to be considered in the court exercising the power to determine whether to grant or refuse stay of execution pending appeal. It stated that that power is discretionary and which should be exercised in such a way as not to prevent an appeal.
9. Secondly, 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 the appeal court reverse the judge's discretion. Thirdly, 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 proceeding. Finally, the court in exercising its discretion should consider the special circumstances of the case and its unique requirements.

10. In the present case, the applicant averred that it would suffer substantial loss since the respondent intends to use the decretal sum and was not in a position to refund the decretal sum if the appeal succeeds. With respect to security, it averred that it was willing to give a bank guarantee on the decretal sum. On its part, the respondent indicated that it would invest the decretal sum and generate profit that would be able to satisfy the decretal sum in the event the appeal succeeds.
11. In *National Industrial Credit Bank Ltd V Aquinas Francis Wasike and Another* (2006) eKLR, the Court of Appeal stated: -

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such applicant to know in detail the resources owned by a respondent or the lack of them. 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”.
12. Further, in *Abn Amro Bank Vs Lemond Foods Limited* Civil Application No.15 of 2002, the Court Appeal held that: -

“The legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land cash in bank and so on.”
13. I am satisfied that there has been no inordinate delay in bringing the present application. With respect to substantial loss, the Court finds that the applicant only stated that it would suffer loss because the respondent is not operational and there is no proof that the decretal sum if released would be recovered. It was not clear what substantial loss that the applicant would suffer if a stay is not granted. It was upon the applicant to satisfy that aspect of substantial loss before the evidential burden of proof could shift to the respondent.
14. While on security, the applicant offered to give a bank guarantee, I do not think it is relevant or would fall for consideration once the issue of substantial loss has not been proved. The Court finds that, taking all factors into consideration, the- applicant has not discharged its burden for grant of stay.
15. Accordingly, the application is without merit and the same is dismissed with costs.  
It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023.**

**A. MABEYA, FCI Arb**

**JUDGE**

