



REPUBLIC OF KENYA



**Alitex Enterprises Limited v Mueke (Civil Appeal E639 of 2023)
[2023] KEHC 26935 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E639 OF 2023
AN ONGERI, J
DECEMBER 15, 2023**

BETWEEN

ALITEX ENTERPRISES LIMITED APPELLANT

AND

TIMOTHY MWEMA MUEKE RESPONDENT

RULING

1. The application dated 14/7/2023 is brought under Rules (2) of the Court of Appeal Rules 2010, Section 3A, 79G of the *Civil Procedure Act* and Order 22 rule 22, Order 42 Rule 6(2) and Order 51 Rule 1 of the *Civil Procedure rules* 2010 and all other enabling provisions of law.
2. The application is seeking for extension of stay of execution of the interlocutory judgement entered in CMCC No. 375 of 2019 pending the hearing and determination of this application and of the intended appeal.
3. The application is based on the following grounds;
 - i. That the applicant has an arguable appeal with very good chances of success.
 - ii. That the applicant is aggrieved by the entire ruling delivered on 30/July/2022 and intends to file an appeal.
 - iii. That this application is timely made and without any reasonable delay.
 - iv. That the applicant stands to suffer substantial and irreparable loss and damage if execution is allowed to proceed.
 - v. That unless this application is allowed the applicant's intended appeal will be rendered nugatory.



- vi. That the respondent will not suffer any prejudice or damage that cannot be compensated by costs if this application is allowed.
4. The respondent filed a replying affidavit sworn on 25/8/2023 by Timothy Mwema Mueke in which he deposed that the application herein is vexatious and a clear abuse of court process.
5. He further deposed that there is no stay to be extended as the stay that was there was vacated after the parties were heard and a ruling delivered on 14/7/2023.
6. He deposed that the issue of service of summons and service of all pleadings was deliberated and a ruling was made on the same. He averred that he is looking to recover his money that was never paid by the appellant after making use of his motor vehicle yet the provisions of the agreement dated 27/8/2013 were very clear as it stated how much he was to be paid. Further that the debt in issue is not denied and he is the judgement debtor pursuing what is rightfully his.
7. The parties filed written submissions as follows; the appellant submitted that the Civil Procedure Rules grants the courts unfettered discretion to enlarge time. Order 50 Rule 6 of the CPR grants the courts powers to enlarge time where a limited time has been fixed for doing any act or taking proceedings under these rules or by summary notice or by order of the court.
8. On substantial loss the appellant submitted that the Respondent herein instructed auctioneers to proclaim and attach goods with an aim of recovering Kshs. 416,717.71/=. Warrants of proclamation were already served upon the appellants and therefore there is eminent execution.
9. Further that it will be prejudicial to the appellants if this application is not allowed and that the appeal will be rendered nugatory.
10. On delay the appellants submitted that the present application was filed on the 14/7/2023. This is on the same day when the honorable court delivered its ruling. The application is therefore made without any delay and/or unreasonable delay.
11. Finally, on the issue as to whether the appeal is arguable, the appellant submitted that it has filed and annexed a memorandum of appeal demonstrating the grounds of the intended appeal. It's the applicant's submission that it has a good and arguable appeal which has chances of success.
12. The respondent submitted that the appellant has not met the requirements under order 42 rule 6 of the Civil Procedure Rules. First, no security for stay of execution pending the appeal has been furnished or proposed by the appellant.
13. Further, that the appellant is mandated to demonstrate that they are able and willing to comply with that condition on security for the due performance of the decree appealed from. The appellant, further did not adduce real and cogent evidence before the Court to even slightly indicate that the respondent is not able to refund the decretal sum should the appeal succeed.
14. The respondent submitted on substantial loss that the logical conclusion is that mere financial burden occasioned by a judgment does not constitute substantial loss for purposes of grant of an order of stay of execution.
15. Further that there is a valid judgment from the court that was a result of a lawful process that was in compliance with all the procedures encapsulated in the books of law. The excuse given for not settling the money is invalid.



16. That the trial court heard all the parties on merit, and the court found that the respondent had a meritorious case against the appellant. Consequently, the said fruits of the judgment must be enjoyed by the respondent.
17. On unreasonable delay it was the respondent’s argument that appellant has not attached the ruling being appealed or the decree thereof.
18. Therefore, it was submitted that the appellant has not proved that the present application was filed on the same day the court delivered its ruling. It is trite law that whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove.
19. The sole issue for determination in this application is whether stay pending appeal should be granted.
20. The application is seeking for extension of stay of execution of the interlocutory judgement entered in CMCC No. 375 of 2019 pending the hearing and determination of this application and of the intended appeal.
21. The Court has a discretion to grant the Applicant stay pending appeal.
22. In the case of *Simon Thuo Mwangi V Unga Feeds Civil* Appeal No.181 of 2003 at Nairobi in *Esther Waimaitba Njibia & Others Vs. Safaricom Ltd* (2014) eKLR the Court of Appeal held as follows;

“The exercise of judicial discretionis not designed to assist a person who has deliberately sought, whether by evasion or otherwise or obstruct or delay the cause of justice.”
23. It is in the interest of justice that the applicant be granted an opportunity to be heard on merit.
24. In the case of *Global Tours & Trailys* WC 43 of 2000 (UR) three –prong tier test was outlined by the Court as follows:

“Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion, it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the Court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case. The prima facie merits of the intended appeal in the sense of not whether, it will probably succeed or not but whether, it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”
25. I grant the appellant the chance to be heard on the appeal.
26. I find that the respondent cannot suffer prejudice that cannot be compensated by an award of costs.
27. The appeal to be prosecuted within 90 days of this date in default the appeal to be dismissed automatically with costs to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

