



**Mwirigi & another v GKK (Suing As Father And Next Friend Of SKM) (Civil Appeal E057 of 2022) [2022] KEHC 11485 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11485 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E057 OF 2022  
TW CHERERE, J  
MAY 31, 2022**

**BETWEEN**

**KENNETH MWIRIGI ..... 1<sup>ST</sup> APPELLANT**

**KIEGOI TEA FACTORY COMPANY LTD T/A KTDA ISEMBE TEA  
FACTORY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GKK ..... RESPONDENT**

**SUING AS FATHER AND NEXT FRIEND OF SKM**

**RULING**

**Background**

1. On April 13, 2022, the court entered judgment in Maua CMCC No 135 of 2018 in favour of the respondent as against the appellants jointly and severally for Kshs 6,335,930/- together with costs and interest.
2. By a notice of motion dated May 12, 2022 and filed on May 3, 2022, appellants seek orders for:
  1. Stay of execution of judgment in Maua CMCC No 135 of 2018 pending the hearing and determination of the appeal
  2. Costs be provided for
3. The notice of motion is premised on grounds among others that the appellants are aggrieved by the judgment of the trial court whose award they contend was against the weight of evidence and have filed this appeal which they argue has high chances of success.
4. The application is also supported by an affidavit sworn on May 12, 2022 by David Kanja, factory manager of the 2<sup>nd</sup> appellant in which he reiterates the grounds on the face of the application. He



additionally avers that the respondent is not in a position to refund the judgment sum in the event that the appeal succeeds.

5. Respondent opposed the application by way of an affidavit sworn on May 25, 2022 in which he avers that the applicants are guilty of laches having filed the application a month after judgment was delivered. He prays that he be paid half of the decretal sum and the balance be deposited in an interest earning account in the name of both advocates.

### **Analysis and Determination**

6. I have considered the application in light of affidavit on record the issue for determination is whether there ought to be an order of stay of execution of judgment in Maua CMCC No 135 of 2018 pending the hearing and determination of the appeal
7. Concerning stay of execution, order 42 (6) of the *Civil Procedure Rules* provides:
  - (2) 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
      - b. That the application has been made without unreasonable delay; and
      - c. 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. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money. (See civil appeal No 186 of 2007 *Standard Assurance Co Ltd v Alfred Mumea Komu*; civil case No 41 of 1995 *United Builders & Contractors (Africa) Limited v Standard Chartered Bank Ltd* and *ABN Amro Bank N V v Le Monde Foods Ltd* civil application No Nairobi 15 of 2002.
9. The respondent was awarded damages in the sum of Kshs 6,335,930/-. This is a money decree and since there is no evidence that the respondent is in a position to refund the decretal sum in the event that the appeal succeeds. I am persuaded that appellant is likely to suffer substantial loss if an order of stay is not granted.
10. This application was filed exactly one month after the impugned judgment was delivered and I find that it was filed without delay.
11. Security is a legal requirement under 42 (6) (2) (c) of the *Civil Procedure Rules*. The appellant has not offered any security for due performance of the decree herein pending the hearing and determination of the appeal but that does not bar the court from considering the application since the court has a duty to ensure security is given in every case for stay of execution pending appeal.
12. Whereas it is not my duty at this stage to determine if the applicants have an arguable appeal, I am minded, in the interest of justice to exercise this court's discretion under section 3A of the *Act* to afford the appellants an opportunity to prosecute his appeal.
13. In the end, the notice of motion dated May 12, 2022 and filed on May 13, 2022 is allowed in the following terms:



1. There shall be a stay of execution of judgment in Maua CMCC No 135 of 2018 pending the hearing and determination of the intended appeal on condition that the appellants shall:
  - a. Deposits Kshs 1,000,000/- (one million) with the court within 30 days from today's date
2. The appellant is directed to file and serve the record of appeal not later than 30 days' from today's date
3. Mention on June 30, 2022 to confirm compliance with orders 1 and 2 above
4. Costs shall abide the outcome of the intended appeal

**DATED IN MERU THIS 31<sup>ST</sup> DAY OF MAY 2022**

**T.W. CHERERE**

**JUDGE**

**Appearances**

**Court - Morris Kinoti**

For Appellants/Applicants - Mr. Njomo for Kamocho Njomo & Co Advocates

For Respondent - Mr. Njindo for Ngunjiri Michael & Co. Advocates

