



REPUBLIC OF KENYA



KENYA LAW
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**Dreamlilne Express Ltd v Achieng (Civil Appeal E054 of 2021)
[2022] KEHC 11563 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E054 OF 2021**

GMA DULU, J

MAY 25, 2022

BETWEEN

DREAMLILNE EXPRESS LTD APPELLANT

AND

WILKISTER ACHIENG RESPONDENT

RULING

1. Before is an application dated 24th September 2021 filed under Order 22 Rule 22, Order 24 Rule 4 and 6, Order 51 Rule 1 and 3 of the [Civil Procedure Rules 2010](#), and section 3 and 3A of the [Civil Procedure Act](#) (Cap. 21).
2. The applicant seeks various orders, some of which have been spent as follows –
 1. (Spent)
 2. (Spent)
 3. That this court be pleased to stay execution of the judgment/decree obtained herein pending the hearing and determination of the appellant/applicant appeal filed at the High Court of Kenya at Makueni as Civil Appeal No. 54 of 2021.
 4. That the court be pleased to order the applicant to provide sufficient security in the form of a Bank Guarantee from a reputable financial institution to secure the judgment herein.
 5. (spent)
 6. The costs of the application abide the outcome of the appeal.
3. The application has grounds on the face of the Notice of Motion that judgment was entered in the magistrate's court on 23/08/2021 in Kilungu PMCC 224 of 2018 in favour of the respondent for KShs.180,000/= with costs and interest, that an appeal has now been filed against that judgment with



high chances of success, and that if stay orders are not granted and the amount is paid to the respondent, if the appeal succeeds the decretal amount might not be recoverable by the appellant.

4. The application was filed with a supporting affidavit sworn on 24/08/2021 by Kelvin Ngunjiri the Claims Manager of Directline Assurance Company Ltd the insurers of motor vehicle KCF 674U at whose instance the suit was defended. The affidavit amplifies the grounds of the application.
5. The application has been opposed through grounds of objection filed by Waiganjo Wachira & Company advocates on 27/10/2021 stating that the application is unmeritorious, fatally defective, unnecessary and vexatious and meant to delay the case.
6. The application proceeded through filing of written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka advocates for the applicant and Waiganjo Wachira advocates for the respondent. I note that both counsel relied on decided court case authorities.
7. This being an application for stay of execution of judgment or decree, it is anchored on the exercise of this court's discretionary powers in order to do justice. The latitude of the exercise of this court's discretionary powers has been considered in many cases, but I will only cite the case of *Patel -vs- E.A Cargo Handling Services* [1974] E.A 75, and the case of *Shah -vs- Mbogo* [1967] E.A 116 wherein the court stated that the latitude of the exercise of such discretionary powers is wide and unfettered and intended to avoid occasioning injustice or hardship to parties, but is subject to the applicable law.
8. Coming to our case, the present application for stay of execution is governed by the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, which require the court to consider whether substantial loss will result to the applicant if the stay orders sought are not granted, whether the application has been made without undue delay, and lastly whether the applicant has offered or is willing to provide security for the orders that might ultimately be made by the court against him.
9. With regard to whether the application was filed without undue delay, I find no inordinate delay in filing the present application.
10. On whether the applicant will suffer substantial loss if the stay orders sought are not granted, I note that the judgment is a money decree and the financial means of the respondent to refund the money is not known. I have also seen the Memorandum of Appeal and it is clear that this is an arguable appeal.
11. In my view therefore, the applicant will suffer substantial loss if the stay orders sought are not granted. However as the appeal is basically on quantum of damages, I will grant stay orders subject to payment of part of the decretal amount.
12. As for provision of security, the applicant has indicated willingness to provide a bank guarantee, but I am of the view that payment of part of the decretal sum is adequate security.
13. Consequently and for the above reasons, I order as follows –
 1. Stay of execution of judgment or decree herein is granted pending determination of appeal.
 2. The above stay order is subject to the applicant paying the respondent through counsel part of the decretal amount Kshs.80,000/= within 30 days from today.
 3. In default of compliance with (2) above, the stay orders herein granted will automatically lapse.
 4. The costs of the application will follow the decision in the appeal.



DELIVERED, SIGNED & DATED THIS 25TH DAY OF MAY, 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

