



Parbat Siyani Construction Limited v Covermax Insurance Brokers Limited (Civil Appeal E792 of 2021) [2022] KEHC 11741 (KLR) (Civ) (20 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E792 OF 2021

JK SERGON, J

MAY 20, 2022

BETWEEN

PARBAT SIYANI CONSTRUCTION LIMITED APPLICANT

AND

COVERMAX INSURANCE BROKERS LIMITED RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated February 14, 2022 taken out by the appellant/ applicant and supported by the grounds set out on its body and the facts stated in the affidavit of Mukesh Halai. The order being sought is for a stay of execution of the judgment delivered on November 11, 2021 in Milimani CMCC no 5739 of 2010 pending the hearing and determination of the appeal against the aforesaid judgment.
2. The respondent opposed the motion by putting in the replying affidavit sworn by Dilip Amritlal Sheth on March 28, 2022.
3. The motion was dispensed with through the filing and exchanging of written submissions.
4. I have considered the grounds laid out on the body of the motion; the facts deponed in the supporting and replying affidavits respectively; and the contending written submissions.
5. As earlier noted, the order being sought herein is that of a stay of execution of the decree pending appeal.
6. The guiding provision is order 42, rule 6(2) of the [Civil Procedure Rules](#) which sets out the following conditions in determining an application for stay.



7. The first condition provides that the application must have been made without unreasonable delay. On the one part, the applicant is of the view that the instant Motion has been brought within reasonable timelines, while the respondent on the other part states that there has been an inordinate and unexplained delay in bringing the Motion.
8. From my perusal of the record, it is apparent that the impugned judgment was delivered on November 11, 2021 while the instant motion was filed about three (3) months later. In my view, while there has been a delay, I do not find the same to be unreasonable in the circumstances.
9. The second condition touches on the subject of substantial loss to be suffered by an applicant.
10. On the part of the applicant, it is stated and submitted that unless an order for a stay of execution is granted, the respondent will likely move to execute the decree, thereby rendering the appeal nugatory.
11. The respondent retorts by stating and submitting that no substantial loss has been demonstrated by the applicant and further states and submits that there is evidence to show that it will be in a position to refund the decretal amount to the applicant in the event that the appeal succeeds, since it is a large insurance brokerage.
12. The legal position is that execution is a lawful process and hence a party cannot simply argue that a stay of execution is necessary in order to halt or prevent execution. It is on this basis that the court in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR cited the submissions by the respondent, rendered itself thus:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail...”
13. Upon my perusal of the record, I note that the decretal sum which stands at kshs 1,504,289/= is fairly colossal in nature.
14. Upon my further perusal of the record, I observed that while the respondent annexed to the replying affidavit a copy of its financial management accounts, the same are for the period ended December 31, 2021.
15. In the absence of any credible evidence tendered to indicate or ascertain the respondent’s current financial standing and ability to refund the aforementioned decretal sum, I am satisfied on the likelihood of substantial loss resulting to the applicant if the order for a stay of execution be denied.
16. Under the final condition which is the provision of security for the due performance of a decree or order, the applicant has indicated its readiness and willingness to comply with the conditions which will be set by this court. The respondent has retorted by stating and submitting that no offer has been made for the provision of security and yet the provision of security is a mandatory requirement in the granting of an order for a stay of execution.
17. Upon considering the decretal amount in question, I am of the view that an order for deposit of the same in a joint interest earning account would constitute the most suitable security.
18. Consequently, the motion dated February 14, 2022 succeeds, giving rise to the following orders:
 - i. There shall be an order for stay of execution of the judgment delivered on November 11, 2021 by the trial court on the condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties’ advocates/firm of advocates within 45 days from today, failing which the order for stay shall automatically lapse.



ii. Costs of the application to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
20TH DAY OF MAY, 2022.**

J K SERGON

JUDGE

In the presence of:

.....for the appellant/applicant

..... for the respondent

