



**Seo and Sons Limited v M'Mburugu (Civil Appeal E047 of 2022)  
[2022] KEHC 10926 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10926 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E047 OF 2022  
TW CHERERE, J  
JUNE 23, 2022**

**BETWEEN**

**SEO AND SONS LIMITED ..... APPELLANT**

**AND**

**FREDRICK KOOME M'MBURUGU ..... RESPONDENT**

**RULING**

1. On 20<sup>th</sup> January, 2022, the court entered judgment in Maua CMCC No. 8 of 2019 in favour of the Respondent as against the Appellant for Kshs. 7,223,727/- together with costs and interest.
2. By a notice of motion dated and filed on 06<sup>th</sup> May, 2022, Appellant seeks orders for:  

Stay of execution of judgment, decree and certificate of costs in Maua CMCC No. 8 of 2019 pending the hearing and determination of the appeal
3. The notice of motion is premised on grounds among others that the Appellant is aggrieved by the judgment of the trial court and has filed this appeal which has high chances of success.
4. The application is also supported by an affidavit sworn by Samow Osman, the Appellant's director in which he reiterates the grounds on the face of the application and on the ground that it is apprehensive that the Respondent might not be in a position to refund the decretal sum once paid thus rendering the appeal nugatory.
5. Respondent opposed the application by way of an affidavit sworn on 25<sup>th</sup> May, 2022 in which he avers that this application is meant to delay him the enjoyment of fruits of the judgment and that the appeal does not stand a chance of success. Respondent 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 affidavits on record the issue for determination is whether there ought to be Stay of execution of judgment in Maua MCC NO. 8 of 2019 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. In *ABN Amro Bank N.V. v Le Monde Foods Ltd* Civil Application No. Nairobi 15 of 2002 held that:

“ Each party bears a specific burden regarding proof of substantial loss in a case such as before us. ....So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, 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 were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”
9. The Respondent was awarded general damages in the sum of 7,223,727/- together with costs and interest. 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. 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.
11. 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 Appellant an opportunity to prosecute his appeal.
12. In the end, the notice of motion dated and filed on 06<sup>th</sup> May, 2022 is allowed in the following terms:
  1. There shall be a Stay of execution of judgment in Maua CMCC No. 8 of 2019 pending the hearing and determination of the intended appeal on condition that the Appellant shall:
    - a. Deposits Kshs. 1,000,000/- (One million) with the court within 14 days from today’s date



2. The Appellant is directed to file and serve the record of Appeal not later than 21 days' from today's date
3. Mention on 19<sup>th</sup> October, 2022 to confirm compliance with orders 1 and 2 above
4. Costs shall abide the outcome of the intended appeal

**DATED IN MERU THIS 23<sup>RD</sup> DAY OF JUNE 2022**

**TW. CHERERE**

**JUDGE**

**Appearances**

Court Assistant - Morris Kinoti

For Appellant/Applicant - Mr. Lesagor for Hashim & Leisagor & Co Advocates

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

