



**Vastu Company Limited v Mwangi (Civil Appeal 547 of 2019)  
[2022] KEHC 12334 (KLR) (Civ) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12334 (KLR)

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

**CIVIL**

**CIVIL APPEAL 547 OF 2019**

**JK SERGON, J**

**JULY 27, 2022**

**BETWEEN**

**VASTU COMPANY LIMITED ..... APPELLANT**

**AND**

**DANIEL MWANGI ..... RESPONDENT**

**RULING**

1. The appellant/applicant in this instance has brought the notice of motion dated June 20, 2022 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive order for stay of execution of the judgment delivered on June 17, 2022 by this court, pending the hearing and determination of the appellant's appeal in the Court of Appeal.
2. The respondent opposed the Motion by filing the replying affidavit sworn by his advocate, Joseph Kithinji Thurunira on July 14, 2022.
3. When the motion came up for interparties hearing the parties respective advocates chose to rely on the averments made in their respective affidavits.
4. A brief background of the matter is that the respondent instituted a suit against the applicant vide the plaint dated November 21, 2017 and sought for reliefs in the nature of general and special damages together with costs of the suit and interest on the same.
5. Upon hearing the parties, judgment was delivered on September 5, 2019 and was entered in favour of the respondent. Being aggrieved by the aforementioned decision the applicant appealed to this court against the lower court judgment.



6. In its judgement delivered on June 17, 2022, this court dismissed the appellant’s appeal. Being aggrieved by the dismissal order, the appellant filed an appeal against the same to the Court of Appeal.
7. I have considered the grounds laid out on the body of the motion; the facts deponed in the affidavits supporting and opposing it; and the brief oral arguments.
8. The guiding provision in considering an application seeking an order for a stay of execution is order 42, rule 6(2) of the [Civil Procedure Rules](#) which sets out the following conditions in determining an application for stay:
  - i. The application should have been brought without unreasonable delay;
  - ii. The applicant must demonstrate the substantial loss to be suffered; and
  - iii. There must be provision of security for the due performance of the decree or order being appealed against.
9. The above conditions were similarly laid out in the case of [G. N. Muema P/A \(Sic\) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another](#) [2018] eKLR.
10. On the first condition, from my study of the record and the impugned judgment, I note that it was delivered on June 17, 2022 which is barely 3 days prior to the filing of the instant Motion. I therefore find that there has been no unreasonable delay in bringing the Motion.
11. Under the second condition on substantial loss, it is apparent from the Motion that the applicant avers that this court should exercise its discretion in their favour because they stand to suffer irreparable loss and that the respondent, whose financial means are unknown, will not be able to refund the decretal sum if the same is paid to him and the appeal succeeds. The applicant is apprehensive that the appeal will consequently be rendered nugatory.
12. On his part, the respondent is of the view that the current application does not meet the threshold of granting stay of execution, since the applicant has not shown what damage it will suffer if stay of execution is denied.
13. In the case of [Masisi Mwita v Damaris Wanjiku Njeri](#) [2016] eKLR in which the court reasoned that:
 

“The corner stone of the jurisdiction of the court under order 42 of the [Civil Procedure Rules](#) is that substantial loss would result to the applicant unless a stay of execution is granted... 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.”
14. The courts have time and time again discussed the question on who has the burden of proof on the issue of refund of the decretal sum. I am both guided and bound by the Court of Appeal’s analysis in the case of [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) [2006] eKLR where it held thus:
 

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”



15. In the absence of anything to indicate or ascertain the respondent's financial capacity therefore, I am satisfied that the applicant has reasonably demonstrated the manner in which it stands to suffer substantial loss.
16. In respect to the final condition on the provision of security for the due performance of such decree or order, the applicant on the one hand indicates its readiness and willingness to comply with any conditions that will be set by this court on the provision of security, which position was reiterated by their advocate during oral submissions. On the other hand, the respondent is of the view that should an order for a stay of execution be granted, then the applicant should be ordered to deposit the decretal sum in a joint interest earning account.
17. In the end, the motion dated June 20, 2022 is found to be meritorious and it is allowed, therefore giving rise to a grant of the following orders:
  - i. An order for stay of execution of the judgment and decree delivered on June 17, 2022 is granted on 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 and firm of advocates within 30 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  
27<sup>TH</sup> DAY OF JULY, 2022**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent

