



**Wainaina v Kemboi (Civil Appeal E452 of 2022)
[2022] KEHC 12556 (KLR) (Civ) (25 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12556 (KLR)

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

CIVIL

CIVIL APPEAL E452 OF 2022

JK SERGON, J

AUGUST 25, 2022

BETWEEN

SAMUEL CHEGE WAINAINA APPLICANT

AND

KENNEDY KIBIWOTT KEMBOI RESPONDENT

RULING

1. Samuel Chege Wainaina, the applicant herein, took out the motion dated 28/6/2022 whereof he sought for an order for stay of execution of the trial court's decree in Milimani S.C.C.C No. 782 of 2021. The application is supported by the affidavit sworn by Harriet Sang. Kennedy Kibiwott Kemboi, the respondent herein filed the replying affidavit sworn Sarwa Duncan to oppose the motion.
2. I have considered the grounds stated on the motion dated June 28, 2022 and the facts deponed in the rival affidavits. It is the averment that on May 30, 2022 the trial court delivered judgment in favour of the respondent and against the appellant in the sum of ksh.151,960/=.
3. The applicant avers that he is aggrieved by the decision of the trial court hence this appeal. He now avers that unless an order for stay is granted he will suffer substantial loss in that the respondent is not in a financial position to make a refund. He offered to give a bank guarantee as security for the due performance of the decree.
4. The respondent opposed the motion stating that the same is vexatious hence it should be struck out. He argued that the application is premature since no appeal has been preferred nor execution commenced. The respondent stated that the applicant has not shown the substantial loss he would suffer if the order for stay of execution is denied.



5. He also pointed out that the court has been wrongly moved under Order 40 of the Civil Procedure Rules instead of Order 42 of the *Civil Procedure Rules*.
6. Having considered the rival averments, it is apparent that the respondent has not controverted the assertion by the applicant that if the decretal sum is paid to the respondent, the respondent will not be in a financial position to make a refund of the money if the appeal turns successful. In the circumstances, I am satisfied that he will suffer substantial loss if the order for stay is not granted.
7. In the end, I find the motion dated June 28, 2022 to be meritorious. It is allowed. Consequently, an order for stay of execution pending appeal is granted on condition that the applicant deposits the decretal sum in court within 30 days. In default, the order for stay shall automatically lapse. Costs of the motion to abide the outcome of the appeal.
8. To avoid this appeal procrastinating further, I direct the appellant to file and serve the record of appeal within 30 days from today's date. Mention on 29/9/2022 for purpose of confirming compliance and thereafter to have the appeal admitted to hearing and to give further orders and directions on the hearing of the same. Costs to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF AUGUST, 2022.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

