



**Mwilu v Standard Group Limited (Civil Suit 226 of 2018)
[2022] KEHC 13013 (KLR) (Civ) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13013 (KLR)

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

**CIVIL
CIVIL SUIT 226 OF 2018**

**JK SERGON, J
SEPTEMBER 23, 2022**

BETWEEN

PHILOMENA MBETE MWILU PLAINTIFF

AND

STANDARD GROUP LIMITED DEFENDANT

RULING

1. The defendant/applicant has taken out the notice of motion dated June 9, 2022 supported by the grounds laid out on its face and the facts stated in the affidavit of Millicent Ng'etich, the company secretary and head of the legal department of the applicant. The order being sought is for a stay of execution of the judgment and decree issued by this court on March 17, 2022 pending the hearing and determination of an intended appeal against the said judgment.
2. The respondent swore a replying affidavit on July 12, 2022 in retort to the motion.
3. The motion was to be canvassed by way of written submissions. At the time of writing this ruling, this court had only received the submissions by the applicant for reference.
4. I have considered the grounds laid out on the body of the motion; the facts deponed in the supporting and replying affidavits; and the submissions on record plus the authorities cited therein.
5. As noted earlier on, the substantive order sought is that of a stay of execution pending appeal. The guiding provision is order 42, rule 6(2) of the *Civil Procedure Rules* which sets out the conditions in determining an application for stay.
6. The first condition states that the application must have been made without unreasonable delay. Millicent Ng'etich states in her supporting affidavit that the instant motion has been brought



without unreasonable delay and that previously, a stay of execution of 30 days had been granted by the court orally and which stay lapsed on April 17, 2022.

7. In retort, the respondent states that there has been an inordinate delay of 52 days in bringing the Motion, since the lapse of the stay orders issued by this court.
8. From my study of the record, it is not in dispute that the judgment which the applicant is desirous of challenging was delivered on March 17, 2022 following which this court granted the applicant a stay of execution to last 30 days.
9. I note that there has been a lapse of about two (2) months since the lapse of the stay of execution orders issued earlier on and the bringing of the instant motion. I am therefore satisfied that there has been no unreasonable delay here.
10. The second condition concerns the substantial loss likely to be suffered by an applicant if the order for stay is denied. The applicant on its part states and submits that unless an order for a stay of execution is granted, the respondent is likely to proceed with execution of the decree, thereby rendering the appeal nugatory and resulting in irreparable loss to the applicant.
11. The applicant further states that upon execution, it may not be able to recover the decretal sum in question from the respondent and which sum is colossal in nature, making reference to the case of *Focin Motorcycle Co Limited v Ann Wambui Wangui & another* [2018] eKLR in which the court held that once an applicant has expressed apprehension over the capability by a respondent to refund the decretal amount, the legal duty rests with the respondent to demonstrate by way of evidence his or her capability to make the refund should the appeal succeed.
12. The respondent on her part states that the applicant has not demonstrated the substantial loss it stands to suffer and that the instant motion is purely aimed at delaying her entitlement to enjoy the fruits of her judgment and hence no substantial loss has been demonstrated by the applicant.
13. The respondent further states that given her professional standing and her standing as the Deputy Chief Justice, she possesses the financial capacity to refund the decretal sum if necessary and hence the averments being made by the applicant are merely speculative in nature.
14. The legal position on who has the burden of proof on the issue of refund of the decretal sum was considered by the Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where it reasoned as follows:

“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 present instance, I have taken into account the professional and societal standing of the respondent to support her averments that she is capable of refunding the decretal amount.
16. It is clear to this court that the respondent has discharged the burden of demonstrating that she is in financial position to refund the decretal amount should the appeal turn successful. It therefore follows that the respondent has displaced the appellant’s argument that it will suffer substantial loss.
17. In the end therefore, I find the defendant’s motion to be without merit. It is dismissed with costs to the plaintiff/respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.



J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant

