



**Swan Carriers Limited v United Transport Agencies (Civil Appeal
E003 of 2022) [2022] KEHC 13523 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E003 OF 2022
AN ONGERI, J
SEPTEMBER 23, 2022**

BETWEEN

SWAN CARRIERS LIMITED APPLICANT

AND

UNITED TRANSPORT AGENCIES RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated January 31, 2022 seeking stay of execution of the judgment delivered on January 27, 2022 in Kericho CMCC No 111 of 2017 pending hearing and determination of the appeal lodged herein.
2. The application is supported by the affidavit of Joseph Gachigua dated January 31, 2022, in which he avers that the appellant/applicant being aggrieved and dissatisfied by judgment delivered on January 27, 2022 in Kericho CMCC No 111 of 2017 lodged an appeal.
3. The appellant/applicant avers that the said appeal was arguable with a high likelihood of success and would be rendered nugatory unless the court grants stay of execution pending hearing and determination of the instant application as well as the intended appeal.
4. The appellant/applicant avers that should the decretal sum be paid to the respondent, they would suffer substantial loss and damages.
5. The appellant/applicant avers that they are ready and willing to comply with all the conditions for stay as would be determined by the court.
6. The respondent filed a replying affidavit opposing the application sworn by Wazir Merali on March 4, 2022 in which he avers that the matter was litigated for close to 11 years after which the court had issued judgment in favour of the respondent.



7. The respondent avers that the instant application lacked merit and was instituted to bar the respondent from enjoying the fruits of its judgment.
8. The respondent avers that the appellant/applicant had not demonstrated how they would suffer substantial loss if the stay is not granted.
9. The respondent further avers that any further delay allowing the appellant/applicant to withhold the decretal sum pending an appeal whose lifespan was indeterminate would greatly inconvenience the Respondent.
10. The parties filed written submissions which I have duly considered.
11. The appellant/applicant submitted that the intended appeal had merit and was not frivolous and/or vexatious.
12. The appellant/applicant submitted that they would suffer substantial and/or irreparable loss if made to pay the decretal sum.
13. The appellant/applicant contended if the respondent was allowed to execute the appeal would be rendered nugatory.
14. The appellant/applicant was apprehensive that in the event stay is not granted, the respondent would proceed to execute the decree, their goods would be attached and sold by way of public auction to raise the decretal amount following which they would not be able to recover the said goods.
15. The appellant/applicant reiterated that the instant application was filed without unreasonable delay and that they were willing to furnish security.
16. The respondent in opposing the application submitted that the appellant/applicant had not met the threshold of grant of stay of execution pending appeal under order 42 rule 6 (2) of the [*Civil Procedure Rules*](#).
17. The respondent reiterated that the appellant/applicant had not demonstrated how they would suffer substantial loss by settling the decretal sum.
18. The respondent further contended that the decree subject to appeal was a monetary decree and the financial position of the respondent, a company operating in the transport business for over 50 years was not in doubt.
19. The respondent submitted that the matter was in court for 11 years and it would be unjust to keep the respondent waiting further to enjoy the fruits of its judgment.
20. The respondent conceded that the instant application was filed without unreasonable and inordinate delays.
21. The issues for determination are as follows;
 - i. Whether the applicant is entitled to stay pending appeal.
 - ii. Who pays the costs of the application?
22. The provision governing stay pending appeal is order 42 rule 6 of the [*Civil Procedure Rules*](#) which states as follows;
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as



the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) No order for stay of execution shall be made under subrule (1) unless—
- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) 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.”

23. The application dated January 31, 2022 is hereby allowed on the following conditions;

- i. That the entire decretal sum is deposited in a joint interest earning account held by Advocates for both parties within 60 days of this date.
- ii. That the Applicant pays the costs of this Application.
- iii. That in default execution to issue.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 23RD DAY OF SEPTEMBER 2022.

A. N. ONGERI

JUDGE

