



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kazungu v Marindwa Contractors Limited (Civil Appeal  
E007 of 2022) [2022] KEHC 18117 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 18117 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E007 OF 2022  
SM GITHINJI, J  
OCTOBER 25, 2022**

**BETWEEN**

**CHRISTOPHER KARISA KAZUNGU ..... APPELLANT**

**AND**

**MARINDWA CONTRACTORS LIMITED ..... RESPONDENT**

*(An Appeal from the Ruling of the Chief Magistrate Court at Kilifi,  
made in SPMCC No.426 of 2019 delivered on 26th January, 2022)*

**RULING**

CORAM: Hon. Justice S.M Githinji

Mr Olwande Advocate for the Appellant

Mr Mwangi Advocate for the Respondent

- 1 Before court for determination is the appellant's notice of motion dated February 17, 2022. The orders sought are as follows:
  1. Spent.
  2. Spent.
  3. There be a stay of execution of the judgment of the Magistrate's Court at Kilifi, in SPMCC 426 of 2019 pending the hearing and determination of the appeal filed herein.
- 2 The application is founded on the grounds on its face and supported by the affidavit sworn on the even date by Christopher Karisa Kazungu, the Appellant, who deposed that upon judgment being entered against him in the lower court, he filed an application to be allowed to settle the decretal amount by way of instalment. That application was dismissed on January 26, 2022. It is that ruling that prompted the present appeal.



- 3 The appellant further deposed that the respondent has taken out warrants of arrest in execution of the decree and that he stands to suffer substantial loss in the event that he is incarcerated.
- 4 In response, the respondent filed a replying affidavit sworn on March 1, 2022 by Lenox Mwadzoya Mwasirya who deposed that the present application and appeal were an attempt to delay the course of justice since the appellant had filed a similar application on November 15, 2019 and another dated July 22, 2021 which were both dismissed.
- 5 The application was canvassed by way of written submissions which I have considered and find that the only issue for determination is whether an order for stay of execution should be granted.

### **Analysis and Determination**

- 6 Order 42 rule 6 of the *Civil Procedure Rules*, 2010 lays down the conditions which an applicant must satisfy in order to deserve orders of stay of execution pending an appeal. It provides:
1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.
- 7 As regards the time taken to file the application, the impugned ruling herein was delivered on January 26, 2022 and the present application filed on February 18, 2022. It is my considered view that the application was made timeously without unreasonable delay.
- 8 On substantial loss, the court in *James Wangalwa & Another -v- Agnes Naliaka Cheseto* [2012] eKLR, observed as follows:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

- 9 In the present case, the appellant averred that he stands to suffer substantial loss if the warrants of arrest issued in execution are effected. That if he is incarcerated, his ability to raise the decretal sum will be impossible. The respondent’s contention is that the appellant has no intentions of paying the



decretal sum and if he did have such intentions, he would have commenced payment of the suggested instalments.

10 In my view, the issues raised by the respondent are issues which can and will be determined at the hearing of the appeal. Therefore, I find that in the event of the appeal succeeding and without an order of stay of execution of the impugned ruling and warrants of arrest, there is high likelihood that the appellant will suffer substantial loss.

11 On the issue of security, I note that the appellant did not demonstrate his willingness to deposit the same. He averred that his business was destabilized by Covid-19 pandemic. Bearing in mind the principle that a successful litigant has the right to enjoy the fruits of judgment and a litigant's right to appeal, and this court's duty to ensure that an appeal is not rendered nugatory; I hereby order that the application dated February 17, 2022 be and is hereby allowed in the following terms:

1. The appellant deposit as security in a joint interest earning account of the sum of Kshs. 2,000,000/- within a period of 30days from the date hereof.
2. Failure to deposit the said security as ordered, the orders herein shall stand vacated.
3. Parties are hereby directed to set down the appeal for hearing on a priority basis.
4. Mention on December 5, 2022.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25<sup>TH</sup> DAY OF OCTOBER, 2022.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the absence of; -**

1. Mr Olwande Advocate for the Appellant

Mr Mwangi Advocate for the Respondent

