



**Housemart Company Limited v Kanana (Civil Appeal E070 of 2022)
[2022] KEHC 14049 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E070 OF 2022
TW CHERERE, J
OCTOBER 19, 2022**

BETWEEN

HOUSEMART COMPANY LIMITED APPELLANT

AND

FAITH KANANA RESPONDENT

RULING

1. On May 11, 2022, the court entered judgment in Meru CMCC NO E276 OF 2021 in favour of the Respondent as against the appellant for KES 1,600,000/- together less 10% agreed contribution, costs and interest.
2. By a notice of motion dated and filed on May 6, 2022, Appellant seeks orders for:
 - 1) Stay of execution of judgment and decree in Meru CMCC NO E276 of 2021 pending the hearing and determination of this appeal
3. The notice of motion is premised on grounds among others that the appellant is aggrieved by the judgment of the trial court and has filed this appeal and is likely to suffer substantial loss if the respondents executes the judgment.
4. The application is also supported by an affidavit sworn on 23rd June, 2022 by Joseph K Mungai advocate for the applicant in which he reiterates the grounds on the face of the application.
5. In opposing the application, respondent's advocate L Mutinda filed an affidavit sworn on July 19, 2022 in which he avers that this application is meant to delay the respondent from enjoying the fruits of the judgment. It is proposed for the respondent that in the event the application is granted, half the decretal sum should be paid to the respondent or the entire decretal sum be deposited in court.



Analysis and Determination

6. I have considered the application in light of affidavits on record the issue for determination is whether there ought to be stay of execution of judgment in Meru CMCC NO E276 of 2021 pending the hearing and determination of the appeal
7. Concerning stay of execution, order 42 (6) of the *Civil Procedure Rules* provides:
 - (2) No order for stay of execution shall be made under sub rule (1) Unless—
 - a. The court is satisfied that substantial loss may result to the applicant unless the order is made
 - b. That the application has been made without unreasonable delay; and
 - c. 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.
8. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money. In *ABN Amro Bank NV v Le Monde Foods Ltd* Civil Application No Nairobi 15 of 2002 held that:

“ Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an applicant in the position of the bank (appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the applicant but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”
9. Other than aver that applicant is likely to suffer substantial loss, no material has been placed before the court to demonstrate what substantial loss the applicant is likely to suffer if the impugned judgment is executed.
10. The record reveals that there is consent judgment between the parties at 90:10% in favour of the respondent. Whereas the respondent has a right to enjoy the fruits of its judgment, the applicant on the other hand has a right to have its appeal heard on merit.
11. Further to the orders issued on June 10, 2022, it is hereby ordered:
 - 1) The KES 500,000/- deposited in court shall be released to the respondent forthwith
 - 2) There shall be a Stay of execution of judgment in Meru CMCC NO E276 of 2021 pending the hearing and determination of the intended appeal on condition that:
 - a) Appellant/applicant shall deposit a sum of KES 500,000/- into court within 14 days from today
 - b) Appellant/applicant files and serves the record of appeal not later than 45 days' from today's date



- 3) Mention on November 24, 2022 to confirm compliance with orders 1 and 2 above
- 4) Costs shall abide the outcome of the intended appeal

DATED IN MERU THIS 19TH DAY OF OCTOBER 2022

TW. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellant/Applicant - Ms.Oteko for Kiruki & Kayika Advocates

For Respondent - N/A for Kithome L. Mutinda & Co. Advocates

