



Executrix of the Estate of Ramesh Chander Sharma v Swami Investments Limited (Commercial Case E173 of 2022) [2025] KEHC 460 (KLR) (Commercial and Tax) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 460 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E173 OF 2022
JWW MONG'ARE, J
JANUARY 23, 2025**

BETWEEN

**THE EXECUTRIX OF THE ESTATE OF RAMESH CHANDER
SHARMA APPELLANT**

AND

SWAMI INVESTMENTS LIMITED RESPONDENT

RULING

1. The Respondent has by an application dated 13th June 2024 moved this Honourable Court pursuant to Articles 50(1), 159(2)(a), & (b) of *the Constitution* and Section 1A, 1B, 3, 3A of the *Civil Procedure Act* and Order 50 Rule 1 and 2 Rule 6 of the Civil Procedure Rules seeking the following Orders:-
 - i. Spent
 - ii. That this Honourable court be pleased to order a stay of further proceedings in CMCC No. 11313 of 2021 Swami Investments Limited vs Violet Maranga t/the Legal Representative of the firm of Ramesh Sharma Advocate and the estate of Ramesh Sharma pending the hearing and determination of the Appeal.
 - iii. That the court be pleased to issue any other order as it may deem just, appropriate and expedient in the interest of justice.
 - iv. That costs of this application be provided for.
2. The application is supported on the grounds set out on its face and the supporting and further affidavits sworn by BHAVIN ASHWIN GUDKA, a Director of the Respondent/Applicant. In opposing the application, the Appellant filed a replying affidavit sworn by VIOLET MARANGA, the executrix



of the Estate of Ramesh Sharma Advocate. Both parties have filed written submissions which I have considered.

Analysis and Determination:-

3. It is important to note that the Appellant by an application dated 14/11/2022 moved this Honourable court seeking for leave to file an appeal out of time and that this court on 19th June 2023 allowed the Application and subsequently stayed the execution of the ruling issued by the trial court that had been issued on 8th July 2022 in CMCC 11313/2021. Having obtained the said orders of the court, the Appellant has filed a Memorandum of Appeal and the Record of Appeal in the said Appeal. The court further notes from a reading of the said Memorandum of Appeal and the record thereto, the matter at the lower court is yet to be concluded and therefore the appeal filed herein seeks to overturn interlocutory orders granted in the suit therein.
4. In opposing the present application, the Appellant argues that the matter at the trial court has already proceeded for hearing and that the same had been set down for a full hearing on 22/10/2024. The Appellant argues that the present application is an afterthought having been brought 12 months after the delivery of the impugned ruling and it is a further attempt to keep this matter in court and to vex the Appellants.
5. From my analysis of the applications and facts surrounding this matter, I note that the Applicant has moved this court under Order 42 of the Civil Procedure Rules. Specifically Order 42 Rule 6 provides as follows:-

“Stay in case of Appeal [Order 42, rule 6]

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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.



- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

6. Ostensibly, this court is called upon to consider if it is necessary to interfere with the trial at the trial court at this interlocutory stage of the proceedings and stay the proceedings therein. As stated above, the granting of stay of execution pending Appeal by the High Court is governed by Under Order 42 Rule 6 of the Civil Procedure Rules. It is grantable at the discretion of the court on sufficient cause being established by the Applicant. The incidence of the legal burden of proof on matters which the Applicant must prove lies with the Applicant. See the Halsbury’s Law of England, vol.17, paragraph 14: “14. Incidence of the legal burden in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case.”
7. Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:-
 - a. Substantial loss may result to the Applicant unless the order is made,
 - b. The application has been made without unreasonable delay,
 - c. And Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given by the Applicant.
8. I have considered the application before me and the arguments put forth by all the parties, the fact that the same was filed 12 months from the date of the ruling was issued by the trial court. I have also reviewed the ruling from which the appeal is set to emanate and the Memorandum of Appeal filed therein. In addition, I note the averments that the lower court matter whose proceedings are sought to be stayed has proceeded for trial despite the earlier orders of this court. I am not satisfied that the Applicant has established the threshold required by Order 42 of the Civil Procedure Rules for a grant of the orders sought.
9. I have also not been persuaded that the Applicant will suffer substantial loss if the orders sought herein are not granted. Noting that the Applicant has not offered any form security for costs as required by the law, the application fails on all fours to meet the tenets set out by order 42 of the Civil Procedure Rules. I therefore find and hold that the application dated 13th June 2024 is without merit. The same is dismissed and the interim orders issued hereinbefore are vacated forthwith. Costs of the present application are awarded to the Defendant to be borne by the Applicant. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JANUARY 2025

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J.W.W. MONG'ARE



JUDGE

In the Presence of:-

1. Ms. Wanjau holding brief for Mr. Hassan for the Applicants/Respondents.
2. Ms. Gachara holding brief Mr. Rabongo for the Respondents.
3. Amos - Court Assistant

