



**Namak Sacco Ltd v Mutungi (Civil Miscellaneous E002 of 2023)
[2024] KEHC 3211 (KLR) (11 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL MISCELLANEOUS E002 OF 2023
TM MATHEKA, J
MARCH 11, 2024**

BETWEEN

NAMAK SACCO LTD APPELLANT

AND

CHARLES MAWIA MUTUNGI RESPONDENT

RULING

1. The two issues for determination here are whether the application dated 24/01/2023, seeking leave to file appeal out of time has any merit and if so, whether an order for stay of execution of the Judgment in TAWA PMCC no. 138 of 2019 should issue pending the hearing and determination thereof.
2. The applicant cites Articles 159 and 165 of *the Constitution*, Part 1 Rule 3(1) of the *High Court (Practice & Procedure) Rules* of Judicature Sections 1A,1B, 3A, & 79G of the *CPA* and Orders 40 rules 1,2,4 and 51 rule 1 of the *Civil Procedure Rules* but essentially the court in determining the issues is guided by Order 42 rule 6 and the requirements set out in precedents; the length of the delay, the reason for the delay, any prejudice the respondent may suffer in the event that the stay is granted, and any issue of public interest.
3. Granting this order is an act of judicial discretion not based on whim or caprice but by the circumstances of the case and sound legal principles.
4. I have carefully considered the application, the rival affidavits and the submissions that each party has filed.
5. Judgment was delivered in Tawa PMCC No. 138 of 2019 on 27/10/2022. The learned trial magistrate granted 30 days stay of execution.
6. These expired on 27/11/2022. This application was filed on 24/01/2023. The applicant has annexed a letter dated 7/11/2023 received by the court on 08/11/2023, asking for a copy of the judgment. The



copy in the court's file indicates it that a copy of the judgment was certified as a true copy of the original on 13/12/2022 and the applicant depones that his advocate received the judgment on 20/12/2022. The respondent's position is that the applicant has not demonstrated any evidence of following up on the judgment after writing to court and therefore that the delay is unjustified and unexplained.

7. I have considered these facts. Evidently, the advocate wrote in good time to court. It was the duty of the court to supply the copy of the judgment at the time of delivery on or soon thereafter to enable any appeal proceedings to continue. If for any reason that did not happen, it cannot be held against the applicant because he did his part, write to court. I do not agree with the position that upon request for certified copy of the judgment or proceedings a party must follow up – the fact that the court received the request on 08/11/2022 and certified a true copy of the judgment on 13/12/2022 is evidence enough that the delay by the applicant was not by the applicant. Hence though the delay may be inordinate – it is well explained.
8. The respondent raises the issue that the applicant does not have an arguable appeal to warrant an order of stay of execution and in addition has not provided any security for the performance of the decree as required in Order 42 Rule 6 of [CPR](#).
9. I perused the Memorandum of Appeal and it is evident that the ownership of the motor vehicle involved in the road accident is challenged, and so is the award of liability and general damages – hence one cannot say that the Memorandum of Appeal is pedestrian.
10. The respondent argues that the applicant has not offered any security for the performance of the decree; and applicant that the respondent will not suffer any prejudice. On these two issues – it is necessary that if stay of execution is to be granted pending appeal – the applicant must give security for the performance of the decree. The applicant only argues that he will suffer substantial loss if execution occurs but makes no offer on the security.
11. On the issue of security – the applicant has made no provision yet – I have before me a successful litigant against whose judgment the applicant seeks stay of execution. The applicant cannot argue about substantial loss while not making provision for security for the performance of the decree should the appeal not succeed.
12. In these applications the court is expected to balance the rights of the applicant and those of the respondent – but it is the applicant who has brought this application and who must bring his application within the ambit of Order 42 Rule 6. For the avoidance of doubt it states inter alia;

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.

13. I have found the delay not inordinate but well explained. The applicant has argued about substantial loss but neglects to provide to provide security for the performance of the performance of the decree to the prejudice of the respondent. However, the court has the power to order the provision of that security as a condition for stay pending appeal.
14. Looking at the award of Ksh 1,247,131 plus costs and interest it would not be farfetched to find that indeed it is a substantial sum and in the face of the applicant's grounds of appeal only fair to allow the application on the condition of provision for security.
15. The application is allowed in the following terms;
 - a. the applicant to file the appeal within 30 days hereof
 - b. there be stay of execution pending the hearing and determination of the appeal.
 - c. the order of stay of execution is on the condition that the applicant deposits the entire decretal sum in a joint interest earning account in the joint names of the advocates for the parties within 45 days hereof.
 - d. in default of (c) the stay will lapse and the application will stand dismissed with costs to the respondent.
 - e. otherwise the costs of this application will be borne by the respondent

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF MARCH 2024

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MUMBUA T MATHEKA

JUDGE

CA Nelima

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