



**Milhan Access Capital Limited v Masika (Civil Appeal
E010 of 2024) [2024] KEHC 10289 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 10289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E010 OF 2024
F WANGARI, J
APRIL 18, 2024**

BETWEEN

MILHAN ACCESS CAPITAL LIMITED APPELLANT

AND

GEORGE SIKUKU MASIKA RESPONDENT

RULING

1. This is a Ruling on an Applications dated 17th January 2024.
2. The Application seeks the following Orders:
 - i. Spent
 - ii. Spent
 - iii. That there be stay of execution of the Decree and Judgement delivered in Mombasa CMCC No. 661 of 2022 pending the hearing and determination of the Appeal.
3. The Application is premised on the Grounds stated *inter alia* as follows:
 - i. There is eminent danger of execution
 - ii. The Applicant has a meritorious appeal.
 - iii. The Appeal will be rendered nugatory.
4. The Respondents opposed the Application materially on the ground that the Applicant had not satisfied the conditions for grant of stay of execution.
5. Parties filed submissions. I have considered the submissions and authorities relied upon.



Analysis

6. I have analyzed the Application, response and the submissions and authorities filed by the parties in support and opposition to their respective positions.
7. I have to determine whether the Appellant has satisfied the conditions for the grant of stay of execution pending Appeal.
8. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:
 - “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.
9. Further to the grounds on substantial loss and security, I understand that stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay underscores the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#). The court is thus enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.
10. Section 1A(2) of the [Civil Procedure Act](#) provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
11. Therefore, an Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) 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) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR.
12. I have to ascertain whether the Applicant has demonstrated loss that it stands to suffer if the order of stay is not granted. From the affidavit in support of the Application, it is deposed that should the order be declined, the Applicant stands to suffer substantial damage after execution takes place. The Respondent on the other hand strongly argues that the Applicant has not demonstrated substantial loss to warrant the grant of stay.
13. Substantial loss for purposes of Order 42 rule 6 of the [Civil Procedure Rules](#) was discussed in [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR, that:
 - “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.”

14. The Court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

15. Having considered the Application vis-à-vis the response thereto, I am of the considered view that the Applicant has demonstrated that it will suffer substantial loss in the event that the Appeal succeeds. There is no assurance that the decretal sum will be intact. In the case of *G. N. Muema p/a(sic) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another* [2018] eKLR, the court held as follows:-

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

16. This Application was filed timeously. However, I also have to consider whether security for the decretal sum should be furnished. In the instant Application, the Applicant has not offered any security. I am inclined to find that security for the due performance of the decree herein is essential to protect the rights of the successful Respondent pending the determination of the Appeal.

Determination

17. The upshot of the foregoing is that I allow the Notice of Motion dated 17th January 2024 as follows:
- a. There be stay of execution of the Judgement in Mombasa CMCC No. 661 of 2022 pending the Hearing and Determination of the Appeal.
 - b. The Applicant shall deposit the entire decretal amount into a Joint Interest Earning Account in the name of the Advocates for the Parties within 30 days.
 - c. Costs shall abide the outcome of the Appeal.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 18TH DAY OF APRIL 2024.

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F. WANGARI

JUDGE

In the presence of;

N/A by the Applicant

M/S Saul Advocate h/b for Wanyonyi Advocate for the Respondents.

Barile, Court Assistant

