



**Capiteus Investment Limited v Mugambi (Civil Appeal E007 of 2024)
[2024] KEHC 6858 (KLR) (Commercial and Tax) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E007 OF 2024
FG MUGAMBI, J
JUNE 7, 2024**

BETWEEN

CAPITEUS INVESTMENT LIMITED APPELLANT

AND

LIZA MURUGI MUGAMBI RESPONDENT

RULING

Background

1. This ruling determines the application dated 16th January 2024. It seeks to stay the execution of a judgment delivered by the Hon. Adjudicator on 17th November 2023 in Nairobi Small Claims Commercial Case No E5625 of 2023 pending the hearing and determination of the intended appeal.
2. The application is opposed vide a replying affidavit and a preliminary objection both dated 19th February 2024. The preliminary objection raised by the respondent is premised on the fact that the application for stay of execution pending appeal and the intended appeal are time barred as they contravene the provisions of Section 79G of the *Civil Procedure Act*.
3. The said section provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”



4. It is the respondent's case that there being no statutory provision for the timeline between the date of the judgment to that of obtaining a decree, section 79G of the *Civil Procedure Act* should not be read in isolation but together with section 38(1) of the *Small Claims Court*.
5. In this regard, the respondent argues that if the court were to agree on this submission, it follows that the statutory 30 days would run from the date of the decision of the Small Claims Court. The applicant filed its Memorandum of Appeal and the application for stay of execution pending appeal on 15th and 16th of January 2024 respectively, in which case both the application and the appeal are way out of time.

Analysis and determination

6. In determining the preliminary objection, it is not in issue that the impugned judgment was delivered on 17th November 2023 and that the decree was issued on 21st December 2023. The wording of section 79G is clear and unambiguous that the period of 30 days begins running from the date of the decree or order. If Parliament wanted this interpreted in any other way, nothing would have been easier than to state so.
7. In any case, the *Civil Procedure Act* is also clear that time does not run between 21st December in any year and the 13th day of January in the year next following (both days included) in each year so as to exclude the court's Christmas recess from computation of time.
8. Order 50 rule 4 of the *Civil Procedure Act* provides as follows:

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleadings or the doing of any other act.”
9. The decree having been issued on 21st December 2023 means that time began running from 14th January 2024. The Memorandum of Appeal was filed on 15th January 2024 and this appeal is therefore properly before this Honourable Court.
10. Having so stated, I now turn to the application for stay of execution pending the appeal. The legal basis for grant of stay pending appeal is Order 42 Rule 6 of the *Civil Procedure Rules, 2010*. The applicant is required to demonstrate that:

“Substantial loss may result unless the order is made; the application has been made without unreasonable delay; such security as the court orders for the due performance of the decree has been given before the applicant.”
11. On the first test the applicant argues that the appeal lodged is meritorious, arguable and raises pertinent issues of law and that unless stay of execution is granted, the applicant will have to pay the decretal amount which is substantial. The entire appeal will also be rendered nugatory should the applicant be successful. I have perused the Memorandum of Appeal attached to the application and I am satisfied that it raises issues that warrant interrogation by this court. Substantial loss may occur if payment is done and same is not recovered in event the appeal is successful.
12. On the issue of security, the appellant confirms that they are ready and willing to deposit security as will be ordered by this court. The decretal amount subject of the appeal is about Kshs 224,966.58/=.



Disposition

13. Taking all these factors into consideration, the application dated 16th January 2024 is allowed and consequently this court therefore makes the following orders:
- i. The stay of execution of the decree is granted as prayed.
 - ii. The applicant will however deposit the entire decretal amount in an interest earning account in the joint names of the advocates of the parties within 30 days from date of this ruling and in default execution to proceed.
 - iii. Costs shall be in the main cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7TH DAY OF JUNE 2024.

F. MUGAMBI

JUDGE

