



**Watembo v Passionist Missionaries of Africa - Kenya (Constitutional
Petition 5 of 2022) [2024] KEHC 17039 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 17039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CONSTITUTIONAL PETITION 5 OF 2022
RPV WENDOH, J
JUNE 20, 2024**

BETWEEN

EDWIN ORWA WATEMBO PETITIONER

AND

PASSIONIST MISSIONARIES OF AFRICA - KENYA RESPONDENT

RULING

1. This judgement is in respect to the Passionist Missionaries of Africa - Kenya (the applicant) application dated 14/1/2024. The applicant is seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That this court be pleased to issue orders of stay of execution of the judgement and orders thereof of the Hon. Justice R. Wendoh dated 20/12/2023 pending the hearing and determination of the intended appeal.
 - d. Any other orders this court deems fit in the interest of justice.
 - e. Costs be provided for
2. The application is premised on the grounds on its face and the supporting affidavit of Raphael Mangiti, the Superior General of the applicant. It was deposed that the ruling on the applicant's preliminary objection on jurisdiction was to take precedence and the same ought to have been heard first; that this court instead rendered itself on the merits of the main petition and this came as a shock to the applicant as all parties had been waiting for the ruling on the preliminary objection and not the petition; that the applicant is aggrieved by the decision of this court and has filed a Notice of Appeal to the Court of Appeal against the said judgement; that the impugned judgement forms the substratum of the intended appeal and the same has not been stayed; that the applicant is a non-profitable organisation



and if the application for stay is not allowed, it stands to suffer substantial loss of over Kshs. 500,000/= which the respondent has not demonstrated that he is able to refund the judgement sum if the appeal succeeds.

3. The applicant urged that the overriding objective of the Civil Procedure is to allow the applicant to ventilate its appeal while protecting the substratum by allowing this application; that the applicant is willing to comply with this court's direction in so far as security of costs is concerned once the application is allowed.
4. In rebuttal, Edwin Orwa Watembo (the respondent) filed a replying affidavit dated 25th June 2024. It was deposed that the application does not disclose any merit warranting orders of stay of execution; that this court issued directions that this petition be argued by way of written submissions; that there is nothing wrong on a judgement being delivered on the preliminary objection and the petition at the same time; that the process of execution itself does not amount to substantial loss; that the respondent is a man of means able to pay the amount if the intended appeal is allowed; that in the alternative, the amount awarded can be deposited in a joint interest earning account of both advocates pending the hearing and determination of the intended appeal; that the applicant has not demonstrated to this court how it will suffer any substantial loss in the event the instant application is declined. The respondent urged this court to dismiss the application with costs.
5. Both parties were directed to file their respective written submissions, It is only the applicant who complied by filing written submissions dated 22nd March 2024 which I have duly considered.
6. The applicant is asking for orders of stay of execution pending the hearing and determination of the intended appeal at the Court of Appeal. Order 42 Rule (6) (1) and (2) of the Civil Procedure Rules gives provisions for stay pending appeal. An applicant must establish the following before grant of the orders: -
 - a. He shall suffer substantial loss if stay is not granted;
 - b. That the application has been filed without unreasonable delay;
 - c. The applicant is willing to furnish security for the due performance of the decree;
 - d. The applicant has an arguable appeal.
7. The applicant has already intimated that it has filed a Notice of Appeal to the Court of Appeal against the judgement of this court dated and delivered on 20 /12/2023. This court will therefore deliberate on the issue of whether the applicant shall suffer substantial loss and whether the applicant is willing to furnish security for the due performance of the decree.
8. On whether the applicant shall suffer substantial loss. Substantial loss is the cornerstone for granting a stay. It is what must be prevented. In Kenya National Highways Authority vs Ahmednasir Maalim Abdullahi (2020) eKLR it was held: -

“It must be clear to an applicant seeking stay of execution that the law places a duty on him to demonstrate to the satisfaction of the court that he will suffer something special and that he may not be put back to the original position he was in before execution and, therefore, deserves exercise of the court's discretion in his favour.”
9. This court in its judgement of 20/12/2023, awarded the respondent Kshs. 500,000/= as damages together with costs. The applicant is apprehensive that if stay is not granted and the respondent proceeds with the execution, it will suffer substantial loss as the respondent will not be able to repay



the amount. On the other hand, the respondent is emphatic that he is a man of means and therefore no substantial loss will be suffered by the applicant.

10. The assurance that the applicant will not suffer substantial loss is the ability of the respondent to refund the decretal sum if the appeal succeeds. In *Superior (Homes) Kenya Limited vs Musango Kithome (2018) eKLR* the Court of Appeal rendered itself as follows: -

“...The law, however appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant 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 is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. 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.”

11. From the averments of the respondent, he has not demonstrated how he is a man of means by producing evidence of how he caters for his livelihood. A mere averment that a person is a man of means is not sufficient to convince the court. It is the finding of this court that the applicant is likely to suffer substantial loss.
12. On the security for the due performance, what this court has discerned from the averments of both parties in their respective affidavits is that the applicant is willing to comply with the directions this court shall give on the furnishing of security. On the other hand, the respondent is amenable to the decretal sum being deposited in a joint interest earning account in the name of the Advocates of both parties pending the determination of the intended appeal.
13. On the second limb, I hereby direct that the decretal sum of Kshs. 500,000/= be deposited in a joint interest earning account in the name of both Counsel within 21 days of this ruling.
14. I find that the application has merit and the following orders do issue: -
1. A grant of stay of execution of the judgement and decree issued on 20/12/2023 is hereby issued pending the hearing and determination of the intended appeal before the Court of Appeal on condition that half the decretal sum is deposited in court within 30 days hereof;
 2. Failure to comply with direction no. 2 the respondent is at liberty to commence execution;
 3. Costs will abide the outcome of the intended appeal.**

DATED, DELIVERED AND SIGNED AT MIGORI THIS 20TH DAY OF JUNE, 2024

R. WENDOH

JUDGE

