



**Grain Industries Limited v Kimani (Miscellaneous Application
E049 of 2024) [2024] KEHC 8248 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION E049 OF 2024
DO CHEPKWONY, J
JULY 10, 2024**

BETWEEN

GRAIN INDUSTRIES LIMITED APPELLANT

AND

LAWRENCE KIMANI RESPONDENT

RULING

1. This is a ruling in the Notice of Motion application dated March 28, 2024 which seeks the following orders:
 - a. Spent.
 - b. That an Order be granted staying the execution of the judgment and Decree of the lower court in Kiambu Chief Magistrate Civil Case No. E084 of 2020 between Lawrence Kimani versus Grain Industries Limited delivered on February 19, 2024 pending the hearing and determination of the Appeal.
 - c. That upon the hearing of this application, the Applicant be granted leave to file Memorandum of Appeal and the Appeal out of time.
2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of Masanya Edinah, a Senior Legal Claims Officer at Britam General Insurance Company sworn on March 28, 2024 wherein the Applicant holds that judgment was delivered on February 19, 2024 for the Respondent in the sum of Kshs 758,696/= in Kiambu Chief Magistrate Case No. E084 of 2020, and he was aggrieved by the said judgment as it was excessive.
3. According to the Applicant, the instructions to file an appeal were received late due to inadvertent communication and the thirty (30) days statutory timeline lapsed whereby the stay of execution period issued by the trial court has also lapsed and the Respondent is likely to execute. It is the Appellant/



Applicant's contention that the appeal has high chances of success, the application has been filed at the earliest opportunity and without undue delay and that it stands to suffer prejudice and substantial loss if the same is not allowed and therefore it would be in the interest of justice that the same be allowed.

4. The Application was served upon the Respondent but his Counsel, Mr. Gikonge informed the court that he was not opposed to the application and that the same could be allowed on condition that the Applicant deposits the decretal sum in court as security for the appeal.
5. The Counsel for the Applicant, Ms Muranda objected to this and urged the court to direct them to only deposit half of the decretal sum in a joint interest-earning account in the names of both Counsel. The Counsel of the Respondent reiterated that the Applicant should deposit the full amount because if the judgment is successful then he will be entitled to a refund of the full amount. He stated that half of the decretal sum will not be adequate security.
6. In this Ruling, it is common ground that the application is not opposed and the only issue in dispute is the security for the due performance of the Appeal. The Applicant has offered to pay half of the decretal sum in a joint interest earning account of both Counsel whereas the Respondent's Counsel wants the full decretal sum deposited in court.
7. The issue of security for the due performance was discussed in the case of *Gianfranco Manenthi & Another -vs- Africa Merchant Assurance Company Ltd* [2019] eKLR, where the court held that:-

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails...”
8. The purpose of security was discussed in the case of *Arun C Sharma -vs- Asbana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others* [2014] eKLR which stated:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment-debtor. The alternative security being offered presents several problems. The first one-the security is owned by another person. This is a civil suit where the Applicants are judgment-debtors. But, the Applicants seem to have borrowed from the criminal procedures where a person stands surety for the attendance of another in court. Civil process is quite different because, in a civil process, the judgment is like a debt hence the Applicants become and are judgment-debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume, the security must be one which can serve that purpose.”
9. Since the purpose of the security is to provide a guarantee for due performance of the Appeal, the court proceeds to exercise its discretion and order the Applicant to deposit half of the decretal sum of Kshs. 379,348/= in court as security for costs.
10. In the ultimate, the Notice of Motion application dated March 28, 2024 is hereby allowed on the following terms:-



- a. That there be stay of execution of the judgment and the decree of the lower court in Kiambu Chief Magistrate's Court Case No.084 of 2020 between Lawrence Kimani –versus- Grain Industries Limited pending the hearing and determination of the appeal on decretal sum being Kshs.379,348.00 in court as security for costs within thirty (30) days from the date of this ruling.
- b. The Applicant/Appellant be and is hereby granted leave to file an appeal out of time and the draft Memorandum of Appeal annexed on the application as Exh-1 be and is hereby deemed as duly filed and served.
- c. The Appellant to file and serve a Record of Appeal within thirty (30) days from the date hereof.
- d. Failure to comply with Order No.(a), the Notice of Motion application dated March 28, 2024 shall be deemed as dismissed with costs to the Respondent and interim stay of execution orders in force shall be deemed as vacated.
- e. Mention on August 6, 2024 for parties to confirm compliance and take directions on hearing of the appeal.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KIAMBU VIA ELECTRONIC MAIL THIS 10TH DAY OF JULY, 2024.

D. O. CHEPKWONY

JUDGE

