



REPUBLIC OF KENYA



**Daipas Trading Co Ltd v Ondari (Civil Appeal E026 of 2021)  
[2023] KEHC 2209 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2209 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E026 OF 2021  
WA OKWANY, J  
MARCH 16, 2023**

**BETWEEN**

**DAIPAS TRADING CO LTD ..... APPELLANT**

**AND**

**JUDY NYAMUSI ONDARI ..... RESPONDENT**

*(Being an Appeal against the Judgment/Decree of Hon. W. C. Waswa (Mr.) –  
RM Nyamira dated and delivered at Nyamira on the 8th day of March 2021  
in the original Nyamira Chief Magistrate’s Court Civil Case No. 68 of 2020)*

**RULING**

1. This ruling is in respect to the application dated August 10, 2022 wherein the applicant/appellant seeks the following orders: -
  1. Spent
  2. Spent
  3. That this honourable court be pleased to grant an order of reinstatement of this appeal being Nyamira HCCA 26 of 2021.
  4. That this court be pleased to grant an order of stay of the respondent’s declaratory suit being Nyamira CMCC E150 of 2022.
  5. That this honourable court do make any such further order (s) and issue any other relief it may deem just to grant in the interest of justice.
  6. That the costs of the application be in the cause.



2. The application is supported by the affidavit of the applicant's advocate Mr Lawrence Njuguna and is premised on the grounds that: -
  1. That judgment was delivered in Nyamira CMCC No 68 of 2020 on March 8, 2021 in favour of the respondent herein.
  2. That being aggrieved by the said judgment the appellant instituted this appeal *vide* a memorandum of appeal dated April 8, 2021.
  3. That the appellant requested for certified typed copies of court proceedings, judgment and decree to enable the appellant prepare their record of appeal.
  4. That before the appellant had received the certified typed copies of the proceedings, judgment and decree the honourable judge E. N Maina dismissed the appeal on July 29, 2022.
  5. That the appellant obtained the certified typed copies of the proceedings, judgment and decree and prepared filed and served their record of appeal together with their submissions.
  6. That there was an oversight in the handing over of this file by the previous advocate handling this matter which occasioned a delay in filing this application for reinstatement.
  7. That the respondent herein has already begun execution by filing a declaratory suit being Nyamira CMCC E150 of 2020.
  8. That if this application is not heard and the prayers of reinstatement of the appeal granted, the applicant shall suffer irreparable harm.
  9. That unless this application is certified urgent and heard immediately and the orders sought herein granted, the applicant's appeal will be rendered nugatory.
  10. That this application will not occasion any prejudice to the respondent or any damage that cannot be compensated by way of costs if this application is allowed.
  11. That this application has been made without unreasonable/inordinate delay.
3. The respondent opposed the application through her replying affidavit sworn on September 19, 2022 wherein she states that the applicant's supporting affidavit is riddled with falsehoods and that the applicant was not keen on prosecuting the appeal despite directions that it be canvassed by way of written submissions. The respondent states that the applicant is guilty of laches and further, that the application is an afterthought filed after the applicant's realization that the respondent had filed a declaratory suit.
4. It is the respondent's case that the applicant is not entitled to the orders for stay of execution on account of its failure to comply with the conditions for stay pending appeal granted to them on May 27, 2021.
5. Parties canvassed the application by way of written submissions which I have considered.
6. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.
7. The applicant seeks orders for stay of execution of the judgment delivered on March 8, 2021, the reinstatement of the appeal and stay of the respondent's declaratory suit.



8. The law governing the granting of orders for stay of execution is stated under order 42 rule 6 of the [Civil Procedure Rules](#) (CPR) which stipulates as follows: -

“ 6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 referred 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

9. In the instant suit, a perusal of the court record indicates that upon filing the appeal, this court, differently constituted on May 27, 2021 granted the applicant, a stay of execution of the decree but



on condition that it deposits the full decretal sum in an interest earning account in the joint names of counsel for both parties within 30 days.

10. It was not disputed that the applicant has to date not complied with the said order of May 27, 2021. I therefore find that the applicant is not entitled to have a second bite at the cherry by once again seeking the same orders for stay of execution of the decree or stay of the declaratory suit, for that matter, on account of its failure to comply with this court's orders.
11. Turning to the prayer for the reinstatement of the appeal, I note that the appeal was admitted on April 16, 2021 after which directions were issued that the record of appeal be filed within 30 days. I further note that on June 10, 2021, parties informed the court that the record of appeal had been filed after which directions were taken that the appeal be canvassed by way of written submissions.
12. The record shows that the respondent complied with the directions and filed her submissions while the appellant did not file its submissions and did not attend court on July 29, 2021 thereby resulting in the dismissal of the appeal. I also note that the court granted the appellant at least two (2) adjournments to enable it file its submissions to no avail.
13. The instant application was filed more than one (1) year after the impugned dismissal of the appeal. The applicant attributes the delay in filing the application to an oversight by the previous advocate who handled the file; while, in the supporting affidavit, it blames the delay to the failure by the lower court to supply it with the typed copies of the proceedings.
14. I am not satisfied with the explanation offered by the applicant for the over one-year delay in filing the present application. To my mind, no plausible reason has been given for the delay in filing the application so as to warrant the exercise of this court's discretion to reinstate the appeal which was dismissed after the court satisfied itself that the applicant was not keen on prosecuting it.
15. For the reasons stated in this ruling, I find no merit in the application dated August 10, 2022 and I therefore dismiss it with costs to the respondent.
16. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS  
16<sup>TH</sup> DAY OF MARCH 2023.**

**W. A. OKWANY**

**JUDGE**

