



**Kipkebe Limited v Kericho Wholesalers Limited (Civil Appeal
21 of 2019) [2023] KEHC 2546 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL 21 OF 2019
JK SERGON, J
MARCH 23, 2023**

BETWEEN

KIPKEBE LIMITED APPELLANT

AND

KERICHO WHOLESALERS LIMITED RESPONDENT

(Lady Justice Ongeru)

RULING

1. The subject matter of this ruling is the motion dated May 23, 2022 taken out by Kericho Wholesalers Limited, the respondent/applicant herein, whereof it sought for the following orders:-
 - a. That this application be certified urgent and service thereof be dispensed with in the first instance.
 - b. That pending the hearing and determination of the present application interpartes, this honourable court be pleased to order for a Stay of execution of the judgment dated March 4, 2022.
 - c. That pending the hearing and determination of the preferred appeal, this honourable court be pleased to order for a stay of execution of the judgment dated March 4, 2022.
 - d. That the costs of this application be provided for.
2. The applicant filed in support of the motion the affidavit sworn by Surendra C Patel Kipkebe Limited the appellant/respondent herein, filed the replying affidavit sworn by Victor Kiminja to oppose the application. When the Motion came up for interpartes hearing, the court directed the parties to file written submissions.



3. I have considered the grounds stated on the face of the motion plus the facts deponed in the rival affidavits. I have also considered the written submissions together with authorities cited. The background of the instant application is short and straight forward. The appellant/respondent filed an action before the Chief Magistrate's Court, Kericho against the respondent/applicant seeking to be paid sum of Kshs 3,603,144/60 in respect of the value of the tea consignment which got lost while on transit.
4. The Appellant also sought to be paid a sum of Kshs 202,814/= being the adjuster's fee plus costs and interest.
5. The Respondent denied the appellant's claim. Hon BR Kipyegon, Learned Senior Resident Magistrate heard the suit and in his Judgment delivered on June 17, 2019, he awarded the appellant a sum of Kshs 30,000/=.
6. Being dissatisfied, the appellant/respondent preferred this appeal and put forward the following grounds of appeal:-
 - a. That the learned trial judge erred in law and fact in failing to appreciate the fact that the respondent had not sufficiently proved the particulars of negligence and breach of contract upon which the respondent's suit was hinged thus arriving at an erroneous judgment.
 - b. That the learned trial judge erred in law and fact by relying on the principle of subrogation which was not applicable in the circumstances of this case.
 - c. That the learned trial judge erred in law and fact in misdirecting herself by purporting to rewrite the parties contract thus arriving at a wrong Judgment.
 - d. That the learned trial judge erred in law and fact in failing to appreciate precedents set down by High courts thereby arriving at a wrong Judgment.
 - e. That the learned trial judge erred in law and fact in finding in favour of the respondent when the evidence on record militated against.
7. The appeal was heard and allowed by Lady Justice Ongeri on May 4, 2022 whereof the award of the Learned Senior Resident magistrate was set aside and substituted with an award of Kshs 3,805,958/= plus interest and costs.
8. The respondent/applicant being dissatisfied with the aforesaid decision, filed a notice of appeal to challenge the same in the court of appeal. The respondent/applicant is now before this court seeking for an order for stay of execution of the judgment pending appeal.
9. It is the submissions of the applicant that it is going to suffer substantial loss if the order for stay is granted since the decree is in respect of huge amounts of money which might lead to closure of its business despite there being no negligence attributed to it.
10. It is pointed out that the appeal will be rendered nugatory which will be a significant loss because there will be no purpose of success on appeal. The applicant further stated that it is ready and willing to offer security and abide by orders, conditions and or directions that this court may impose.
11. The appellant/respondent opposed, the aforesaid application stating that the execution of the decree by itself does not amount to substantial loss as the applicant cannot be barred from executing the judgment since execution is a lawful process through which successful litigants enjoy the fruits of litigation.



12. The appellant/respondent further pointed out that the respondent/applicant did not meet the threshold for a grant of stay of execution as provided for until order 42 rule 6 of the [Civil Procedure Rules](#). The appellant/respondent further argued that the delay of 60 days to take out the instant is inordinate and unexplained.
13. The principles to be considered in determining an application for stay of execution of a decree pending appeal are stated under order 42 rule 6 (2) of the [Civil Procedure Rules](#).
First, the application for stay of execution should be filed without unreasonable delay. The record shows that this court delivered its judgment on March 4, 2022 and that the instant application was filed on May 26, 2022. The respondent/applicant did not deem it fit to address this court over the issue.
14. I have already noted that the appellant/respondent has urged this court to find the delay of more than sixty days to file the instant application is unexplained hence unreasonable. The record also shows that the notice of appeal dated 8/3/2022 was filed on March 9, 2023. The application for stay of execution of the decree was filed after the lapse of 2 ½ months. The applicant avers that it has brought the Application without unreasonable delay. There is no explanation as to why the applicant took more than two months to file the Instant Application. In the absence of any explanation, I find the delay to be unreasonable.
15. The second consideration to be taken into account is that the applicant must show that unless the order for stay is granted, it would suffer substantial loss. The respondent/applicant averred that it would suffer substantial loss if the order for stay is not granted in that the decretal amount is huge and that its business may grind to a halt.
16. With respect, the execution of the decree, is a lawful process which cannot be said to amount to a substantial loss. I find that the respondent/applicant has miserably failed to establish the substantial loss which principle is the cornerstone of an application for stay of execution pending appeal.
17. The third and final principle is that the court should, if it is of the opinion that the order for stay of execution should be granted, determine the appropriate security for the due performance of the decree to be offered. Had the application been successful, I would have ordered the applicant to deposit the entire decretal sum in an interest earning account in the joint names of the advocates and or firms of advocates appearing in this appeal.

In the end, I find the motion dated May 23, 2022 to be without merit. The same is dismissed with costs to the appellant/respondent.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 23RD DAY OF MARCH, 2023.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Respondent

..... for the Respondent/Applicant

