



**Kananu & another v M'amanja & another (Civil Appeal
E008 of 2023) [2023] KEHC 1710 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E008 OF 2023
TW CHERERE, J
MARCH 2, 2023**

BETWEEN

STEPHEN SOPHIA KANANU 1ST APPLICANT

ELIUD NTORURU 2ND APPLICANT

AND

MICHAEL KIREMA M'AMANJA 1ST RESPONDENT

ELIZABETH KARIMI 2ND RESPONDENT

RULING

1. By a judgment dated December 16, 2022, the court in Tigania PMCC E062 of 2021 entered judgment for the respondents as against the appellants/applicants for Kes 990,000/- plus costs and interest.
2. By a notice of motion dated January 16, 2023, supported by an affidavit sworn on January 17, 2023 by the 1st appellant/applicant, appellants/applicants seek orders for stay of execution pending the hearing and determination of the appeal. The application is based on the grounds that appellants/applicants have filed an appeal which has high chances of success and are unlikely to recover the decretal sum of it is paid to the respondents.
3. Respondents opposed the application vide a replying affidavit sworn by the 1st respondent on February 6, 2023. He deposes that he is a prominent tea farmer and is able to refund the decretal sum in the event that the appeal succeeds.

Analysis and Determination

4. I have considered the notice of motion in the light of affidavits on record and submissions filed on behalf of the respondent.



5. Concerning stay of execution, order 42 (6) of the *Civil Procedure Rules* provides:

"(2) No order for stay of execution shall be made under sub rule

(1) Unless—

- a. The court is satisfied that substantial loss may result to the applicant unless the order is made
- b. That the application has been made without unreasonable delay; and
- c. 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."

6. The impugned judgment was delivered on December 16, 2022. This application was filed without delay on January 16, 2023 and was therefore filed timeously.

7. As rightly submitted by the respondents, the order for stay of execution pending appeal is discretionary and requires the court weigh the interests of both parties to ensure that no party suffers prejudice that cannot be compensated by damages. (See *RWW vs EKW* [2019] eKLR that was cited with approval in *HGE v SM* [2020] eKLR).

8. I have considered whether applicants have demonstrated that they are likely to suffer substantial loss if stay of execution is not granted.

9. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. There is a myriad of cases on what constitutes substantial loss. In Civil Appeal No 186 of 2007 *Standard Assurance Co Ltd –Vs- Alfred Mumea Komu* the court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

10. Similarly, in Civil Case No 41 of 1995 *United Builders & Contractors (Africa) Limited –Vs- Standard Chartered Bank Ltd* the court stated-

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”

11. Additionally, the court in *ABN Amro Bank NV v Le Monde Foods Ltd* Civil Application No Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an applicant in the position of the bank (appellant) 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 were paid over to him and the pending appeal was to succeed. 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 if it is paid out to him and the pending appeal were to



succeed. This evidential burden would be very easy for a respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

12. Respondents was awarded the sum of Kes 990,000/- plus costs and interest. Whereas this is a money decree, there is no evidence that the Respondents are in a position to refund the decretal sum in the event that the appeal succeeds and that is persuasive evidence that appellants are likely to suffer substantial loss if an orders sought are not granted.
13. Security is a legal requirement under 42 (6) (2) (c) of the *Civil Procedure Rules*. The appellants have not offered security for due performance of the decree herein pending the hearing and determination of the appeal.
14. Whereas it is not my duty at this stage to determine if the applicants have an arguable appeal, I am minded, in the interest of justice to exercise this court’s discretion under section 3A of the Act to afford the appellants an opportunity to prosecute their appeal.
15. There is evidence that appellants/applicants have already deposited Kes 400,000/- with the court as ordered on 18th January.
16. In the end, the notice of motion dated January 16, 2023 is allowed in the following terms:
 1. There shall be a stay of execution of judgment in Tigania PMCC E062 of 2021 pending the hearing and determination of this appeal and the deposit of Kes 400,000/- (four hundred thousand) shall act as security for the due performance of the decree
 2. The record of appeal shall be filed and served within 45 days from today’s date
 3. The appeal shall be disposed off by way of written submission
 4. Mention on July 5, 2023 to confirm compliance and for further orders
 5. Costs shall abide the outcome of the intended appeal

DATED AT MERU THIS 02ND DAY OF MARCH 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

For Appellants/Applicants - Mr. Nyamu for D.M.Nyamu & Co. Advocates

For Respondents - Ms. Kiemafor Nkunja & Co. Advocates

