



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gifted Beauty (K) Ltd v Kasturi Supermarket Limited (Civil Appeal  
E041 of 2022) [2023] KEHC 17393 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17393 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E041 OF 2022**

**M MUYA, J  
MAY 11, 2023**

**BETWEEN**

**GIFTED BEAUTY (K) LTD ..... APPELLANT**

**AND**

**KASTURI SUPERMARKET LIMITED ..... RESPONDENT**

**RULING**

1. The Notice of Motion application dated September 13, 2022 seeks the following orders:-
  1. Spent
  2. Spent
  3. That pending the hearing and determination of the application an order of temporary injunction be and is hereby issued restraining the Respondent whether by itself, employees, servants and or agents or otherwise assigns and or any person whatsoever acting on its behalf and or under its mandate or instructions from alienating, advertising for sale, offering for sale, selling or otherwise in any manner whatsoever interfering with all that applicants properly attached on September 12, 2022 until this application is heard and determined.
  4. That pending the hearing and determination of this application, the Respondents Whether by itself, employees or persons acting on its behalf be directed to forthwith return the applicants goods attached on September 12, 2022.



5. That pending the hearing and determination of this appeal, the Respondents whether by itself, employees, servants and or agents be directed to forthwith return the appellants goods attached on September 12, 2022.
6. That pending the hearing and determination of the application the court issue a stay of execution of the ruling and orders made on June 23, 2022.
7. That pending, the hearing and determination of this appeal this honourable court be pleased to issue a stay of execution of the orders made in CMCC 310 of 2016 at Nyeri on June 23, 2022.

2. The grounds are:-

- a. That Judgment was entered on June 23, 2022 in the Subordinate Court.
- b. That the appellant herein being dissatisfied has since filed Appeal No E041 of 2022 in this court.
- c. That upon service of the appeal to the respondents they were served with Appeal No 40 of 2022 by the respondents who had equally been dissatisfied with the decision in the subordinate court.
- d. That both appeals are still pending.
- e. The Agents of the respondents going by the name Chandors Auctioneers went to the Applicant's premises and carried away all stock and goods in execution of the Judgement dated June 23, 2022.
- f. That the said Auctioneers acted outside the Law by failing to give appropriate notices as per the Law required as no proclamation notice was issued.
- g. That the actions of the respondent will render the business in operable and the staff jobless.
- h. That the instant appeal raises several substantial grounds of Appeal with high chances of success.
  - i. That unless this court urgently intervenes, the appeal will be rendered nugatory as the respondents shall proceed and sale the attached goods causing irreversible damage to the appellant/applicant.
- j. That the appellant/applicant is aggrieved by the said Judgment and has instituted on appeal.
- k. The applicant stands to suffer substantial loss
- l. That the appeal raises adequate and arguable grounds with high chances of success.
- m. The respondents will not suffer any prejudice as both appeals are still pending and have not been determined.

3. This application is opposed and the grounds are to be found in the replying affidavit of Kirtesh Shah one of the Directors of the respondent in which at Paragraph 4 he depones that Judgment of the lower



court was delivered on the June 23, 2022 when the appellant sought 30 days stay of execution so as to pay the decretal amount. The stay was granted but no payment was made.

6. that he instructed his advocate on record to institute an appeal, partially challenging the said Judgment.
- 8 that proclamation on the attached goods was done on August 10, 2022. Notice was issued to the applicant/appellant.
11. That execution was done after the expiry of the 30 days stay which was granted by the court
13. That the orders granted by the court on September 19, 2022 were prejudicial to the respondent in that the appeal has no chance of success.

### **Applicants Submissions**

#### 4. Substantial Loss

Reliance is placed on the case of *Mohamed Omar v Mohamed Abubakar Ali 2017* e KLR where the court was of the view that there were no guidelines as to what substantial loss means as it varies from one person to the other.

That in the present case the Respondent through its agent attached all machines which the applicant uses stools of trade by so doing crippled the applicants business.

5. Reliance is placed on the case of *James Wangalwa & another v Agnes Naliaka Chase to* (2012) e KLR. Where it was held :- “No doubt in law, the fact the process of execution has been put in motion, or is likely to be put in motion, by itself does not amount to substantial loss ..... Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory
6. It is submitted that this is a money decree and the appellant is capable of fully settling it should he fail to convince the court in the appeal. That way the Respondent would not suffer loss.

### **Overriding objectives**

7. The applicant has cited the case of *Nicholas Stephen Okaka & another versus Alfred Wanga Wesonga* (2022) e KLR

“Where the court observed:- “ stay may only be granted for sufficient cause and that the court in deciding whether or not to grant stay and that in light of the overriding objectives stipulated in sections 1A and 1B of the *Civil Procedure Act* the court is no longer limited to the foregoing provisions. The Courts are now enjoined to give effect to the overriding objective in the exercise of the powers under the *Civil Procedure Act* or in the interpretation of any Provisions.

### **Undue Delay**

8. There are two appeals.

The appellants appeal is said to have been filed on the July 22, 2022 which was within the 30 day window granted by the lower court. The Respondent appeal was also filed on July 22, 2022.

### **Respondents Submissions**

9. It is submitted that the applicant sought 30 days stay of execution following the Judgment delivered on July 22, 2022 after the expiry of the duration granted by the court.



10. That the applicant is guilty of laches as there was an inordinate delay of filing the application for stay 3 months down the line.
11. The respondent relies on the case of *Mwangi Kimenji v Attorney General & another* (2014) e KLR. Where it was held:- “An inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads to inescapable conclusion that its inordinate and thus inexcusable .
12. The respondent urges this court to order the applicant to deposit the decretal sum in court as security for performance of the decree and relies in the case of *Micheal Ntouthi Mitheu v Abraham Kivondo Musau* (2021) e KLR.
13. Further that Notice and proclamation were duly served.

#### **Analysis and determination**

14. This application is principally brought under order 42 rule 6 of the *Civil Procedure Act*. Order 42 rule 6 (2) provides:- “ 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 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 be ultimately be binding on him has been given by the applicant
15. A perusal of the Judgment of the lower court which is appealed from Indicates that goods were sold to the applicant/appellant and she later denied the transaction. The court found that goods were sold to the applicant and she failed to pay for them. Hence what is before this court is a money decree. It has not been shown that the respondent is a man of straw and if payment of the decretal sum is made to him, he will not be able to refund in the event the appeal against him is successful.
16. The applicant has not shown that she would suffer substantial loss if the orders sought are not granted. However, it is noted that the respondent has also filed an appeal on the same suit. In the premises, I will grant a stay of execution on the condition that the applicant shall deposit the whole of the decretal sum in an interest earning account in the names of both counsels in a reputable bank within a period of 30 days in default execution to proceed.

**Ruling read, signed and delivered in open court at Nyeri this 11<sup>th</sup> day of May 2023.**

**HON JUSTICE MARTIN M MUYA**

**JUDGE**

**In the presence of:**

Gori: Applicant/Appellant

.....Respondents

**Court Assistant: Kinyua**

**30 days R/A.**

