



**Kimani t/a Peck Housing Agencies v M'Tuerandu (Civil Appeal
E380 of 2022) [2023] KEHC 20871 (KLR) (Civ) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20871 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E380 OF 2022

JN MULWA, J

JULY 25, 2023

BETWEEN

PETER CHEGE KIMANI T/A PECK HOUSING AGENCIES APPELLANT

AND

JULIUS MUTWIRI M'TUERANDU RESPONDENT

RULING

1. Before the court is a Notice of Motion application dated June 6, 2022, brought pursuant to Sections 3A of the *Civil Procedure Act* and Order 42 Rule 6 of the *Civil Procedure Rules*. The Applicant seeks a stay of execution of the Judgment delivered by Hon CA Okumu on May 17, 2022 in Milimani Small Claims Suit No SCCC 898 of 2021; Julius Mutwiri M'tuanderu vs Peter Chege Kimani t/a Peck Housing Agencies pending the hearing and determination of his Appeal herein. He also seeks for the costs of the application.
2. The Application is predicated on the grounds set out on its face and the supporting affidavit of Peter Chege Kimani, the Applicant herein.
3. The Respondent opposed the application through a Replying Affidavit sworn on October 11, 2022 by his advocate Charles Ngugi.
4. The court has considered the parties respective affidavits in support of and in opposition of the application as well as their respective submissions. The sole issue that falls for determination is whether the Applicant has satisfied the conditions for the grant of stay of execution pending appeal.
5. The conditions for the grant of stay of execution pending appeal are laid out under Order 42 Rule 6(2) of the Civil Procedure Rules as follows:
 - (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 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.'
6. There is no doubt that the application was filed without delay. As regards substantial loss, the Applicant merely states that he is apprehensive that he may not recover the decretal sum of Kshs 172,500/- from the Respondent should the appeal succeed because the Respondent no longer resides in the Applicant's rental property. However, there is no contention by the Applicant that the Respondent is a man of straw who is incapable of refunding the decretal sum when called upon to. In the court's view therefore, the Applicant has not demonstrated the substantial loss he stands to suffer if stay is not granted.
7. Be that as it may, the court notes that on June 20, 2022, the Applicant deposited in court the sum of Kshs 80,000/- as a condition for the grant of a temporary stay of execution. In the court's view, this was a demonstration of good will on the Applicant's part which calls for the court to balance the parties interests in a manner that ensures that the Appellant's appeal is not rendered nugatory and the Respondent is not impeded from the enjoyment of the fruits of his judgment. See *Samvir Trustee Limited vs Guardian Bank Limited - Nairobi HCCC 795 of 1997.*
8. For the foregoing, the court allows the Applicant's Notice of Motion dated June 6, 2022 on the following conditions:
 1. The entire decretal sum of Kshs 172,500/- be deposited in a joint interest earning account in the names of the advocates of both parties, within 30 days from date of this ruling.
 2. The sum of Kshs 80,000/- deposited in court on June 20, 2022 by the Applicant be released to him for the above purpose at (1) above within 14 days of this ruling.
 3. In default of order (1) above, the stay order shall lapse automatically.
 4. The Respondent shall have the costs of this application.
 5. The Appellant is directed to file the Record of Appeal within 60 days hereafter and return for mention on the October 24, 2023.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 25TH DAY OF JULY 2023.

JANET MULWA

JUDGE

