



REPUBLIC OF KENYA



**KENYA LAW**  
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**Btine Investments c/o Mizizi Sacco v Lyann (Civil Appeal  
E026 of 2023) [2023] KEHC 23601 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23601 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E026 OF 2023  
WA OKWANY, J  
OCTOBER 12, 2023**

**BETWEEN**

**BTNINE INVESTMENTS C/O MIZIZI SACCO ..... APPELLANT**

**AND**

**ONYIEGO TIMOTHY LYANN ..... RESPONDENT**

**RULING**

1. The Appellant/Applicant herein filed the application dated 12<sup>th</sup> June 2023 seeking the following orders: -
  1. Spent
  2. Spent
  3. That this Honourable court be pleased to order a stay of execution of the ex-parte judgment/decree dated 26.05.2021 vide Keroka Cmcc Number 115 Of 2019; Onyiego Timothy Lyann - vs- Btine Investments C/o Mizizi Sacco pending the hearing and determination of Nyamira Hcca no.... OF 2023.
  4. That this Honourable court be pleased to order that the Appellant furnishes security in the form of a Bank Guarantee for the decretal sum of Kshs. 217,819/= pending hearing and determination of this Appeal.
  5. That the costs of this application be provided for.
2. The application is supported by the Affidavit of Applicant's Director Mr. Francis Abuya and is premised on the grounds that: -
  1. The Applicant filed an application dated 18.3.2023 vide Keroka CMCC No 115 of 2019 under certificate of urgency seeking to set aside the ex-parte judgment.



2. The said application was certified urgent and fixed for directions on the 19.04.2022 before the trial court.
  3. That on the 19.04.2022 the file was not listed and efforts to trace it at the courts registry were futile.
  4. The file went missing and we only traced the file on 19<sup>th</sup> November 2022 when the file had been listed for hearing which hearing was adjourned to 12<sup>th</sup> of April 2023 with orders that the plaintiff to undergo second medical examination before then.
  5. That on the said 19<sup>th</sup> November 2023 the advocates handling the matter inadvertently did not take directions on our application.
  6. On the 12<sup>th</sup> day of April 2023, we took directions on our application to set aside Exparte judgment and court delivered ruling on the same on 7<sup>th</sup> June 2023 dismissing our application.
  7. That on the 12<sup>th</sup> day of April 2023 we took directions on our application to set aside Exparte judgement and court delivered ruling on the same on 7<sup>th</sup> June 2023 dismissing our application.
  8. The Appellant aggrieved by the ruling dismissing the Applicant's application dated 18.3.2023 has lodged an appeal against the ruling of the trial court vide Nyamira HCCA NO. E026 OF 2023.
  9. The Appellant and its insurer will suffer irreparable damage should the plaintiff proceed to execute ex-parte judgment entered on the 26.05.2021 without the benefit of the defence case being heard on merit and cross examining the witnesses thereby occasioning the Applicant irreparable loss and damage by being condemned unheard.
  10. It is trite law that an appeal does not operate as stay thus exposing the Appellant to irreparable loss and damage.
  11. That there are no orders staying execution in the trial court and the Applicants are apprehensive that the Respondent will obtain a warrants of attachment and proceed to execute.
  12. In such event, the Appellant/Applicant herein stands suffer irreparable loss and damage if the orders sought in the Application herein is not granted.
  13. The Applicants implore this Honourable Court to adhere to natural justice, doctrines of equity and *the constitution* in this matter as the Applicants will be condemned unheard if the Applicants are not granted an opportunity to defend the Appeal.
  14. The Applicants have to come to court within a reasonable period of time and without undue delay.
  15. The Application will no occasion any prejudice to the Respondent.
  16. This application is made in good faith, timeously and it will be in the interest of justice that the same be allowed.
3. The Respondent opposed the application through his Replying Affidavit dated 6<sup>th</sup> July 2023 wherein he avers that the application is not merited and is a waste of the court's precious time as the Applicant chose not to defend the suit filed against it despite proper service with the pleadings together with the judgment notice. The Respondent notes that the impugned judgment was rendered on 26<sup>th</sup> May 2021 and that the Appellant filed an application dated 8<sup>th</sup> March 2022 seeking to set it aside which application was dismissed by the trial court thus triggering the instant appeal and application.



4. The application was canvassed by way of written submissions which I have considered.
5. The main issue for determination is whether the Applicant has made out a case for the granting of orders for stay of execution pending appeal.
6. The gist of the Applicant's case is that it has an arguable appeal and that the instant application was filed within reasonable time. The Applicant further states that its appeal will be rendered nugatory unless the orders sought in the application are granted.
7. The Respondent, on the other hand, maintained that the application is a waste of time as the lower court considered all the issues on merit.
8. It was the Respondent's case that there is no proper arguable appeal upon which the orders for stay of execution can be anchored as the appeal in question was filed out of time without the court's leave. The Respondent observed that the Applicant's Advocates application before the Lower Court for leave to come on record and to stay execution was dismissed.
9. From the outset, I wish to point out that a perusal of this file reveals that the Record of Appeal has not been filed. This means that this court, will, in delivering this ruling be relying solely on the documents that the parties have so far filed in respect to the instant application. In effect, the court will not have the full picture of what may have transpired before the Lower Court.
10. A perusal of the Memorandum of Appeal filed on 16<sup>th</sup> June 2023 shows that the Appeal herein challenges the Lower Court's Ruling dated 7<sup>th</sup> June 2023 dismissing the Appellant's application dated 28<sup>th</sup> March 2022 wherein it had sought orders to set aside the exparte judgment.
11. As I have already noted in this ruling, the Record of Appeal is yet to be filed which means that the court is not in a position to tell if the appeal in question is merited. Be that as it may, courts have taken the position that in an application for stay of execution pending the appeal, the court has to balance the rights of the Appellant to appeal and those of the Respondent, to the fruits of the decree.
12. In the present case, I note the Applicant has offered to provide security for the due performance on the decree. In balancing the rights of the parties, I will allow the prayer for stay of execution pending appeal but on condition that the Appellant shall within 30 days from today's date pay a half of the decretal sum to the Respondent and deposits the other half in court or in a joint interest earning account to be held in the names of Counsel for both parties herein.
13. In the event of failure to comply with the above stated conditions for stay, the orders for stay of execution shall automatically stand vacated, in which case, the Respondent will be at liberty to proceed with the execution.
14. I award the costs of the application to the Respondent.
15. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 12<sup>TH</sup> DAY OF OCTOBER 2023.**

**W. A. OKWANY**

**JUDGE**

