



**Blessed Shelters Housing Sacco v Muita (Civil Appeal E194 of 2023)
[2023] KEHC 23217 (KLR) (Civ) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23217 (KLR)

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

CIVIL

CIVIL APPEAL E194 OF 2023

JN MULWA, J

OCTOBER 5, 2023

BETWEEN

BLESSED SHELTERS HOUSING SACCO APPELLANT

AND

CHARLES KAIRU MUTTA RESPONDENT

RULING

1. Before the Court is an application dated March 16, 2023 brought by the Appellant, seeking orders against the Respondent to stay execution of the Judgment of the lower court delivered on the October 29, 2021 in Milimani CMCC NO E708 'A' of 2021 pending hearing and determination of this application and the Appeal. It is premised on provisions of Orders 42 and 51 of the [Civil Procedure Rules](#) and upon the Supporting Affidavit of one Lucy Watiri Kimani sworn on the March 16, 2023.
2. In opposing the application, a Replying Affidavit sworn by Meg Wambui Muhia, an advocate for the Respondent on the May 5, 2023. Parties argued the application before me on the July 13, 2023. I have considered both parties pleadings and arguments.
3. The ruling subject of this appeal was delivered on the March 7, 2023 dismissing the Applicant's application dated October 18, 2022 seeking orders to set aside the Judgment entered against it in default of filing a defense, on grounds that a draft defense was not provided among others for it to consider whether there existed trial issues.
4. By this application, the applicant has brought another reason that the lower Court lacked jurisdiction ab initio to hear the Suit as it involved a member of the applicant cooperative Society and thus, by dint of Section 76 of the Cooperative [Societies Act](#), it is the Co-operative Tribunal that ought to have heard and determined the dispute, citing the Court of Appeal decision in 'Lillian S' –vs- Caltex Oil (Kenya) (1989), and urging for this Court to allow the application.



5. In opposing the application, the Respondent argued that the applicant has not met the threshold for grant of a stay order as if failed to offer any security for the due performance of the decree nor demonstrated any likelihood to suffer substantial loss; and further that the Judgment was regular, the applicant having been duly served with Court Summons but opted not to enter appearance or file defense.
6. It is trite that an applicant to be granted an order of stay of execution pending appeal ought to comply with conditions stated under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules that:
 - a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and 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.
7. There is no dispute that the application was made without undue delay. On Substantial loss, the applicant has not shown that the Respondent is a man of straw and may not be able to refund the decretal sum should the appeal succeed. As stated earlier, the decretal sum is Kshs 1,185,989.
8. As to whether the appeal has high chances of success, I have perused the Memorandum of Appeal. Pertinent issues are raised touching on the trial Court's jurisdiction to entertain the dispute. No doubt the appellate Court will deal with the issue at the opportune time.
9. On Security for the due performance of the decree, the applicant has not offered any such security. The Respondent too has not rendered himself on whether he would be ready and capable of refunding the said sum should he be paid and the appeal succeeds.
10. In the case *Global Tours & Travels Limited Nairobi HC Winding UP Cause No 43 of 2000*, the Court Appeal rendered that;

'...whether or not to grant a stay of proceeding so further proceedings on a decree or order appealed from is a matter of Judicial discretion to be executed in the interest of justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted...'
11. Further, in *Kenya Shell Ltd -vs- Kabiru & another (1986) eKLR 410*, the Court pronounced itself thus:

'...an intended appeal does not operate as a stay ...if there is no evidence of substantial loss, it would be a rare case when an appeal would be rendered nugatory by some other event.'

See also *Tine Bees Credit (K) Limited -vs- Patrick Macharia Nderitu and another (2022) eKLR*, *Zoa Taka Limited & another -vs- Dennis Kyalo (2022) eKRL*.
12. For the foregoing, and in an attempt to preserve the substratum of the appeal, being a money decree, I am obligated to balance both parties interests pending the final hearing and determination of the appeal so as not to render it nugatory as justice, being a double edged sword cuts both ways.
13. The applicant has a right to appeal and not to have the appeal rendered nugatory should it succeed. On the other hand, the Respondent has a right not to be deprived of enjoyment of his judgment fruits that should not be denied without sufficient cause.



14. Consequently, the Court finds the Applicants application to be merited, SUBJECT to the following conditions:
- a. That the Applicant/Appellant shall deposit the Decretal Sum in the sum of Khs 1,185,989/- in a joint interest earning account in the parties Advocates names within 30 days of this ruling. In default, the stay orders shall lapse automatically.
 - b. The Applicant shall file the Record of Appeal and serve within 60 days.
 - c. Mention for status of the appeal before the Judge on the November 16, 2023.

Orders accordingly.

Dated, Delivered and Signed in Nairobi this 5th Day of October 2023.

JANET MULWA

JUDGE

