



**Kenya Revenue Authority v Embrio Enterprises Limited (Civil Application  
E292 of 2023) [2024] KECA 18 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KECA 18 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E292 OF 2023  
SG KAIRU, F TUIYOTT & JW LESSIT, JJA  
JANUARY 25, 2024**

**BETWEEN**

**KENYA REVENUE AUTHORITY ..... APPLICANT**

**AND**

**EMBRIO ENTERPRISES LIMITED ..... RESPONDENT**

*(An application for stay of execution pending the lodgement, hearing and determination of intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ongeri, J.) delivered on 24th May 2023 in High Court Civil Case No. 523 of 2013)*

**RULING**

1. In a judgment delivered on 24<sup>th</sup> May 2023, the High Court at Nairobi (A.N. Ongeri, J.) awarded the respondent Kshs. 12,870,033.00 and interest at court rates from 21<sup>st</sup> May 2013 (date of loss of consignment) until payment in full being the value of a consignment of sugar allegedly lost while in the custody of the applicant.
2. Aggrieved, and intending to challenge that judgment before this Court, the applicant filed a notice of appeal dated 31<sup>st</sup> May 2023 on the strength of which it now seeks, by application dated 27<sup>th</sup> June 2023 supported by affidavit of Joseph Ngugi, an officer of the applicant, an order of stay of execution of that judgment under Rule 5(2)(b) of the [Court of Appeal Rules](#).
3. Appearing before us during the hearing of the application on 30<sup>th</sup> October 2023, Mr. Gaya Ochieng, learned counsel for the applicant in his written and oral submissions urged that the intended appeal is arguable and that unless the orders sought are granted, the intended appeal will be rendered nugatory. Referring to the applicant's draft memorandum of appeal, counsel submitted that the learned Judge failed to consider the totality of evidence that was presented; that the judge made the award in favour of the respondent on the wrong factual premise that four trucks with the consignment had disappeared;



and that the judge failed to appreciate that the trucks disappeared before the applicant got custody of them.

4. On the nugatory aspect, it was submitted for the applicant that respondent has no physical presence or known assets in Kenya and has not demonstrated that it would be able to refund the decretal amount should the applicant's appeal succeed. To buttress his argument, counsel pointed out that based on the affidavit of Wilfred Githua Kinyanjui, a director of the respondent in reply to the application, he is based in Indiana in the United States of America and there is no evidence of the respondent's presence in Kenya.
5. On his part, learned counsel for the respondent Mr. Kuonah referred to the replying affidavit sworn by Wilfred Githua Kinyanjui and submitted that the respondent has waited for over nine years for the judgment and should be permitted to realize its fruits; that the intended appeal is not arguable as the learned Judge duly considered the evidence and arrived at the correct findings; that there is no doubt the sugar consignment for which the respondent was awarded compensation disappeared while under the control of the applicant.
6. Regarding the ability of the respondent to refund the decretal amount in the event the applicant's appeal succeeds, counsel submitted that the respondent is a going concern and has the means to refund the decretal amount if the appeal is successful. Counsel indicated that given a chance, he would be able to provide evidence in that regard.
7. Mindful of the standard applicable in applications of this nature, see [Stanley Kinyanjui vs. Tony Ketter & 5 others](#) [2013] eKLR, we are satisfied that the intended appeal is not frivolous. It is arguable. There is for instance the argument that the learned Judge disregarded evidence that the consignment or part of it was lost while outside the custody of the applicant.
8. On the nugatory aspect, this Court stated in [Attorney General vs James Hoseah Gitau Mwara](#) [2014] eKLR, that

“where an applicant alleges the respondent's inability to refund the decretal sum if the appeal ultimately succeeds, the burden is shifted onto the respondent to prove ability to refund by showing list of assets, bank accounts *inter alia*.”

With that in mind, the respondent did not present any material, beyond the statement that it is a going concern, to counter the claim by the applicant that it would not be able to refund the decretal amount should the appeal succeed.

9. Consequently, we allow the application dated June 27, 2023 in terms of prayer 3 and grant an order of stay of execution of the judgment of the High Court delivered on May 24, 2023 pending the hearing and determination of the applicant's intended appeal.
10. Cost of the application shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

