



**Maasai Mara Wilderness Lodge Limited v Soni (Civil Application E402 of 2023) [2024] KECA 84 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 84 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E402 OF 2023  
S OLE KANTAL, F TUIYOT'T & A ALI-ARONI, JJA  
FEBRUARY 9, 2024**

**BETWEEN**

**MAASAI MARA WILDERNESS LODGE LIMITED ..... APPLICANT**

**AND**

**RUPA SONI ..... RESPONDENT**

*(An application for stay of execution against the Ruling and Order of the High Court of Kenya at Nairobi (Mulwa, J.) delivered on 31st July 2023 in HCCA No. E261 of 2023)*

**RULING**

1. Before the court is the applicant’s Notice of Motion dated 18<sup>th</sup> August 2023, brought under Article 164 (3)(a) of the Constitution, Section 3, 3A and 3B of the Appellate Jurisdiction Act, rule 5(2) (b) of the Court of Appeal Rules, Section 10 of the Judicature Act and the Court of Appeal Practice Vacation Rules seeking *inter alia*:
  - “a. Spent.
  - b. Spent.
  - c. That this Honourable Court be pleased to stay the execution of the Orders by Honourable Lady Justice J. Mulwa delivered on 31<sup>st</sup> July, 2023 in this matter pending the hearing and determination of the intended appeal.
  - d. That this Honourable Court be pleased to set aside the Orders delivered on 31<sup>st</sup> July, 2023 by the Honourable Lady Justice J. Mulwa.
  - e. That costs of the Application be provided for.”



2. The application is predicated on grounds that the applicant has good grounds of appeal; that the High Court's order of 31<sup>st</sup> July, 2023 was not only contradictory but had the effect of drastically varying the earlier orders of stay of execution which had been issued in the matter; that the revised order did not take into account the difficulty posed in recovering the sums paid to the respondent should the appeal succeed and at the same time allows for execution and deprives the appellant of the right of appeal, as the entire decretal sum would have been paid out prior to hearing of the appeal; the appeal was ready for hearing and the learned judge should have proceeded with appeal without varying the orders, in a way that the substratum of the appeal would be affected.
3. In the affidavit in support of the application sworn on 18th August 2023, by John Smith a director of the applicant, he rehashed the grounds on the face of the application. In addition, deposed that the applicant has since filed a notice of appeal dated 31<sup>st</sup> July, 2023; has a strong and arguable appeal with a probability of success; the instant application has been filed timeously; that should execution proceed and the appellant pays the decretal amount and the appeal succeeds, irreparable damage would occur since the respondent has no known assets or means to refund the decretal sum; that on the contrary, the appellant is a solid company operating an active lodge in the Maasai Mara, and will always be in a position to pay the decretal sum were the appeal not to succeed; that the respondent has extracted the decree and is ready to execute the decretal sum; and that no prejudice will be caused or occasioned to any party, if the orders of stay are granted, since it will maintain the current status quo on the ground.
4. By way of background and in order to contextualize the dispute, it is necessary to give a brief summary of facts. The matter was initially filed in the Chief Magistrates Court; CMCC No. 6914 of 2017, where the respondent claimed that while on safari in the applicant lodge, she sustained severe injuries having fallen while disembarking from the applicant's tour van, when she missed a step and sustaining severe injuries. As a result she cut short her trip and was hospitalised. In the suit, the respondent sought for: general damages, special damages of Kshs.2,929,64.84, a refund of Kshs.65,000/- for unutilised holiday and costs. The applicant herein denied liability and blamed the respondent for her own negligence and prayed that the suit be dismissed. The court found that the respondent had proved her case and awarded liability at 80:20 in favour of the respondent, general damages of Kshs.800,000/-, special damages of Kshs.2,929,614.84, a refund of Kshs.65,000, costs of the suit and interest from the date of judgment until payment in full.
5. The applicant being aggrieved by the trial court's judgement, lodged an appeal to the High Court, contemporaneously, it filed an application dated 14<sup>th</sup> April, 2023 seeking for stay of execution of those orders. Upon hearing the application *ex parte* the High Court granted temporary stay on condition that the sum of Kshs.1,000,000/- is deposited in court, which the applicant did on the 26th of April 2023.
6. After hearing the said application *inter partes*, the High Court on 31<sup>st</sup> July, 2023 delivered a ruling and affirmed the conditional temporary order of stay of the judgment delivered on 22<sup>nd</sup> March 2023, pending the hearing and determination of the appeal, with a variation to the extent that the applicant was ordered to pay 50% of the decretal sum to the respondent within 30 days of the order, and the balance of 50% was to be deposited in an interest earning account in joint names of parties' advocates, within 30 days.
7. In the application before us is annexed a memorandum of appeal raising 12 grounds, where the applicant faults the learned Judge for *inter alia*; failing to properly analyze the applicant's application and taking into account extraneous factors to wit; the application was filed by counsel for the appellant and not counsel for the respondent as stated in the order; failing to take into account the provisions of the law relied on in the application but chose to dwell on Section 3 of the *Civil Procedure Act* and



- Order 17 rule 2 of the [Civil Procedure Rules](#); and failing to consider the affidavit of John Smith sworn on 14<sup>th</sup> April, 2023.
8. Learned counsel for the applicant in his written submissions dated 3<sup>rd</sup> October 2023, argued that the applicant has an arguable appeal with overwhelming chances of success as demonstrated in the memorandum of appeal and that execution is imminent as the respondent has extracted the decree ready to execute for the decretal sum; that the intended appeal, if successful, will be rendered nugatory. Learned counsel relied on the case of [Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji & Another](#) [2015] eKLR that was quoted with approval in its' decision in [Kenya Hotel Properties Limited vs. Willesden Properties Limited](#), Civil application Nai No. 322 of 2006 (UR 178/06).
  9. On her part, the respondent filed a replying affidavit sworn on 22<sup>nd</sup> August 2023, where she deposed that the application is a delaying tactic used to keep her away from the fruits of the judgment; that the appeal has no chances of success, is misconceived and lacks merit, and does not raise any triable issue; that the applicant has not furnished the court with security of performance and that she is a person of means and can refund the applicant in the unlikely event the appeal succeeds.
  10. The respondent's counsel in his written submissions dated 25<sup>th</sup> August, 2023 submitted that the respondent has demonstrated that she is a person of means and is capable of refunding the decretal amount to the applicant; that the appellant having not offered any security the condition for security has not been met, hence application should be dismissed for failure to meet that threshold. Learned counsel relied on the case of [Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates](#) [2014] eKLR.
  11. To succeed in an application under rule 5 (2) (b) of this [Court's Rules](#), an applicant has to satisfy the twin principles. Firstly, an applicant must demonstrate that he has an arguable appeal; and secondly, the intended appeal will be rendered nugatory if the execution of the decree, order of proceedings is not stayed.
  12. On the first limb of the twin principle, this Court held in [David Morton Silversein vs. Atsango Chesoni](#) [2002] eKLR, that for an order of stay to issue, the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous and that the appeal or intended appeal, would in the absence of stay, be rendered nugatory.  
  
In [Yellow Horse Inns Ltd vs. A.A Kawir Transporters and 4 others](#) [2014] eKLR, this Court observed that an applicant need not to show a multiplicity of arguable points, even one arguable point would suffice. Also see [Kenya Commercial Bank Limited vs. Nicholas Ombija](#) [2009] eKLR.
  13. On the arguability of the appeal, the applicant has raised a number of grounds in the memorandum of appeal. At this point we need not to satisfy ourselves that the appeal will be successful, that is the task of the bench that will hear and determine the main appeal. For us, having heard a cursory look at the grounds, we are satisfied that some points are arguable, meaning that the memorandum of appeal is not frivolous.
  14. Turning to the second limb, as to whether the appeal would be rendered nugatory, if stay orders are not granted. We take cognizance that the decretal sum of Kshs.3,035,691.87 is not a meagre sum by any means, there is reasonable apprehension as to the ability of the respondent to repay the same in the event that the appeal is successful. This Court in the case of [Kenya Hotel Properties Limited vs. Willesden Properties Limited](#) Civil Application Nai. No. 322 of 2006 (UR 178/06) stated thus: -

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains



that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.

15. In the application dated 14<sup>th</sup> April, 2023 the applicant had brought up the issue of the inability of the respondent to pay back the decretal amount in the event the appeal succeeded. The respondent in her response sworn on 12<sup>th</sup> May, 2023, did not move an inch in proving that the contrary was true. There is no statement in the affidavit alluding to her financial ability to rebut the assertions by the applicant. She had an opportunity to prove to the court that the applicants’ assertions are baseless by attaching any proof of an asset she owns, valuation thereof, or bank statements. This was not done and failure thereof gives the applicant’s assertions some basis. The same argument has been brought before this Court and once again, the replying affidavit sworn on 22<sup>nd</sup> August, 2023 by the respondent does not say much about the respondent’s ability to pay back the decretal amount. The assertions by the applicant cannot go unnoticed. The respondent’s counsel submits that she has demonstrated ability to pay, but other than those mere words, no effort has been put to prove the ability to pay.
16. The court must always strive to strike a balance between the interests of the respective parties and we find ourselves agreeing with the holding in *Hotel Properties Limited vs. Willesden Properties Limited* (*supra*). In the absence of any information regarding the financial status of the respondent and taking into account the monies involved, we are persuaded that this is one of those rare cases where the court must grant a stay in a matter involving a money decree to safeguard the substratum of the appeal.
17. Accordingly, we hereby grant a conditional stay. We allow the application and grant a stay and order that the sum of Kshs.1,000,000 already paid into court do hold as security pending hearing and determination of the appeal herein. Costs of this application to abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**S. OLE KANTAI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**ALI - ARONI**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

