



REPUBLIC OF KENYA



**China Road and Bridge Corporation v Mbogo (Appeal 5A of 2020)  
[2022] KEELRC 13272 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13272 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
APPEAL 5A OF 2020  
MA ONYANGO, J  
NOVEMBER 23, 2022**

**BETWEEN**

**CHINA ROAD AND BRIDGE CORPORATION ..... APPELLANT**

**AND**

**KIMUYU MBOGO ..... RESPONDENT**

*(Being an Appeal arising from the ruling C C Oluoch Chief Magistrate  
delivered on October 30, 2019 in CMCC no 106 of 2018 at Mavoko)*

**RULING**

1. When I took directions on this file it was on the assumption that the file was coming up for disposal of the appeal herein which is against the ruling of Hon C C Oluoch in Chief Magistrates Court, Mavoko Civil Suit no 106 of 2016 delivered on October 30, 2019. Upon perusal of the file, I have noted that the appeal was filed in the High Court Machokos on October 31, 2019. The memorandum of appeal is dated October 30, 2019.
2. It was filed together with an application of even date in which the appellant seeks stay of execution of the decree together with all consequential orders, proclamation, attachment and related processes pending the hearing and determination of the appeal
3. In a ruling delivered on February 5, 2020 D K Kemei J referred the appeal to this court on grounds that the High Court lacked jurisdiction to hear and determine the appeal
4. This therefore means that the application ought to be disposed of before the appeal as the orders the appellant has been relying on are interim, the High Court having not made a determination on the application.
5. From the record, both the appellant and respondent were represented on the date the ruling was delivered. When this matter came up before me on September 24, 2021 only the appellant was



represented, counsel did not inform the court that the application was still pending hence the court gave directions for disposal of the appeal

6. The submissions on record having been in respect of the notice of motion dated October 30, 2019, I will proceed to render a ruling in respect of the application.
7. In the grounds in support of the application the applicant alleges that the respondent filed a fictitious claim seeking compensation for an industrial accident which never happened, that the summons to enter appearance were served directly upon the appellant's insurers without notice to the appellant. That the insurance company entered an appearance and filed defence but abandoned the suit upon its investigations establishing that the claim was fictitious.
8. It is further the appellant's position that the chief magistrates court lacked jurisdiction to hear and determine the claim by virtue of section 23 of the *Work Injury Benefits Act*. Further, that the appellant was not given notice of the *ex parte* judgment against it and that it only became aware of the same upon service with the decree together with warrants of attachment issued on August 9, 2019 by Sadique Enterprises Auctioneers by letter dated August 14, 2019 for kshs.1,009,060.12.
9. The appellant consequently filed an application dated August 19, 2019 before the Chief Magistrates Court Mavoko seeking *inter alia*, stay of execution of the decree, review and setting aside of the judgment and decree in the subject suit.
10. In a ruling delivered by the trial court on October 30, 2019, the court dismissed the appellant's application, hence the application now before the court for determination.
11. The appellant pleads that it has an arguable appeal and has listed the grounds of appeal in the grounds in support of the application. It further pleads that the lower court failed to consider the salient circumstances of the case and therefore erred in dismissing the application.
12. The appellant states that it is willing to provide security should this court order for the same in the circumstances of this case.
13. The application is supported on the affidavit of Veronica Ouko, human resource officer of the appellant who reiterates the averments on the grounds in support of the application.
14. The respondent opposes the application through the replying affidavit of Kimuyu Mboo, the respondent, sworn on November 6, 2019. He states that the allegations that the suit is fictitious has been made in the appeal yet it was not raised in the lower court. Further, that the appellant conceded the jurisdiction of the lower court but now contests the same on appeal, yet it was willing to proceed in the lower court and filed an application for setting aside of the judgment without raising a preliminary objection on the jurisdiction of the court.
15. The respondent states that the applicant has not met the conditions for grant of stay under order 42 rule 6 of the *Civil Procedure Rules* by depositing security.
16. In a supplementary affidavit sworn on December 9, 2019 Veronica Ouko depones that M Joel Khamala who is alleged to have been served with summons to enter appearance and plaintiff did not have authority documents on behalf of the appellant and neither was he served as alleged as the signature on the summons to enter appearance is a forgery.
17. The affiant further depones that although the firm of L Wang'ombe entered appearance on instructions of the appellant's insurers, the appellant was not aware about such representation and neither did it instruct the said firm of advocates.



18. Further, that the said firm of advocates ceased acting without notifying the appellant. It was thus never given an opportunity to be heard before judgment was entered against it.
19. The application was disposed of by way of written submissions.
20. I have considered the pleadings and submissions on record.
21. The circumstances under which stay of execution pending appeal may be granted are well set out in order 42 rule 6(2) of the Civil Procedure Rules which provides –
  - (2) No order for stay of execution shall be made under subrule (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.
22. The appellant submits that it will suffer substantial loss as the respondent’s means are unknown to the appellant and it may therefore not be able to recover the decretal sum of kshs 1,009,060.12 should the respondent execute the decree. Further, that should execution issue the appeal will be rendered nugatory. The appellant relies on the decisions in *Esther Wanjiru v Jackline Arege and Mukuma Abuoga* where the court discussed substantial loss.
23. The appellant further submits that the application was filed without delay and that it is willing to furnish security.
24. The appellant further relies on the decision in *Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others* [2012] eKLR where the court held –

“In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.”
25. I have considered the grounds of appeal and I am satisfied that the appeal is not frivolous. There are triable issues raised in the appeal which require the court to inquire into before determining whether or not the appeal should succeed.
26. It is also evident from the record that the appeal and application were filed timeously, the ruling which is the subject of appeal having been delivered on October 30, 2019 and the application and appeal filed on October 31, 2019.
27. The appellant has further offered security should the Court order the same.
28. For the foregoing reasons I am satisfied that the applicant meets the conditions for grant of stay of execution and make the following orders: -
  - i. The judgment decree and all consequential orders including execution process in Mavoko CMCCC no 106 of 2016 Kimuyu Mboo v China Road and Bridge Corporation be and are hereby stayed pending hearing and determination of the appeal herein.



- ii. The appellant shall as a condition for grant of the stay deposit the sum of kshs 1,009,060.12 in a joint interest earning account in the joint names of counsel for the respondent and counsel of the appellant within 30 days as a condition for the stay.
- iii. Parties will dispose of the appeal by way of written submissions, the timelines to be given by the Court at the time of delivering this ruling.
- iv. The costs of the application shall abide the outcome of the appeal.

29. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2022.**

**MAUREEN ONYANGO**

**JUDGE**

