



REPUBLIC OF KENYA



**Kipkorir v Kamer Holdings Ltd (Civil Appeal E621 of 2023)  
[2024] KEHC 1769 (KLR) (Civ) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1769 (KLR)

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

**CIVIL  
CIVIL APPEAL E621 OF 2023**

**JN MULWA, J**

**FEBRUARY 22, 2024**

**BETWEEN**

**BENJAMIN TARUS KIPKORIR ..... APPLICANT**

**AND**

**KAMER HOLDINGS LTD ..... RESPONDENT**

**RULING**

1. By an Application dated 19/07/2023, Benjamin Tarus Kipkorir seeks an Order of Stay of Execution of the judgment and decree of the trial court delivered on 13/06/2023 in Milimani CMCC No. 168 of 2020 pending hearing of the appeal filed herein.

The grounds for the same are stated at its face and supporting affidavit sworn by the Applicant on even date.

2. The Application is opposed by a Replying Affidavit sworn on 2/08/2023.

The parties rely on their Affidavits in support and in opposition. I have considered them.

Under Order 42 Rule 6(1) and (2) of the *civil procedure Rules*, conditions for grant of stay of execution are provided thus:

- a. the court must be satisfied that substantial loss may result unless the order is denied
  - b. the application has been brought without unreasonable delay
  - c. the applicant must offer sufficient security for the due performance of the decree.
3. Further the applicant must establish factors which show that the execution will create a state of affairs that will irreparably or negate the very essential core of the applicant as the successful party in the appeal as stated in *James Wangalwa & another v Agnes Naliaka* (2012) eKLR. Additionally the court must be



satisfied that the appeal has high chances of success. The Appeal arising from an application for review before the trial magistrate wherein on 6/6/2022 the ex parte judgment was set aside and the Applicant allowed to file a defense upon deposit of Kshs. 20,000/- as security for costs.

4. The Applicant avers that it paid the said sum on 21/06/2022 via Mpesa to the Respondents Advocates but the same was returned with a threat of execution. The trial court's decree is for Kshs. 323,423/=. I have also seen the trial Magistrate's Ruling dated 6/06/2022. By the said Ruling, the Interlocutory Judgment was set aside subject to the Applicant paying throw away costs of Kshs. 20,000/= within 10 days, and the Defendant filing a defense within 10 days from the date of the ruling failure to which the orders would lapse automatically.
5. The Respondent in the Replying Affidavit acknowledged the trial court's ruling of 6/06/2022 that the costs were duly paid but in installments and slightly out of time, and thus the payment was returned to the Applicant and by an Application for review, the Applicant sought to be allowed to pay the said money into court which application was denied. This ruling is the subject of Appeal herein.

The respondent has urged for dismissal of the instant Application.

6. At the center of the Application is whether conditions for stay of execution pending appeal have been complied with – Order 42 Rule 6(2) of the Civil Procedure Rules. The purpose of stay orders is to preserve the subject of the appeal.

This is a money decree. It is rare that a party will suffer irreparable loss unless it is shown that the Applicant will not be able to pay the decretal sum if the appeal succeeds. In Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR the court held that a stay order is not automatic, but at the discretion of the court. See also RWW vs. EKW [2019] eKLR.

7. In Zoa Taka Ltd & James Gitau v. Dennis Kyalo [2023] eKLR and National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another [2006] eKLR the courts held that Substantial loss being the cornerstone in an application for stay pending appeal must be demonstrated.
8. I have not seen any demonstration of substantial loss to the Respondent if stay orders are not granted. To the contrary the Applicant has shown that it would suffer substantial loss if the stay orders are granted by its willingness to comply with conditional stay orders by payment of the throw away costs ordered by the trial court, though time lines were not complied with have not been sufficiently explained but at the end, the money was send to the Respondent who refused to accept the same due to some delay.
9. The right of a litigant to appeal is protected under the law. To that end, I am persuaded that the Applicant ought to be allowed to progress his Appeal and be heard. If execution of the monetary decree is not stayed the appeal will be rendered nugatory as the Respondent will proceed to execute the decree which may cause loss to the Applicant.
10. The upshot is that the Application dated 19/07/2023 is allowed upon the following conditions:

- a. The Applicant shall deposit a sum of Kshs. 50,000/- in court as security for the due performance of the decree within 30 days of this ruling. In default the stay order shall lapse automatically.
- b. The Record of Appeal shall be filed within 60 days of this ruling
- c. Mention for directions on the Appeal before the DR on 11/4/2024.

Orders accordingly.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024.**

**J. N. MULWA**

**JUDGE**

