



REPUBLIC OF KENYA



**Mwiti & another v Maina (Civil Appeal E259 of 2023)
[2024] KEHC 1541 (KLR) (Civ) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL APPEAL E259 OF 2023
PM MULWA, J
FEBRUARY 22, 2024**

BETWEEN

JEDIDAH KARWITHA MWITI 1ST APPELLANT

TRAVERSE BUILDING COMPANY LTD 2ND APPELLANT

AND

ZAKAYO KIMANI MAINA RESPONDENT

*(An application for stay of execution pending the hearing and
determination of the appeal against the ruling and order in
Milimani CM Case No. 4117 of 2022 delivered on 2nd October, 2023)*

JUDGMENT

1. This ruling is in respect of an application dated 4th October, 2023 by the appellants under Order 23 Rule 1 of the *Civil Procedure Rules*. The applicants seek an order of stay of execution of the Ruling and Order of PK Rotich, Senior Principal Magistrate delivered on 2nd October, 2023 declining to set aside the consent entered into between the advocates for the parties. The application is supported by the annexed affidavit of Jedidah Karwitha Mwiti the Director of Traverse Building & Company Ltd the 2nd appellant/applicant.
2. The brief background of the matter is that the applicants were sued by the defendant in Milimani Chief Magistrate's Court Case No. 4117 of 2022 for the sum of Kshs. 2,500,000/=. The applicants having been served with the summons to enter appearance appointed the firm of Mutuma Meja & Company Advocates to act on their behalf. No defence was filed but the matter was settled by a consent recorded on 21st December, 2022 and adopted as the judgment of the court in which the appellants were to clear the decretal sum in 3 instalments. The appellants only paid the sum of Kshs. 200,000/



= and defaulted on the terms of the consent prompting the respondent to commence execution. The appellants then filed the Notice of Motion dated 19th May 2023 seeking to set aside the consent on the grounds that counsel did not have instructions to enter into the consent. In a ruling dated 19th May 2023, the Court dismissed the said application, hence the appeal herein which was filed together with the instant application.

3. The applicant contends she is in danger of being committed to civil jail for failure to satisfy the decree, despite having been condemned unheard and she stands to suffer irreparable loss if the orders are not granted. The applicant further argues that the trial magistrate failed to address the prayer for lifting the order freezing her account No. 1040280754805 held with Equity Bank. It was also submitted that the application was brought without unreasonable delay. The applicant argues that the former counsel was only authorized to negotiate settlement and the amount of Kshs 200,000 paid was a sign of good faith.
4. The application was opposed by the replying affidavit of Zakayo Maina Kimani sworn on 17th October 2023, in which he depones that the applicants have filed a similar application in the trial court and the institution of the instant application amounts to duplicity. The consent was duly entered into by the parties and the applicant should not renege from the same.
5. It is contended that the instant application is premised on falsehoods and the court is urged to dismiss the same. The respondent submits the appeal is not arguable as the issue raised is between the advocate and her then advocate, which issues ought to be addressed in a different forum. In any case, it was argued, the consent judgment being a money decree the applicant will suffer no substantial loss if the orders sought are not granted.

Analysis and Determination

6. I have considered the application, the affidavits sworn in support and in rebuttal alongside the submissions filed by counsel. The issue for determination is whether the applicant is entitled to the orders sought.
7. An application for a stay of execution of a judgment pending appeal is governed by Order 42 Rule 6(2) of the *Civil Procedure Rules*, which lays down the conditions to be satisfied by an applicant seeking a stay of execution pending appeal. The conditions to be satisfied are as follows:
 - i. The applicant must satisfy that she stands to suffer substantial loss if the stay is not granted,
 - ii. That the application has been filed without undue delay and
 - iii. That the applicant is willing to offer such security as may be ordered by the court.
8. It is settled law that the purpose of an order for a stay of execution is to preserve the subject matter. The Court of Appeal in *RWW v. EKW* (2019) eKLR held that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for a stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”



9. In the present case, the impugned ruling was delivered on 2nd October, 2023 while the instant application was filed on 4th October 2023. There was therefore no delay in bringing the instant application.
10. On the issue of substantial loss, the applicant avers she was condemned unheard as the consent was entered without express instructions given to counsel and hence she has been prejudiced. That the sum of Kshs 200,000/= paid after the recording of the consent was done in good faith. From the record the applicant was served with the plaint and summons to enter an appearance, she instructed counsel but failed to file a defence and proceeded to enter a consent for the settlement of the amount in dispute.
11. There are no reasons advanced by the applicant for the failure to file the defence. The failure to file a defence and the subsequent recording of consent and making of part payment of the debt amounts to admission thereof. I am not persuaded that the then advocate for the appellant did not have the authority to act for her as she made a payment of Kshs 200,000/= after the consent was signed.
12. I have perused the memorandum of appeal as filed herein and the same faults the trial magistrate for not setting aside the consent and for condemning the applicants unheard. According to the applicant, her then counsel lacked the authority to enter into the consent as the amount in contention was disputed.
13. That basically is the basis of the appeal and I will be hesitant to determine on its merit or otherwise. Suffice it to state that the court is vested with the duty to consider the interest of both parties, that is, the respondent on the right to enjoy the fruits of the judgment as well as the right of the applicant to be heard on appeal. In the instant case, while balancing the rights of the parties, it is my view that the grounds of the appeal are arguable. Execution thereof will render the appeal nugatory and may occasion substantial loss to the respondent.
14. The last consideration is that of security. The applicant has not offered any security to be deposited in due performance of the decree. The respondent avers the applicant ought to deposit security to ensure compliance with the appeal. Security is one of the conditions set in determining whether to grant or deny stay of execution of the judgment.
15. In *Mwaura Karuga t/a Limit Enterprises v. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, the court held that:

“ ... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost...”
16. The applicant ought to propose and show the willingness to comply with the security to be deposited in due performance of the court. In the absence of such an offer by the applicant, the court will exercise its discretion and allow the application and set a condition for security.
17. In the circumstances I do allow the appellant’s application dated 4th October 2023 in the following terms:
 - a. Stay of execution of the consent judgment is granted on condition that the applicant deposit the decretal sum, less Kshs. 200,000/= already paid, in a joint interest earning account in the names of counsel for both parties within 30 days from the date hereof, in default the stay orders shall stand discharged.
 - b. Costs of the application shall abide the appeal.



It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

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P. MULWA

JUDGE

In the presence of:

N/A for the Appellant/Applicant

Mr. Njoroge h/b for Ms. Kanja for the Respondent

Court Assistant: Carlos

