



**Willow Motors Ltd & another v Kitanga (Suing as the personal representative of the Estate of James Mwanzia Wambua - Deceased) & another (Civil Appeal E320 of 2023) [2024] KEHC 3193 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3193 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E320 OF 2023  
FR OLEL, J  
MARCH 19, 2024**

**BETWEEN**

**WILLOW MOTORS LTD ..... 1<sup>ST</sup> APPELLANT**

**DANIEL KIBAKA WACHIRA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BENARD MUSYOKA KITANGA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES MWANZIA WAMBUA - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**MICHEAL KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. Before court for determination is the notice of motion application dated 14<sup>th</sup> December 2023 filed by the Appellants/applicants, who seeks for an order of stay of execution of the judgment/decree issued in Kithimani CMCC NO E120 of 2022 by Honourable P Wechuli (PM) dated 16<sup>th</sup> November 2023 pending hearing and determination of the appeal filed.
2. The said application is supported by the supporting affidavit of the 2nd appellant where he does state that they are aggrieved by the said judgment of the trial court and had filed an appeal as against it. Before the trial court, parties had recorded a consent on liability and agreed to file written submissions. Be that as it may the respondent had failed to produce their list of documents and as such there were no exhibits to be relied on by the court to make a determination. The net effect of this failure was that the respondents had not proved their case as against the appellants and there was no basis upon which damages could be assessed.



3. Further it was the appellants contention, that the appeal as filed was meritorious and had high chances of success, thus there was need to grant stay of the said decree appealed against to avoid it being rendered nugatory. The appellants further stated that they were willing and ready to abide by the terms and conditions of stay as the court may order and/or so direct and that if the respondent was allowed to execute, they would suffer substantial loss as the respondents would not be in a position to refund the decretal sum. It would therefore be in the interest of justice to allow the prayers as sought.
4. The respondent advocate Ms Wainaina did appear virtually in court on 6<sup>th</sup> March 2024 and indicated that they had filed their replying affidavit, which as at the date of writing this ruling was not in the court file. Further she also did indicate orally that they prayed that the appellant be directed to pay half the decretal sum and deposit the other half in court.

## **B. Analysis & Determination**

5. I have carefully considered the Application, Supporting Affidavit, the Respondent's oral response and find that the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
6. Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) provides as follows:
  - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
  - (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.”
7. In [Visbram Ravji Halai vs. Thornton & Turpin](#) Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 rule 6 of the [Civil Procedure Rules](#) is fettered by three conditions namely, establishment that the application has been made without unreasonable delay, satisfaction of substantial loss and the furnishing of security. The Court, in exercising its discretion, should also further opt for the lower rather than the higher risk of injustice and finally the court will also consider the overriding objective as stipulated in sections 1A and 1B of the [Civil Procedure Act](#), which the courts are now enjoined to give effect to. See [Suleiman vs. Amboseli Resort Limited](#) [2004] 2 KLR 589, [Samvir Trustee Limited vs. Guardian Bank Limited](#)



Nairobi (Milimani) HCCC 795 of 1997 & Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63.

8. The appellant is obviously aggrieved, by the judgment delivered and did file this appeal promptly and the grounds of appeal do disclose arguable grounds to challenge the judgment appealed against. Secondly, the decretal amount is a tidy sum and no affidavit of means has been filed by the respondents to show that indeed if the said sum is released to them, they would be in a position to refund the same should the appeal succeed. See G. N. Muema P/A (516) Mt View Maternity & Nursing Home Vs Miriam Maalim Bishar & Another (2010) eKLR & National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR.
9. Guided by the above authorities and in the absence of the requisite proof from the Respondents that they are person of means, I find that the Appellants has satisfied this court that they will suffer substantial loss if the entire decretal sum is paid out to the Respondents before the appeal is heard and determined. The Appellants have therefore fulfilled this condition.
10. On the security, the Appellants have indicated that they are ready and willing to abide by this court's direction as to security. The Respondent on the other hand proposes that, the appellants pay them half the decretal sum and deposit the other half in court. In determining what appropriate security should be offered, the court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of her judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of her judgment. See Attorney General Vs Halal Meat Produces Limited Civil Application No. Nairobi 270 of 2008; Kenya Shell Ltd Vs Kibiru & another (Supreme); Mukuma Vs Abuoga (1988) KLR 645.
11. The law is that where the Applicant succeeds, he/she should not be faced with a situation which he would find it difficult to get back his money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. See Court of Appeal in Ndubiu Gitabi Vs Warugongo (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100.

### **C.Disposition**

12. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful plaintiff, I grant a stay of execution of the decree herein on condition that;
  - (a) The Appellant/Applicants do deposit the entire decretal sum in court within the next 30 days from the date of this ruling and in default this application shall be deemed to have been dismissed with costs and the Respondents will be at liberty to execute.
  - (c) The costs of this application shall be in the cause
13. It is so ordered.

**RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 19<sup>TH</sup> DAY OF MARCH, 2024**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 19<sup>TH</sup> DAY OF MARCH, 2024**



In the presence of: -

Mr. Wainaina for Appellants

No appearance for Respondents

Sam Court Assistant

