



**Appleton Resort v Muthaiga Fine Meats Limited (Civil Appeal E310 of 2023)
[2024] KEHC 2690 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E310 OF 2023
FG MUGAMBI, J
MARCH 15, 2024**

BETWEEN

APPLETON RESORT APPELLANT

AND

MUTHAIGA FINE MEATS LIMITED RESPONDENT

RULING

Background

1. This ruling determines the application dated 2nd February 2024 seeking to extend the period of complying with the orders issued by this Court on 5th December, 2023 regarding deposit of security. It also seeks to have this Court vary the amount to be deposited as security from the whole decretal sum to Kshs. 200,000/=.
2. On 5th December, 2023 this Court directed the applicant to deposit the whole decretal sum of Kshs. 597,523/= arising from a judgment in SCCOMM No E5029 of 2023 in a joint interest earning account within 60 days from the date of the orders.
3. The application is supported by the affidavit of Walter Onchwari dated 2nd February 2024 and opposed vide a replying affidavit sworn by Reuben Marema on 1st March 2024. The respondents argue that the applicants had failed to comply with the orders of this Court by failing to deposit the decretal amount within 60 days as ordered and that the orders lapsed on 3rd February 2024. The respondents argue that the application has been made in bad faith having been made at the very last minute while the applicant was aware of its financial situation all along.



4. The respondent is opposed to the application to vary the amount of the security, on the grounds that no good reasons have been given. It is further stated that there is no evidence of the economic hardship of the applicant as stated.
5. The applicant filed a further affidavit confirming that the application was filed before the lapse of the period granted by Court and blaming the respondent for not cooperating in the opening of the bank account as directed by this Court. The applicant confirms that the Record of Appeal has been filed indicating that they may only seek to file a supplementary record of appeal. The applicant further confirms that they are in a position to deposit the entire decretal amount in 7 days.

Analysis

6. I have carefully considered the pleadings, rival submissions as well as the authorities cited by counsel in support of their depositions. The main issue for determination is whether the said application is merited.
7. At the heart of this application should be the need for the Court to do justice to both parties. That is by allowing the applicant an opportunity to ventilate its appeal and to consider that the respondent has a judgment that it ought not be kept away from enjoying. The question is whether the applicant is deserving of the orders sought.
8. I would consider this question in light of the decision of the Court of Appeal in *Absalom Dova V Tarbo Transporters, [2013]* eKLR, where the Court stated as follows:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation.”
9. This Court is equally alive to the purpose of security as was stated in *Arun C. Sharma V Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 Others, [2014]* eKLR, where the court stated:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor. ...”
10. I have looked at the evidence presented by the applicant before this Court. The application for extension of time was made just before the lapse of the time allowed for the security to be deposited. This makes all the difference. Had it been filed after the lapse of that time there would have been nothing to extend. The reason given by the appellant is the difficulty in getting the respondent’s co-operation to open the joint account.
11. This submission is corroborated by the emails on record between the parties. On Friday, 19th January 2024 the applicant wrote to the respondent asking for the respondent’s preferred bank for purposes of opening the account. There does not appear to be a response to that email. The respondent has not provided any answer to the averment of the lack of co-operation,
12. It is therefore my considered view that the respondent should not gain any advantage from the circumstances, especially since he failed to fulfill his part of the order by not cooperating with the



applicant in opening the account. The Court notes that on that date the appellant was ready to deposit the amount of Kshs. 200,000/=. The applicant states that they have since secured the entire decretal amount. The Court further notes that the record of appeal was filed on 11th March 2024. This is evidence of the applicant's genuine intent to diligently pursue the appeal.

13. It is therefore only fair that this Court extends time for the appellant to comply with the Orders of this Court but within strict timelines.

Determination

14. For the reasons that I have stated, the application dated 2nd February 2024 is allowed on the following terms:
 - i. That the period for complying with the orders of 5th December 2023 is hereby extended by 14 days from the date of this orders;
 - ii. The full decretal amount shall be deposited in Court within 14 days of these orders.
 - iii. The costs of this application shall await the outcome of the appeal.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

