



REPUBLIC OF KENYA



**KENYA LAW**  
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**Riaz and Sons Co Ltd v Githiri & 3 others (Civil Appeal  
E037 of 2022) [2024] KEHC 16938 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 16938 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E037 OF 2022**

**F WANGARI, J  
JUNE 28, 2024**

**BETWEEN**

**RIAZ AND SONS CO LTD ..... APPELLANT**

**AND**

**ROSE NJERI GITHIRI ..... 1<sup>ST</sup> RESPONDENT**

**GRACE WAMBUI GITHIRI ..... 2<sup>ND</sup> RESPONDENT**

**NASIOKI AUCTIONEERS ..... 3<sup>RD</sup> RESPONDENT**

**MARTIN KIRAGU ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This is a Ruling on an Applications dated 10/1/2024, by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, which seeks the following Orders:
  - i. Spent
  - ii. Spent
  - iii. The Honourable Court be pleased to order a stay of proceedings pending the hearing and determination of the intended appeal.
  - iv. Any other relief the court deems fit to grant.
  - v. Costs of the application.
2. The application was based on grounds that inter alia that the Appellant in this case had not filed a Record of Appeal as directed by the court, hence this court was functus officio and should not have given directions on an appeal that is non-existent.



3. Further, the Appellant is said to be in contempt of court by failing to adhere to the orders of the lower court, and this court has shielded the Appellant from contempt proceedings.
4. The application was supported by the Affidavit sworn by the 2<sup>nd</sup> Respondent reiterating the contents of the grounds of the application.
5. The application was not opposed.
6. The applicants were directed to file their submissions which this court have perused and considered.

### **Analysis**

7. The only issue for determination is whether stay of execution pending appeal ought to be granted. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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.
8. An Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
  9. The Applicants aver that they stand to suffer substantial loss if the order issued by this court on 8/12/2023 is not stayed. Considering that the Record of Appeal has not been filed almost 2 years later, and the appeal before the Court of Appeal will be rendered nugatory as the aim is to discontinue this court proceedings.
  10. In the previous ruling, I made reliance in the case of *Re Global Tours & Travel Ltd HCWC No.43 of 2000 Ringera, J* (as he then was) held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

11. Considering that this application was filed without delay, and that it was not opposed, and as at the time of writing this ruling, the Record of Appeal had not been filed, I hereby exercise the discretion of the court and grant the stay of proceedings as prayed by the Respondents/ Applicants.



**Determination**

12. In the circumstances I make the following orders: -
- a. The Application dated 10/1/2024 has merits and is allowed.
  - b. Order for Stay of Proceedings allowed pending the hearing and determination of the intended appeal.
  - c. Mention to confirm the status of the appeal on 28/11/2024.
  - d. Costs to abide the outcome of the Appeal.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JUNE, 2024.**

.....

**F. WANGARI**

**JUDGE**

In the presence of:-

M/S Nyaga Advocate h/b for Oloo Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

N/A for the Applicant

Barile, Court Assistant

