



REPUBLIC OF KENYA



**Waceke v Nyaga & another (Civil Appeal E040 of 2023)
[2024] KEHC 7742 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E040 OF 2023
MA ODERO, J
JUNE 28, 2024**

BETWEEN

FAITH WACEKE APPLICANT

AND

TERESA N. NYAGA 1ST RESPONDENT

ROSE W. NDORIA 2ND RESPONDENT

RULING

1. Before court is the Notice of Motion Application dated 30th May, 2023 by which the Applicant Faith Waceke seeks the following orders:-

- “ 1 Spent
- 2 That the orders issued on 18/5/2023 by the small claims court case number 038/2023 be stayed.
- 3 Costs be provide for”

2. The application which was premised upon orders 21, Rules 22 of the Civil Procedure Rules and any other provision of the law was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondents Teresa N. Nyaga and Rose N. Ndoria did not file any reply to the application. The same was therefore unopposed.

4. I have considered the application on record as well as the written submissions filed by the Applicant.

5. Order 42 Rule 6 which sets out the principles for stay of execution provide as follows:-

- 1. No appeal or second appeal shall operate as a stay of Execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appeal 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 to appeal is preferred may apply to the appellate court to have such order set aside. No order for stay of execution shall be made under sub rule

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.
 - c.”

6. Therefore in order to merit the orders being sought the applicants must satisfy the court.
 - (a) That the application for stay was filed without unreasonable delay.
 - (b) That they stand to suffer substantial loss unless the stay order is granted.
 - (c) That security for the performance of the decree or order has been given by the Applicant.
7. The impugned judgment in this matter was delivered on 18th May, 2023. The current application for stay was filed on 30th May, 2023 barely ten (10) days after delivery of the judgment. I am satisfied that the application was filed in a timely manner.
8. Whilst it is not the duty of the court at this stage to comment on the merits or otherwise of the intended appeal, I have perused the Memorandum of Appeal dated 30th May, 2023. In my view it raises triable issues. On the question of substantial loss the court must consider each case on its own merits. The court must weigh the right of the successful party to enjoy the fruits of their judgment against the risk of rendering any appeal filed by the loser nugatory.
9. I note that despite having notice of this application the Respondents did not oppose the same.
10. Finally I grant a stay of execution pending hearing and determination of the appeal subject to the Applicant depositing within (21) days the full decretal sum into a joint interest earning account opened in the names of both Advocates.
11. In the event of failure to comply the stay orders will automatically lapse with no further reference to the Applicant. No orders on costs.

DATED IN NYERI THIS 28TH DAY OF JUNE, 2024.

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MAUREEN A. ODERO

JUDGE

