



REPUBLIC OF KENYA



**Githinji v Moja Expressway Company Limited (Civil Appeal 1380 of 2024)  
[2025] KEHC 2495 (KLR) (Civ) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2495 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 1380 OF 2024**

**TW CHERERE, J**

**FEBRUARY 20, 2025**

**BETWEEN**

**ELIJAH MACHARIA GITHINJI ..... APPELLANT**

**AND**

**MOJA EXPRESSWAY COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. The Appellant has filed a Notice of Motion dated 09<sup>th</sup> December 2024, under Section 36 of the Small Claims Act seeking an order for a stay of execution of the ex parte judgment delivered on 30<sup>th</sup> April 2024 in SCCC No. E1219 of 2024, pending the hearing and determination of his appeal.
2. The application is supported by the affidavit of the Appellant, Elijah Macharia Githinji, sworn on 09<sup>th</sup> December 2024, in which he avers that the appeal is arguable on the basis that his insurer, XPLICO Insurance Company, failed to defend the claim. He further contends that a moratorium placed on the insurer exposes him to execution proceedings that would result in substantial loss.
3. The Respondent opposed the application on the basis of a replying affidavit sworn on 13<sup>th</sup> February 2025 by its legal manager Jude Obiero. He avers that Appellant was duly served with the plaint and summons to enter appearance but failed to defend the claim.
4. In its submissions dated 13<sup>th</sup> February 2025, the Respondent reiterates the grounds in the replying affidavit and further argues that the application is defective as it has been brought under Section 36 of the *Small Claims Court Act* instead of the appropriate provision, Order 42 Rule 6(2) of the Civil Procedure Rules.



5. The Respondent contends that the commencement of execution does not, in itself, amount to substantial loss, citing *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012] eKLR, where the court held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss... The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...”
6. The Respondent additionally argues that the decree in the impugned judgment is monetary, and if the appeal succeeds, the Respondent can reimburse the amount paid. Reliance was placed on *Mutua Kilonzo v Kioko David Machakos* [2008] eKLR, where the Court dismissed an application for stay pending appeal of a monetary decree on the ground that the Applicant failed to demonstrate how he would suffer substantial loss.
7. Based on the holding in *Luxus Woods (K) Limited v Patrick Amugune Kamadi* [2016] eKLR, which relied on *M/S Portreiz Maternity v James Karanja Kabia Civil Appeal No. 6 of 1997*, the Respondent urged the court to balance the Appellant’s rights against the Respondent’s right to enjoy the fruits of the judgment.
8. Finally, the Respondent urged that in the event the application is allowed, the Appellant be ordered to pay half of the decretal sum plus costs to the Respondent so that he does not leave the Court empty-handed pending the appeal. Reliance is placed on the case of *Amal Hauliers Limited v Abdul Nasir Abukar Hassan* (2017) eKLR.
9. Upon considering the application, affidavits on record, annexures thereto, and the Respondent's submissions, the Appellant not having filed any, the Court identifies the following as the issues for determination:
  - a. Whether the application is defective
  - b. Whether the application has been made without unreasonable delay.
  - c. Whether a moratorium on XPLICO Insurance is a triable issue warranting a stay of execution.
  - d. Whether the Appellant has demonstrated that substantial loss may occur unless a stay is granted.
  - e. Whether the Appellant has offered security for the due performance of the decree.

### **Analysis and Determination**

10. I have carefully considered the application, the supporting affidavit, the annexures thereto, and the applicable legal principles.
11. The Respondent correctly points out that this application has been brought under Section 36 of the *Small Claims Court Act*, which only provides for orders that may be issued by the Small Claims Court but does not govern stay of execution.
12. However, in line with Article 159(2)(d) of *the Constitution* of Kenya, this Court shall not sacrifice substantial justice at the altar of procedural technicalities and the argument that the Appellant’s application is defective is thus declined. (See *M’Imunya v Muroko* (Suing on behalf of the Estate of



Alex Muriki Kaiyongi) (Civil Appeal E198 of 2023) [2024] KEHC 327 (KLR) (25 January 2024) (Ruling)).

13. The governing principles for the grant of stay of execution pending appeal are set out in Order 42 Rule 6(2) of the Civil Procedure Rules and were reiterated in *Butt v Rent Restriction Tribunal* [1979] eKLR. These principles require the Court to consider:
  - a. Whether the application has been made without unreasonable delay.
  - b. Whether the appeal is arguable with a probability of success.
  - c. Whether substantial loss may occur unless a stay is granted.
  - d. Whether security for due performance of the decree has been provided.
14. The impugned judgment was delivered on 30<sup>th</sup> April 2024, and this application for stay was filed on 11<sup>th</sup> December 2024, which is eight months from the date of the judgment and one month from 22<sup>nd</sup> November 2024, when the trial court dismissed an application for stay of execution. Given the circumstances, this duration does not, in my considered view, constitute an unreasonable delay.
15. The Appellant argues that the judgment is unenforceable against him due to the statutory management of XPLICO Insurance. However, as held in *Blue Shield Insurance Company Limited (Under Statutory Management)* [2017] eKLR, a moratorium does not shield an insured party from liability to third parties.
16. The Appellant also contends that he was condemned unheard, as the material damage claim did not proceed by way of formal proof. The Respondent has not rebutted this assertion, which raises a serious issue of procedural fairness. There is no doubt that the right to be heard is a constitutional right enshrined under Article 48 of *the Constitution* of Kenya.
17. The burden of proving substantial loss lies with the Appellant as was held by the Court of Appeal in *Mukuma V Abuoga* (1988) KLR 645 that:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
18. The Appellant has demonstrated an arguable appeal and the likelihood of substantial loss if execution proceeds before the appeal is heard. While no security has been offered, Order 42 Rule 6(2) of the Civil Procedure Rules mandates that security be provided to ensure the due performance of the decree (See *Arun C. Sharma v Ashana Raikundalia* [2014] eKLR).
19. In balancing the rights of the parties, the Notice of Motion dated 09<sup>th</sup> December 2024, is allowed on the following terms:
  1. There shall be a stay of execution pending the appeal of the judgment SCCC No. E1219 of 2024 on condition that the Appellant deposit ½ of the decretal sum with the court within 30 days from today’s date
  2. Mention before the Deputy Registrar of this court on 31<sup>st</sup> March 2025 to confirm the filing of the record of appeal
  3. Costs shall abide by the outcome of the appeal

**DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2025**

**WAMAE.T. W. CHERERE**



## **JUDGE**

Appearances

Court Assistant - Ubah

For Appellant - Mr. Mwanzia for Mwanzia Muindi & Co. Advocates

For Respondent - Mr. Wanjohi for Sina Law Advocates

