



**Kamau v Matia (Suing as the Brother and Legal Representative of the Estate of Dominic Mutuku Matia - (Deceased)) (Civil Appeal E213 of 2024) [2025] KEHC 1513 (KLR) (17 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1513 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E213 OF 2024  
MW MUIGAI, J  
FEBRUARY 17, 2025**

**BETWEEN**

**PETER KAMAU ..... APPELLANT**

**AND**

**CHARLES KASANGA MATIA ..... RESPONDENT**

**SUING AS THE BROTHER AND LEGAL REPRESENTATIVE OF THE ESTATE OF DOMINIC MUTUKU MATIA - (DECEASED)**

**RULING**

1. Vide an application dated 15.08.2024 under Order 42 Rule 6 & 7 of the Civil Procedure Rules and Sections 2 and 3A of the [Civil Procedure Act](#), the Applicant seeks the following orders, that;
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That the court be pleased to order stay of execution of the judgment in Kithimanu PMCC No E 200 of 2022 delivered on 25<sup>th</sup> July 2024 pending the hearing and determination of the Appellant's appeal against the aforesaid judgement.
  - e. That such other additional, suitable and/or alternative orders be made as are just, expedient all circumstances of the case and this application considered.
  - f. That the insurer of the Appellant/ Applicant be allowed to deposit an insurance bond against the full judgment sum as security for due performance of the judgment/decree herein pending the hearing and determination of the appeal.



- g. That the costs of this application be in the cause.
2. The application is supported by the affidavit of Rachael Apollo, the legal officer of Cannon General Company Limited who she deposes has insured the Appellant/Applicant against this claim under an insurance policy. That the judgment was delivered on 25.07.2024 with liability at 90:10 in favour of the Plaintiff/Respondent against the Defendant/Appellant and the Defendant was to pay Kshs 955,830 plus interest and costs of the suit.
3. The Appellant has lodged an appeal being dissatisfied by the judgment which in her view has overwhelming chances of success. Further, that the stay period collapsed and the Respondent is at liberty to execute before the appeal is heard. It is indicated that the Insurer is willing and able to abide by such reasonable stay terms as the court may order.

#### **Grounds Of Opposition dated 30.08.2024**

4. The Respondent opposes the application on the grounds that;
  - a. The application is frivolous, incompetent and vexatious, bad in law, incurably defective, an abuse of the court process an afterthought and brought in bad faith and brought after inordinate delay.
  - b. The application is brought in bad faith to frustrate the process of execution.
  - c. The applicant herein is just buying time and no good grounds have been given to warrant the grant of the orders sought.
  - d. The Appellant has not offered a reasonable security for costs and should be ordered to release to the respondent half of the principle sum and costs amounting to Kshs 495,724 and deposit the remaining Kshs 495,724 in court within 14 days to demonstrate his seriousness as is the normal practice of courts to make sure the interests of both parties are taken care of
  - e. The Applicant's application lacks merit, is an afterthought and an abuse of the court process and is improperly before this court.
5. The application was canvassed by way of written submissions.

#### **Submissions.**

6. In addition to the contents of the supporting affidavit, Counsel for the Applicant submitted that the conditions for under Order 42 Rule 6 of the Civil Procedure Rules had been met. That they were apprehensive that the Respondent may not be able to repay the Appellant the decretal sum once the appeal is successful. Further, that the appeal and the application had been filed on time. Reliance was placed on the cases of Focin Motorcycle Co Limited vs Ann Wambui & another [2018] e KLR and Housing Finance Company of Kenya vs Sharick Jher Mohammed Ali Horji & Another [2015] e KLR.
7. As at the time of writing this ruling, the Respondent's submissions were not on record.

#### **Analysis & Determination**

8. I have considered the Application, grounds of opposition and the submissions on record and find that the issue for determination is;
  - a. Whether the Applicant is entitled to an order for stay of proceedings in pending the hearing and determination of the intended appeal.



9. Order 42 Rule 6 (2) of the Civil Procedure Rules provides that;  
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
10. The Court, in *RWW v EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

### **Undue Delay**

11. The decision was rendered on 25<sup>th</sup> of July 2024, this Application is dated 15<sup>th</sup> August 2024, 21 days later. There is a Memorandum of Appeal on record dated 12<sup>th</sup> August 2024. I therefore find that there was no unreasonable delay and thus the first ground has been satisfied.

### **Substantial Loss**

12. The second issue is that of substantial loss. Substantial loss was discussed in the case of *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited (in liquidation)* (2004) EA LR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-

“... Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal ....”

13. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. We repeat that the decretal sum was awarded to the 1st respondent, not the 2nd respondent and all that the 2nd respondent is entitled to from the judgment are the costs of the applicant's dismissed suit. The sum awarded to the 1st respondent was on a counter-claim. On the material before us, the means or resources of the 1st respondent remain wholly unknown and, in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back



and in that case, if the applicant's intended appeal were to succeed, that success would be rendered nugatory."

14. The Applicant contends that he will suffer substantial loss if the Appeal is successful as the Respondent has not attached an affidavit of means to show he may /can refund the funds. This court has stated before that the onus of proving the financial ability and capacity of the Respondent of paying back the decretal sum goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it.
15. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This court is guided by the observation of the court in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at 417 that;

"It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

16. The Applicant in this case has only alleged but has not proved the financial incapability of the Respondent.
17. Third, furnishing of security is key in getting orders of stay pending appeal. I rely on the case quoted by the Applicant of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, where the stated that:-

"Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."

### **Security**

18. It follows therefore that it is the discretion of the court to determine the security. It is not disputable that the Applicant has shown some step of good faith by willing to offer an insurance bond as security however there is no evidence of the terms of the insurance bond for the court or the Respondent to consider and it would not be prudent for this court to issue orders in a vacuum. There is therefore there is no guarantee that the interests of the Respondents will be catered for.

### **Disposition**

1. In the circumstances, I hereby grant stay pending the hearing and determination of the Appeal on condition that the Applicant pay the Respondent Kshs 494,725 within 90 days [from date of Ruling]and;
2. Deposit the outstanding amount of Kshs 494.725 in a joint interest earning account in the name of both advocates within 90 days failure to which the order of stay lapses.



3. The Trial Court File be availed Record of Appeal filed & Served and Appeal processed in normal way in Machakos High Court No 1.

It is so ordered.

**RULING SIGNED DATED & DELIVERED IN OPEN COURT IN MACHAKOS HIGH COURT  
ON LINE ON 17/2/2025.**

**M.W. MUIGAI**

**JUDGE**

In the presence of

Mr. Vincent holding brief for Mutunga for Defendant

Mr. Muli for Appellant

