



**Midland Tyre and Retread Limited & 2 others v Prime Bank (Civil Appeal E1134 of 2024) [2025] KEHC 2729 (KLR) (Civ) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2729 (KLR)

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

**CIVIL**

**CIVIL APPEAL E1134 OF 2024**

**TW CHERERE, J**

**FEBRUARY 20, 2025**

**BETWEEN**

**MIDLAND TYRE AND RETREAD LIMITED ..... 1<sup>ST</sup> APPELLANT**

**JAYESH KOTECHA ..... 2<sup>ND</sup> APPELLANT**

**SHWETA JAYESH KOTECHA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**PRIME BANK ..... RESPONDENT**

**RULING**

1. The Appellants have filed a Notice of Motion dated 30<sup>th</sup> September 2024, principally brought under Order 42 Rule 6(2) of the Civil Procedure Rules. They seek an order of stay of execution pending an appeal against the judgment in MCCC 2884 of 2020, delivered on 9<sup>th</sup> September 2024, which awarded the Respondent KES. 12,771,582.40 plus interest at 12.5% per annum for an unpaid loan and overdraft facilities extended to the 1<sup>st</sup> Appellant, with guarantees provided by the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants.
2. The application is supported by an affidavit sworn by Jayesh Kotecha, the 2<sup>nd</sup> Appellant on 30<sup>th</sup> September 2024 and a supplementary affidavit on 04<sup>th</sup> December 2024.
3. The Appellants argue that they are aggrieved by the judgment, have filed an appeal, and are willing to deposit security. They contend that unless a stay is granted, execution will cause them irreparable loss.
4. The Respondent opposes the application through a replying affidavit sworn by George W. Mathui, the Senior Manager-Legal, on 26<sup>th</sup> November 2024. The Respondent asserts that the Applicants are indeed indebted and that it applied security amounting to KES 10,000,000 to offset the loan before filing the suit, a claim the Appellants dispute.



## Analysis and Determination

5. The principles governing stay of execution pending appeal are set out under Order 42 Rule 6(2) of the Civil Procedure Rules and were reaffirmed in *Butt v Rent Restriction Tribunal* [1979] eKLR. The court must be satisfied that:
  - a) The application has been made without unreasonable delay;
  - b) The appeal is arguable with a probability of success;
  - c) The applicant will suffer substantial loss if the stay is not granted; and
  - d) Security for the due performance of the decree has been provided.
6. The judgment was delivered on 09<sup>th</sup> September 2024, and the present application was filed on 04<sup>th</sup> October 2024. The application was therefore made without unreasonable delay.
7. An arguable appeal need not necessarily succeed but must raise a bona fide issue deserving judicial consideration.
8. On whether the appeal would be rendered nugatory if this court declines to grant the orders sought and the intended appeal succeeds, the Court of Appeal in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR (Civil Application No. Nai. 31 of 2012) stated that:

Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
9. The parties present conflicting accounts regarding an alleged offset of KES 10,000,000/-. The Respondent contends that the securities were applied to the debt, while the Appellants argue that the Respondent has not realized the securities. This dispute, concerning both factual and legal aspects of the realization of securities, is in my considered view an arguable issue that warrants appellate review.
10. It is trite that the burden of proving substantial loss lies with the Appellants. The Court of Appeal in *National Industrial Credit Bank Ltd v. Aquinas Francis Wasike & Another* [2006] eKLR held that where the decree-holder is a financial institution, an applicant must show the institution's inability to refund the decretal amount if the appeal succeeds.
11. The Appellants have not provided evidence that the Respondent, a financial institution, would be unable to refund the decretal sum. A mere claim of substantial loss without concrete evidence is insufficient.
12. In *Arun C. Sharma v. Ashana Raikundalia* [2014] eKLR, the court emphasized that security should be adequate to ensure the due performance of the decree. While the Appellants have offered to deposit security, they have however not made a specific proposal regarding the amount or nature of security.
13. A stay of execution is not automatic but discretionary, as stated in *Antoine Ndiaye v African Virtual University* [2015] eKLR. Even though the Appellants have demonstrated the existence of an arguable appeal and offered security, they have failed to prove substantial loss. However, in the interest of justice, the court finds it appropriate to grant conditional relief as follows:
  1. There shall be a stay of execution pending appeal of the judgment in MCCC 2884 of 2020 on condition that the Applicants 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 March 20, 2025 to confirm the filing of the record of appeal
3. Costs shall abide by the outcome of the appeal

**DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ubah

For Appellants - Ms. Mogeni for Mogeni & Co. Advocates

For Respondent - Mr. Mutua for G. Mutua Molo & Co. Advocates

