



**Muhavana & 5 others v Kashingiri (Civil Appeal E155 of 2024)  
[2025] KEHC 2290 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2290 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E155 OF 2024  
AC BETT, J  
FEBRUARY 12, 2025**

**BETWEEN**

**ALBERT KARAKACHA MUHAVANA ..... 1<sup>ST</sup> APPELLANT  
STEPHEN WAMUKOYA MURUNGA ..... 2<sup>ND</sup> APPELLANT  
SIMON KIMUTAI CHEOKWONY ..... 3<sup>RD</sup> APPELLANT  
JOSEPH NJOGU MUNGAI ..... 4<sup>TH</sup> APPELLANT  
HENRY NGANGA ..... 5<sup>TH</sup> APPELLANT  
OBADIAH KIOKO KAVINYA ..... 6<sup>TH</sup> APPELLANT**

**AND**

**JANE WAMAITHA KASHINGIRI ..... RESPONDENT**

**RULING**

1. The application before this court is the Notice of Motion dated 20<sup>th</sup> September 2024 brought pursuant to provisions of Section 1A, 1B, 3A and 63 (e) of the [Civil Procedure Act](#), Order 51 rule 1 & 3 of the Civil Procedure Rules, and all other enabling provisions of law. The Applicant seeks for orders that:-
  - a. Spent
  - b. That leave be granted to the Appellants to file a Memorandum of Appeal.
  - c. That pending the lodging, hearing and determination of the Appellants intended appeal, an interim order be issued, suspending/lifting and or staying execution of warrants of attachment issued against the Appellants, and staying execution of the orders in Mumias MCCC E014 of 2020 pending the hearing and determination of the intended Appeal.



- d. That an interim order be issued suspending the Order lifting the veil of incorporation pending the hearing and determination of this Appeal.
  - e. That the ex parte proceedings, orders and or judgment entered in this after to be set aside and or be discharged.
  - f. That the Honorable Court be pleased to grant a further order as it deems fit.
  - g. That costs of this Application be provided for.
2. The application is supported by the ground on the face of the said application and the Supporting Affidavit of Joseph Njogu Mungai dated 20<sup>th</sup> September 2024.
  3. In his affidavit, the Applicant acknowledged that he was a former board member of the 1<sup>st</sup> Defendant and that there was an order allowing for the lifting of the corporate veil and warrants of attachment issued against the Applicants for Kshs. 1,743,086/= on 11<sup>th</sup> September 2024.
  4. He confirms that the 1<sup>st</sup> Defendant, INVESCO had been placed under statutory management on 14<sup>th</sup> August 2024 and Insurance Regulatory Authority had been appointed as the statutory manager by the Policy Holders Compensation Fund and a Moratorium was issued and the company seized operating.
  5. The 4<sup>th</sup> Applicant claims that he was not aware when the hearing of lifting of the veil of incorporation was done ex parte and Beta Base Auctioneers are now in the process of attaching his personal properties and he would be prejudiced if he is not given an opportunity to be heard on merit.
  6. In a Replying Affidavit dated 19<sup>th</sup> November 2024, the Respondent stated that she had sued the 1<sup>st</sup> Defendant INVESCO in Mumias PMCC no. E 014 of 2020 seeking to enforce a judgement in Mumias PMCC No. 264 of 2016 delivered on 13<sup>th</sup> April 2023.
  7. She claimed that when the Defendant was not forthcoming, she made an application on 21<sup>st</sup> November 2023 seeking to lift the corporate veil and the matter was set for inter parties hearing and on 18<sup>th</sup> January 2024 and the Applicants raised a notice of preliminary objection on grounds that the application violated the provisions of the *Companies Act* which application was dismissed by the court on 18<sup>th</sup> April 2024.
  8. She further claimed that she took a notice to show cause on 30<sup>th</sup> May 2024 and served the Applicants through their Counsel who requested for time to allow the parties to negotiate.
  9. The Respondent stated that on 18<sup>th</sup> June 2024 when the matter was coming up for mention, the court was indisposed, and they were given a date on 25<sup>th</sup> July 2024, and the parties were given 14 days to reach a consent. The matter was then scheduled for 10<sup>th</sup> September 2024.
  10. According to the Respondent, the Applicants and their Counsel did not come to court forcing the court to lift the corporate veil and hold that the Applicants were not honest by claiming that they were unaware of the court proceedings when they had instructed a Counsel and that they had further delayed in filing the appeal.
  11. The Respondent prays that if the court were to allow the application, then it should order that half the decretal sum be remitted to her and the other half be deposited in court.

### **Applicants' submissions**

12. The Applicants filed their submission dated 29<sup>th</sup> November 2024 and identified three issues for determination.



13. On the first issue whether the court followed the proper procedure when lifting the corporate veil, they relied on the case of Kolaba Enterprises Ltd vs. Shamsudin Hussein Varani & Ano (2014) eKLR and Mugenyi & Company Advocates vs. The Attorney General (1999) 2 EA 199.
14. The Applicants contended that they were former directors of INVESCO Co. Ltd which was placed under statutory management on 14<sup>th</sup> August 2024 while the corporate veil was lifted on 11<sup>th</sup> September 2024 hence the wrong party was enjoined.
15. They further claimed that the Respondent failed to prove that they had committed any fraud against the company or that proper service was done. They claimed that they were not given an opportunity to cross-examine the Respondent.
16. The Applicants argued that they had a triable case and relied on the Court of Appeal case of Job Kilach vs. Nation Media Group Ltd. Salaba Agencies Ltd & Michael Rono [2015] eKLR which defined what a triable issue is and Laliji t/a Vakkep Building contractors vs. Carousel Limited [1989] eKLR where Nyarangi JJA, Platt JJA and Kwach Ag JA held that:-

“ A trial must be ordered if a triable issue is found to exist or one which is fairly arguable.”
17. The Applicants prayed that the orders to lift the company’s veil be dismissed as the balance of convenience fell in their favour. They relied on the case of Dr. Peter Kamau Njoroge vs. Caroline Wanguthi Ndindi [2013] eKLR that quoted the case of Suleiman vs. Amboseli Resort Limited 2004 2 KLR 589 on what constituted a prima facie case. They further argued that they stand to suffer irreparable harm if the orders of the trial court are not vacated.
18. The Respondent filed their submissions dated 16<sup>th</sup> December 2024. On the claim as to whether the order for the lifting of the corporate veil should be set aside, they urged that the correct procedure was followed in issuing the orders since notice to show cause was issued on 22<sup>nd</sup> April 2024 and duly served upon the Applicants. They relied on the case of Jepkemoi vs. Zabari enterprises company Ltd & 2 others (Miscellaneous civil application 43 of 2023 (2024) KEHL 2343 (KLR) and Jayden Limited vs. Bradley Limited Miscellaneous Application E202 of 2019 (2021) KENC 127 (KLR) (commercial and Tax).
19. According to the Respondent the court was rightful in lifting the corporate veil against the directors where the company had not settled a decree.
20. On whether stay of execution ought to be granted, they referred to order 42 rule 6 of the Civil Procedure Rule and the three conditions that ought to be met and quoted the case of Macharia T/ A Macharia & Co. Advocates vs. East Africa standard No. 2 of (2002) KLR 63. They claimed that the Applicants had not demonstrated the loss they would suffer and how that cannot be remedied by damages.
21. On the ground that the Applicants’ loss ought to be stated and proven, the Respondent quoted the case of Joel Nderitu Ndiang’ui vs. Ann Kabura Chomba which was relied upon in the case of Aveco Limited vs. John Joseph Ndung’u Mwenja & Partners Limited & Another [2021] eKLR.
22. On the issue of whether the Applicants should be granted leave to appeal out of time, she cited section 79 G of the *Civil Procedure Act*. The Respondent claimed that the Applicants approached court on 20<sup>th</sup> September 2024 after they were proclaimed on 16<sup>th</sup> September 2024 and contended that a proclamation was not a ground for extension of time to file an appeal out of time. She prayed that the court dismiss the application.



## Analysis & Determination

23. I have carefully considered the Application, Supporting Affidavit, Respondent's Replying Affidavit and the rival submissions and find the issues for determination as follows;
- a. Whether the court should grant stay of execution of the judgment/decreed dated 11<sup>th</sup> September 2024.
  - b. Whether the court should set aside the orders made on 11<sup>th</sup> September 2024.
24. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides:-
- “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.”
25. The three conditions to be fulfilled can therefore be summarized as follows:-
- a. That substantial loss may result to the Applicant unless the order is made.
  - b. Application has been made without unreasonable delay.
  - c. Security as the court orders for the due performance.
26. These principles were enunciated in *Butt vs. Rent Restriction Tribunal* [1979] KECA 22 (KLR) where the Court of Appeal set out what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements.”
27. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.



28. The first element that the Applicants ought to have proved was that they would suffer substantial loss if the stay was not allowed.
29. According to the Applicants they hold the fear that their property will be attached if the decree was executed against them. On the other hand, the Respondent was of the opinion that the Applicants had not proved any loss that the Respondent would incur that cannot be remedied through an award of damages.
30. In *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 Ogolla, J stated that:-
 

“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.”
31. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:-
 

“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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
32. The Applicants contend that they stand to suffer irreparably if the Respondent levies execution against them. The Respondent argues that the Applicants have not demonstrated the substantial loss they stand to suffer. On perusal of the Applicants’ affidavit, I have noted that the Applicants have not demonstrated how they stand to suffer substantial loss if the orders sought are not granted. The Applicants merely state that they are exposed to execution of the decree unless a stay is granted and further that the intended appeal shall be rendered nugatory if stay is not granted.
33. Order 42 Rule 6 lays out the Law on stay of execution pending appeal, by giving court the discretion to order stay for sufficient cause. Sub-rule 2 outlines the mandatory conditions that have to be met for the court to grant stay pending appeal. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicants.

#### **Whether there was undue delay**

34. As to whether the Application has been filed without undue delay, the ex-parte orders were entered on 11<sup>th</sup> September 2024. The Memorandum of Appeal was filed on 20<sup>th</sup> September 2024, which was done within few days after the decision. This court thus finds that the application for stay of execution has been filed without undue delay.



## Security

35. As regards deposit of security, the court observed that the purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

36. In *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another* [2018] eKLR, it was 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.”

37. From the above decisions, the issue of security is discretionary, and it is upon the court to determine the nature and extent of the same.

38. The 4th Applicant averred that they are willing to abide with the terms and condition set by this court. The Respondent is not opposed to the court allowing the Applicant’s prayer for stay of execution subject to their furnishing security.

Whether the court should set aside the order for lifting of the corporate veil entered against the Applicant on 11<sup>th</sup> September 2024.

39. The law on setting aside of ex parte orders is found under Order 12, rule 7 of the Civil Procedure Rules, 2010 which provides thus:-

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

40. This provision is amplified by Order 51, rule 15 which provides that the court may set aside an order made ex parte.

41. The application dated 30<sup>th</sup> September 2024 sought to set aside the orders made for the lifting of the corporate veil. It also sought to set aside the orders to issue warrants of attachment against the Applicants made on 11<sup>th</sup> September 2024.

42. The Applicants claimed that the orders were made ex parte and they were not given a chance to be heard on merit. They stated that they were the former board members of the 1<sup>st</sup> Defendant company that had been placed under statutory management on 14<sup>th</sup> August 2024.



43. The Respondent claimed that the Applicants were served for inter parties hearing on 14<sup>th</sup> December 2023 and a notice to show cause issued and when the parties came to court on 18<sup>th</sup> January 2024, the Applicants had appointed an Advocate.
44. They claim that the Applicants were served with several notices to show cause as well as hearing dates on 25<sup>th</sup> July 2024 and 10<sup>th</sup> September 2024 but they failed to appear which led the court to give the ex parte orders.
45. In setting aside ex parte orders, the court must be satisfied of one of two things, namely, either that the Applicant was not properly served with summons or that the Applicant failed to appear in court at the hearing due to sufficient cause.
46. In the instant case, the Applicant herein was properly served with the summons dated 29<sup>th</sup> November 2023. On 5<sup>th</sup> December 2023, the applicants appointed the firm of M/s. Otieno, Yogo, Ajura & Co. Advocates to act on their behalf. On 7<sup>th</sup> December 2023, they filed a preliminary objection stating that the 1<sup>st</sup> Defendant as a Limited Company had the capacity to sue and be sued and that the Applicants were a separate entity from the Company. On 30<sup>th</sup> May 2024, a notice to show cause was issued against the Applicants to explain why the Respondent should not execute against them. On 18<sup>th</sup> June 2024, a hearing notice was issued to the Applicants' counsel and on 10<sup>th</sup> September 2024 when the matter was coming to determine if a settlement had been reached between the parties, the Applicants were not present and the court issued an order to lift the corporate veil against them.
47. The pertinent question therefore is whether the Applicants' non-attendance of court on 25<sup>th</sup> July 2024 and 10<sup>th</sup> September 2024 constituted an excusable mistake or was meant to deliberately delay the cause of justice, and whether the explanation given for these failures qualifies as sufficient cause.
48. In the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006*, the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus:-
- “It is difficult to attempt to define the meaning of the words “sufficient cause.” It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the Appellant.”
49. The Applicants submitted that they were not aware of any proceedings and that the lower court failed to follow the correct procedure in lifting the corporate veil.
50. I am of the considered view that the explanation advanced by the Applicants for their failure to attend the hearings was insufficient. However, bearing in mind the fact that by the time the orders were issued, the company had been placed under statutory management, there was need for the court to establish that there were exceptional circumstances to justify the application to lift the corporate veil. There may therefore have been sufficient cause to set aside the order, and this constitutes sufficient grounds for stay of execution.
51. It is clear that the court has the discretion to allow or reject an application of stay depending on the merits of a case. This discretion is to be exercised judiciously while balancing the interests of the parties.
52. Having regard to the findings that I have made in this ruling and in balancing the interests of both parties, I will allow the instant application on the following terms: -



- (a) There shall be a stay of execution of the decree/ Judgment in Mumias MCCC No. E014 of 2020 delivered on 10<sup>th</sup> September 2024 on the following conditions:-
  - (i) The Applicants shall, within forty-five (45) days from the date of this ruling, deposit in a joint interest-earning account to be operated by both parties' advocates the sum of Kshs 1,743,086/= being the decretal sum as security.
  - (b) That 14 days leave is granted to the Applicants to file their Memorandum of Appeal.
  - (c) That an interim order of stay is issued on the lifting of the corporate veil pending the hearing and determination of the appeal.
  - (d) The costs of the application shall abide the outcome of the appeal.

53. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 12<sup>TH</sup> DAY OF FEBRUARY 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Mr. Keranda for Appellants

Ms. Kawira for Respondent

Court Assistant: Polycap

