



**Mwananchi Credit Limited v Mosop (Commercial Appeal E223 of 2024)  
[2025] KEHC 2800 (KLR) (Commercial and Tax) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2800 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E223 OF 2024**

**BM MUSYOKI, J**

**MARCH 14, 2025**

**BETWEEN**

**MWANANCHI CREDIT LIMITED ..... APPELLANT**

**AND**

**LINNER CHEPKOECH MOSOP ..... RESPONDENT**

**RULING**

1. The application before me is a notice of motion dated 4-10-2024 seeking an order for stay of execution of decree in milimani small claims court claim number E9956 of 2023 issued on 7-06-2024. The application is supported by affidavit of sworn by Cedella Aketch on 4-10-2024 and further affidavit of the same deponent dated 17-10-2024. The decree sought to be stayed decreed payment of sum of Kshs 150,000.00 plus costs and interest although the respondent had claimed Kshs 600,000.00. This was compensation for unlawful sale of her motor vehicle registration number KCC 400R. After the judgment, the appellant filed an application for review dated 9-07-2024 which was dismissed on 2-08-2024. This appeal is against the ruling dated 2-08-2024.
2. The appellant has averred that there is a real threat of execution of the decree whereas it has an arguable appeal. The supporting affidavit gives the history of the cause of action and adds that the respondent is not capable of refunding the decretal sum based on her history of inability to pay the loan advanced to her which led to the sale of her motor vehicle. The appellant adds that it is liquid enough to pay any costs or subsequent decree in this appeal unlike the respondent.
3. The respondent has opposed the application through a replying affidavit sworn on 16<sup>th</sup> October 2024. The respondent depones that the judgment of the trial court was delivered on 13<sup>th</sup> June 2024 and application for review was dismissed on 2<sup>nd</sup> August 2024. According to the respondent, this application as well as the application for review were attempts to frustrate her from enjoying the fruits of her



successful litigation. She argues that the appeal is an abuse of the court process, an afterthought and a waste of judicial time.

4. I have noted from the affidavits and submissions of the parties that the big part thereof is on the merits of the appeal. At this stage, the court is not concerned with the merits of the appeal or otherwise but preservation of the status quo in a manner that will not injure either of the parties to the extent of them not recovering the decretal sum once the appeal is finalised either way. The court should ensure that the orders it issues do not make the result of the appeal useless or unhelpful to the winning party. The appellant if it succeeds should be able to recover the decretal sum while the respondent must not be put in a precarious position such that execution of the decree if the appeal fails becomes difficult by placing the decretal sum out of the reach of the appellant. Honourable Justice Asenath Ongeri held in *RWW v EKW (2019) KEHC 6523 (KLR)* that;

“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”

5. Order 42 Rule 6 of the Civil Procedure Rules provides three conditions which must be satisfied for granting of orders for stay. The three conditions are that; the appellant must show that it will suffer substantial loss if the orders are not granted, the application must have been filed timeously and the appellant must provide security for due performance of the decree. These are the established and judicially pronounced conditions for application of this nature.
6. Other than stating that it is likely to suffer substantial loss, the appellant has not demonstrated the extent of loss beyond paying out the Kshs 150,000.00 plus costs and interest decreed to the respondent. Imminent execution alone is not proof of substantial loss as the applicant has submitted. The applicant must establish that execution will create a state of affairs that will likely cripple its operations or interfere with the status quo to a certain degree of inconvenience and loss. In *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR)*, F. Gikonyo 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. 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.”

7. The appellant argues that the respondent’s history of default in loan repayments is a demonstration of its inability to pay the decretal sum. The onus of proving substantial loss is always on the appellant. Although the respondent has equally not demonstrated her financial liquidity, I don’t think that the decretal sum is so substantial that it will affect the appellant or its operations. It is my position that, before a respondent is called to prove her ability to refund the decretal sum in the event the appeal succeeds, the applicant should first establish the substantial loss it is likely to suffer if the orders are not granted.
8. What is substantial loss is always subjective and dependent on each particular case. The appellant claims that the history of respondent’s failure to pay loans advanced to her is testament of her inability to pay the decretal sum. I have not been given the benefit of the full pleadings in the trial court save for averments that the respondent’s vehicle was sold for alleged non-payment of the loan. In the



circumstances, I cannot judge the respondent's liquidity by such mere averments. Failure to pay may as well have been due to factors other than liquidity problems. I say so because there was a finding that the respondent's vehicle was unlawfully sold. Therefore, it is my finding that the appellant has failed to demonstrate substantial loss.

9. Having found as I have above, I do not see the need for me to consider the other conditions for grant of orders for stay of execution as all the conditions must move conjunctively. In *James Wangalwa & Another v Agnes Naliaka Cheseto* (supra), the court restated this position by holding that;

"These conditions are the essence of Order 42 Rule 6 CPR which I need not recite in verbatim. The conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion of the court in granting stay of execution. The Court of Appeal in *Mukuma V Abuoga* (1988) KLR 645 reinforced this position. I will therefore give a deep consideration of each condition and see whether the circumstances of this case neatly fit those scales."

10. Honourable Justice J. Kamau held in *G.N. Muema T/A(sic) Mt View Maternity & Nursing Home v Maalim Bishar & Another* [2018] KEHC 8780 (KLR) that;

"Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-

1. Substantial loss may result to the applicant unless the order was made;
2. The application was made without unreasonable delay; and
3. 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."

11. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is "and". It connotes that all three (3) conditions must be met simultaneously."

12. I in the circumstances, proceed to dismiss the application dated 4-10-2024 with costs to the respondent.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of Mr. Mathenge for the applicant and Mr. Yambasa for the respondent.

