



**Ndung'u & another v Safaricom PLC & another (Civil Appeal  
E272 of 2024) [2025] KEHC 2984 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2984 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E272 OF 2024  
FN MUCHEMI, J  
MARCH 13, 2025**

**BETWEEN**

**MOSES MACHARIA NDUNG'U ..... 1<sup>ST</sup> APPLICANT**

**MOCAT SURGICAL SUPPLIES LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SAFARICOM PLC ..... 1<sup>ST</sup> RESPONDENT**

**FAMILY BANK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Brief facts**

1. The application dated 18<sup>th</sup> November 2024 seeks for orders of stay of execution in respect of the judgment in Ruiru SPMCC No. E363 of 2024 delivered on 25<sup>th</sup> September 2024 as well as stay of the Amended judgment dated 27<sup>th</sup> September 2024 pending the hearing and determination of the appeal. The applicants further seek for orders of stay of execution of the warrants of attachment issued to Keysian Auctioneers on 30<sup>th</sup> October 2024.
2. In opposition to the application, the 1<sup>st</sup> respondent filed Grounds of Opposition dated 18<sup>th</sup> December 2024.

**Appellants'/Applicants' Case**

3. The applicants state that there is a pending appeal with high chances of success challenging the judgment dated 25<sup>th</sup> September 2024 and the amended judgment dated 27<sup>th</sup> September 2024 arising from the case in Ruiru SPMCC No. E363 of 2024 and the decree dated 4<sup>th</sup> October 2024. The applicants aver that if execution is allowed to proceed before the appeal is heard, they are likely to suffer



great prejudice and irreparable loss as the appeal shall be rendered nugatory if the applicants' property is sold or attached.

4. The applicants state that they have demonstrated a serious issue for determination in the appeal and further that there are two conflicting judgments published on 25<sup>th</sup> September and 27<sup>th</sup> September 2024 arising out of the same case number. As such, there is a real likelihood of success in the appeal. The applicants aver that the instant appeal is based on the judgment delivered on 25<sup>th</sup> September 2024 but later without notice, another amended judgment dated 27<sup>th</sup> September 2024 was published which was in conflict with the first judgment. The applicants argue that it is a blatant illegality for a court of law to deliver two conflicting judgments on the same matter.
5. The applicants state that the proclamation issued to Keysian Auctioneers is dated 18<sup>th</sup> November 2024 and was set to lapse in 14 days. In the event that execution proceeds, it will severely prejudice them and frustrate the entire appeal process.
6. The applicants aver that if the orders sought are not granted, they shall suffer great prejudice, irreparable loss and harm that cannot be compensated in damages. The applicants state that the respondents will not suffer any prejudice if the orders for stay are granted. The applicants further state that they are willing to furnish such reasonable security as the court may direct.

### **The 1<sup>st</sup> Respondent's Case**

7. The 1<sup>st</sup> respondent states that the applicants have not disclosed any ground to merit the granting of the orders sought. The 1<sup>st</sup> respondent states that the decree issued is for costs due to them and the applicants have not shown that the respondent lacks the capacity to refund Kshs. 140,800/- in the event the appeal is successful. The 1<sup>st</sup> respondent states that the arguability or otherwise of the appeal is not a requirement under Order 42 Rule 6. As such the issue is not applicable in the determination of the application.
8. Directions were issued that parties put in written submissions and the record shows that the applicants complied by filing submissions on 7<sup>th</sup> February 2025.

### **The Applicants' Submissions**

9. The applicants submit that the 1<sup>st</sup> respondent seeks costs from the judgment of the trial court dated 27<sup>th</sup> September 2024 but there exists another judgment signed and published earlier in the same suit dated 25<sup>th</sup> September 2024 that awarded them costs. The applicants argue that the 1<sup>st</sup> respondent through Keysian Auctioneers have commenced execution proceedings that if allowed to proceed will render the appeal nugatory and cause them irreparable harm. The execution is based on an irregular and illegal occurrence of two judgments arising from the same suit.
10. The applicants refer to Order 42 Rule 6 of the *Civil Procedure Rules* and submit that the execution process initiated by the respondents through auctioneers will cause irreparable loss by disposing of their assets before the appeal is heard and determined. The applicants further submit that the irregularity in the instant suit lies in the fact that there are two conflicting judgments dated 25<sup>th</sup> September 2024 and 27<sup>th</sup> September 2024 arising from CMCC No. E363 of 2024 that awarded costs to both the applicants and the respondents respectively.
11. The applicants argue that since the judgment dated 25<sup>th</sup> September 2024 came first, the final determination of the court, which awarded costs to them. The 1<sup>st</sup> respondent cannot therefore, purport to execute costs for the judgment that came later dated 27<sup>th</sup> September 2024. The applicants argue that allowing such a thing would cause irreparable loss as it is essentially allowing them to execute an



illegality. To support their contentions, the applicants rely on the case of *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR.

12. The applicants submit that their appeal challenges the existence of two conflicting judgments in the trial court. The applicants argue that the amended judgment was delivered without notice to the parties and in direct conflict with the earlier judgment. The applicants further argue that the judgments are in direct conflict with each other and are impossible to execute as there is doubt in the validity of the judgment.
13. The applicants submit that the presence of two conflicting judgments raises serious concerns over the legality and propriety of the decree sought to be executed, thus making the appeal meritorious and worthy of determination.
14. The applicants rely on the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR and submit that they risk the imminent loss of their assets through an auction which would have a severe financial impact on their business operations and such loss cannot be adequately compensated by damages.
15. The applicants further rely on the case of *Peter Kiria & Alice M. Kanyithia vs Eye Group Newspaper & Pauline Kagwiria* [2017] KEHC 2108 (KLR) and submit that they are ready and willing to provide reasonable security as directed by the honourable court. The applicants further submit that considering that both parties were awarded costs in the conflicting judgments, the requirement to furnish security may not apply as the conflicting judgments prejudice all the parties in the suit.
16. The main issue for determination is whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the *Civil Procedure Rules* for stay of execution pending appeal.

**The Law Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.**

17. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-
  1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
  2. 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 1<sup>st</sup> 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.
18. Thus, under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
  1. Substantial loss may result to him/her unless the order is made;



2. That the application has been made without unreasonable delay; and
  3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
19. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-
- “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.
20. The applicants state that they stand to suffer substantial loss as the respondent shall proceed to execute the decree which shall render the appeal nugatory. Further that the proclamation dated 18<sup>th</sup> November 2024 was set to lapse in 14 days at the time of filing this application should execution proceed, it will severely prejudice the applicants.
  21. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicants are required to show how execution shall irreparably affect them or will alter the status quo to their detriment therefore rendering the appeal nugatory. In the instant case, the applicants have not shown how they stand to suffer substantial loss. The applicants have only mentioned that should the respondent proceed with the execution, the instant proceedings and the appeal shall be rendered nugatory and an exercise in futility.
  22. The applicants further argue that the execution sought to be carried out is based on illegally amended judgment dated 27<sup>th</sup> September 2024 that was published after the judgment dated 25<sup>th</sup> September 2024. I have perused the record and noted that judgment was scheduled to be delivered on 25<sup>th</sup> September 2024. However, the said judgment was not ready on the said date and the court re-scheduled it for 27<sup>th</sup> September 2024. All advocates for the parties were present when the judgment was moved to the 27<sup>th</sup> day of September 2024. The court delivered its judgment dismissing the applicants’ case in the presence of advocates for both parties. The applicants’ advocate requested for 30 days to file an appeal. The judgment of the court dated and signed on the 27<sup>th</sup> September 2024 was delivered in presence of the counsel for the appellant and he was granted 30 days to appeal.
  23. On further perusal of the record and noted that on 1<sup>st</sup> October 2024, the counsel for the 1<sup>st</sup> respondent wrote to the trial court and informing it that the court had uploaded judgment on the CTS portal but that it was dated 25<sup>th</sup> September 2024 instead of 27<sup>th</sup> September 2024 which was the actual date of delivery. The registry noted that they inadvertently uploaded a draft judgment but the correct judgment was the one dated 27<sup>th</sup> September 2024. It is clear from the record that although the applicants argue that they lodged an appeal against the judgment dated 25<sup>th</sup> September 2024, their grounds of appeal relate to the judgment dated 27<sup>th</sup> September 2024. As such, there were no two judgments as claimed by the applicant. Thus, it is dishonest for the applicants to claim that execution is based on an illegality being fully aware that the judgment was delivered on 27<sup>th</sup> September 2024. To



confirm that the applicants are not serious, their memorandum of appeal is in respect of the judgment delivered on 27<sup>th</sup> September 2024.

24. Additionally, the trial court dismissed the applicants' case which is in effect a negative order. The impugned judgment was a dismissal of the applicants' case which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

25. Similarly in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December 2006. The order of 18<sup>th</sup> December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

26. It is important to note that a negative order which does not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot grant orders for stay of execution of those said orders.
27. Accordingly, it is my considered view that the applicants have not demonstrated that they stand to suffer substantial loss.

#### **Has the application has been made without unreasonable delay**

28. The judgment was delivered on 27<sup>th</sup> September 2024 and the applicants filed the instant application on 19<sup>th</sup> November 2024. Thus, the application has been filed timeously.



## Security of costs

29. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR 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 the 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.

30. The issue of security is discretionary and it is upon the court to determine the same. The applicant has only stated that they are ready and willing to furnish security for the performance of the decree.

31. It is trite that right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

32. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises as to whether there is just cause for depriving the respondents their right of enjoying their judgment. I have further perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise arguable points of law. It is my considered view that the applicants have not met the threshold of granting stay of execution pending appeal.

33. Accordingly, it is my considered view that the application dated 18<sup>th</sup> November 2024 lacks merit and is hereby dismissed with costs.

34. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 13<sup>TH</sup> DAY OF MARCH 2025.**

**F. MUCHEMI**

**JUDGE**

