



REPUBLIC OF KENYA



**KENYA LAW**  
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**Pesa Swap East Africa Ltd v Muiruri (Civil Appeal E190 of 2024)  
[2025] KEHC 3390 (KLR) (19 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3390 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E190 OF 2024  
SM MOHOCHI, J  
MARCH 19, 2025**

**BETWEEN**

**PESA SWAP EAST AFRICA LTD ..... APPLICANT**

**AND**

**ESTHER WACUKA MUIRURI ..... RESPONDENT**

**RULING**

1. The Application dated 2<sup>nd</sup> September, 2024 is brought under the provisions of Article 159 of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules wherein the Applicant seeks:-
  - i. Spent
  - ii. This Honourable Court be pleased to issue leave to the firm of Odindo & Company Advocates to enter Appearance on behalf of the Appellant herein after judgment has been entered.
  - iii. This Honourable Court be pleased to issue orders of stay of execution of the judgement and decree delivered by Honourable Edward Oboge on 7<sup>th</sup> November, 2023 in Small Claims Court, Nakuru SCCC/E109/2023: Esther Wacuka Muiruri versus Pesa Swap East Africa Limited, ruling of the same Court delivered on 18<sup>th</sup> April, 2024 and its subsequent decree and the ruling of the same Honourable Court dated 27<sup>th</sup> May, 2024 and subsequent decree pending hearing and determination of the of this Application and Appeal.
  - iv. This Honourable Court be pleased to issue orders of stay of execution of the warrant of arrest issued against the directors of the Appellant on the 11<sup>th</sup> June, 2024 in Small Claims Court, Nakuru SCCC/E109/2023: Esther Wacuka Muiruri versus Pesa Swap East Africa Limited, pending hearing and determination of this appeal
  - v. The costs of this Application be granted.



2. The Application is premised on the grounds on its face and the annexed affidavit in support sworn by one Christine Katunge Kitale, the Applicant's director

### **Applicant's Case**

3. It was the Applicant's case that being dissatisfied with the judgement in default entered on 7<sup>th</sup> November, 2023 in SCCC E1097 of 2023 in favour of the Respondent, filed the present appeal. It was deponed that there have been subsequent decisions delivered thereafter, that is, the Rulings delivered on 18<sup>th</sup> April, 2024 and 27<sup>th</sup> May, 2024. The Court also issued warrants of arrest on 11<sup>th</sup> June, 2024 against the directors of the Applicant.
4. It was the Applicant's case that the Appellant has no copy of the claim filed in the Lower Court neither is it on the CTS platform and was only caught by surprise when the Respondent moved to execute the judgment.
5. It was further deponed that, the Applicant retained counsel to set-aside the judgement and having retained counsel, the Applicant went on knowing its interests were being taken care of. That on 7<sup>th</sup> August, 2024 he received warrants of arrest dated 11<sup>th</sup> June, 2024 and on calling counsel, the calls went unanswered. He opted to send emails to make a follow-up.
6. That the then counsels on record sent some documents where he noticed some inconsistencies between the information given by counsel and the information that was in the Court record.
7. The Application dated 13<sup>th</sup> August, 2024 which sought to set-aside the judgment in default, the decree ensuing from it, the ex-parte proceedings, the subsequent rulings and decrees together with the warrants of arrests and for the firm of Odindo and Company advocates to come on record after judgment had been pronounced was preliminarily short down with the Court explaining that, it had already entertained several applications within the claim.
8. It was argued that, the delay in responding to the Statement of Claim was not the Applicant's fault but that of its counsel which mistake ought not to be visited on the Applicant. It was further contended that the response is meritorious and raises triable issues and if the judgment is not set aside the Appellant would be condemned unheard contrary to the rules of natural justice.
9. That denying the Applicant an opportunity to participate in the proceedings will visit irreparable prejudice on the Applicant, as the director stands to lose her liberty. That the Applicant further stands to suffer irreparable loss should execution ensue. The Applicant is willing to abide by the directions of the Court in respect of security.

### **Respondent's Case**

10. The Respondent opposed the Application by way of Replying Affidavit sworn on 19<sup>th</sup> September, 2024. She deposes that the Application is incompetent and an abuse of the Court process. That the Applicant has been economical with facts thus a misdirection to the Court.
11. It was the Respondent's case that the Application is an afterthought as the Memorandum of Appeal fails to raise any triable issues and contains baseless generalizations.
12. It was also argued that, the Applicant has dragged the matter for over one year the two months contemplated in the Small Claims Court notwithstanding. That throughout the process, the Applicant was aware of the progress of the suit and even sought an out of Court settlement vide consent dated 9<sup>th</sup> August 2024.



13. That the Court allowed the Applicant to have its case heard afresh upon payment of a sum which the Applicant ignored. That the Applicant's counsel is not properly on record as leave has not been sought or consent with the previous advocates provided.
14. The Respondent deponed that the Applicant has failed to offer security of costs as they wish to extend the proceedings indefinitely in an attempt to prejudice the Respondent.

### **Applicant's Submissions**

15. The Applicant submitted on three issues as follows: -
  - a. Has the application met the conditions under Order 42 Rule 6?
  - b. Was the trial/proceedings at the lower Court fair?
  - c. Costs of this suit
16. On the first issue, as regards substantial loss, it was the Applicant's submission that the director has been arrested twice before and is apprehensive that the Respondent would continue to harass her as long as there is no stay of such Lower Court directives.
17. Secondly, on the limb of undue delay, it was submitted that the Application dated 13<sup>th</sup> August, 2024 was filed as soon as the Applicant became aware of the of the direction of the Lower Court and rushed to the same Court to seek to rectify its position but it was dismissed. On security of costs it was submitted, that the Applicant has made payments of Kshs 350,000 which is significantly more than half of the decretal sum.
18. On the second issue as to whether there was a fair hearing, it was submitted that there was none. That despite retaining the services of counsel, its counsel was not representing its interest and the misrepresentation of counsel defined the Course of the trial. That is blames the counsel on record and the opportunity to be heard was hidden away from the Applicant.
19. On costs it was submitted the same to follow the suit.

### **Respondents' Submissions**

20. The Respondent submitted on two issues
  - a. Whether the Applicant has fulfilled the conditions of stay.
  - b. Costs
21. On the first issue, it was contended that the requirements as set out under Order 42 Rule, of the Civil Procedure Rules were not met. Reliance was placed in the case of Jaber Mohsen Ali & Another v Pricillah Boit & Another [2014] eKLR to submit that in determining the first limb whether there was delay or not is dependent upon the circumstances of the case. That the Applicant was indolent and made the Application and year after judgment was pronounced.
22. On the issue of substantial loss, it was argued that substantial loss will accrue on the Respondent as she shall be prevented from enjoying the fruits of her judgment. That it is not enough to merely state that substantial loss will result, there must be proof of specific details and particulars to show the loss to the Court.
23. On the third limb of security the Respondent argued, that the Applicant has not offered or proposed security. That the Applicant has failed to intimate that they were willing to abide by any conditions



that would be set by Court and thus failing to satisfy thus condition. Reference was made in the case of John Odongo Joyce Irungu Muhatia [2015] eKLR where the Court emphasized on the need for preparedness as well as readiness to provide security.

24. As regards the second issue of costs, it was submitted that the Applicant having failed to satisfy the conditions essential for the grant of the orders of stay, it is not entitled to the costs.

### **Analysis and Determination**

25. I have considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit, the attachments and the submissions. This Court clothed with the jurisdiction to entertain the instant Application, the only issue for determination is whether the Application has merit.
26. Prayer No. 3 is seeking to stay the execution of three decisions in SCCC E1097 of 2023 that is, the judgement delivered on 7<sup>th</sup> November, 2023 the one dated 18<sup>th</sup> April, 2024 and the one dated 27<sup>th</sup> May, 2024 and their subsequent decrees pending the Appeal.
27. The conditions that have to be met prior to the Court issuing stay orders pending appeal are set out under Order 42 Rule 6(2) of the Civil Procedure Rules which stipulates: -
- 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.
28. In essence the Applicant should satisfy the Court that: -
- a. Substantial loss may result to it should the order not issue;
  - b. The application has been made without unreasonable delay; and
  - c. Such security for the due performance of such decree or order has been given as may ultimately be binding on it
29. In determining the merits or none of the application, I will begin by giving a brief background of the events relevant to this application.
30. The judgement in default of Appearance was entered on 7<sup>th</sup> November, 2023. The Application seeking to set-aside the said judgement was allowed so as to save on time with the condition that the Applicant does pay throw-away costs of Kshs. 20,000/ within 10 days. On 29<sup>th</sup> February, 2024 when the file was called for compliance the Applicant was not present prompting the Court to dismiss the Applicant's Application thereby reinstating the judgement.
31. The Respondent filed an application seeking to lift the corporate veil citing frustrations in the execution process which was allowed on 18<sup>th</sup> April, 2024 as the Court felt there was a lackluster attitude from the Applicant and that the Replying Affidavit guised as a defence was an attempt to place blame on a third Party despite evidence of the sum of Kshs. 540,000 being sent to the Applicant.
32. The Ruling of 27<sup>th</sup> May, 2025 dismissed the Applicant's Application dated 15<sup>th</sup> May, 2024 seeking stay of execution and a review of the judgement entered on 7<sup>th</sup> December, 2023. The reasoning of the Court was that the judgment was not obtained fraudulently, secondly the amount claimed had been received by the Applicant and the Applicant being a middleman knew the entities or the people on either side.



33. From the record, it is manifest that the Applicant gave instructions to the firm of Magua Mbatha and Company Advocates and from the Email thread of between 10<sup>th</sup> August, 2024 to 13<sup>th</sup> August, 2024 between Advocate Olive Mwende from the said firm and one Christine Kitale the Applicant's director several things come out: -
- a. Counsel failed to inform their client that the application for stay had been allowed and that it had to pay throw away costs. Counsel also failed to give an explanation as to why that information was not divulged on time to the client.
  - b. Counsel failed to show up in Court on the date of compliance to the detriment of the Applicant since its application was dismissed reinstating the judgment.
  - c. Warrants of arrest were issued in June without the knowledge of the Applicant.
  - d. It appears the advocates entered into a consent to lift the warrants of arrest temporarily without informing the Applicant of the existence of the said warrants of arrest or the consent.
  - e. The advocates did not also communicate of the Court proceedings to the Applicant fully and left out crucial information and a detailed update was only given after warrants of arrest were issued and the police knocked on the directors' doors.
  - f. The Applicant complains that a Memorandum of Appeal was attached by counsel yet the same was never filed.
  - g. Complaints that the Advocates had instruction to attach liability to a forex broker and the advocates chose to attach liability to a different party despite communication not to.
34. The aforementioned reasons and more are the ones that the Applicant insists were "mistakes of counsel" and should not be visited upon a litigant. Even if there was mistake of counsel as portrayed, the question to be answered is should the Respondent be made to suffer prejudice because of "mistake of Counsel" of the other party yet cases belong to litigants? Has the Applicant brought forth enough reasons and met the requirements precedent to warrant granting of the prayers sought?
35. The conditions for granting stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules should be met simultaneously.

### **Undue Delay**

36. The current application was brought, as can be seen from the record, on 2<sup>nd</sup> September, 2024, eight months after judgement in default and 6 months after dismissal of the Application for stay at the Trial Court. The Applicant has aptly demonstrated that the delay in filing the Application was not inordinate and that it was not fully appraised of the happenings of the case by its then advocates on record and was all along of the opinion that the case was alive in Court.
37. Further, decisions were made by the counsel without the consent or knowledge of the client. Counsel failed to show up in Court or advise their client on the need to pay the throw away costs and acted contrary to instructions.
38. In considering the circumstances leading to the instant application and in examining the nature of mistake of counsel, Courts have held overtime that the mistakes of counsel are punishable as



professional negligence. In *Edney Adaka Ismail v Equity Bank Limited* [2014] KEHC 5932 (KLR), the Court in declining to exercise its discretion by claiming a mistake of counsel. The Court stated that: -

“It is true that where the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by cost

In the Case of *Lucy Bosire -v- Kehancha Div. Land dispute Tribunal & 2 Others* (supra) Odunga J held as follows:-

“It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See *Philip Keipto Chemwolo & Another -v- Augustine Kubende* [1986] KLR 492; [1982-88] 1 KAR 1036 at 1042; [1986-1989] EA 74.”

However, it is not in every Case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court.

39. Following the principal laid down in the above authority and the circumstance so this case, I am persuaded that although judgement was regular and Respondent was legally ensuring she enjoys her judgment, the delay in this case despite being inordinate, cannot be faulted on the Applicant since its counsel improperly misrepresented it, there was inaction and withholding of information.

### **Substantial Loss**

40. On substantial loss, there is a decree alive and execution is a valid legal process. The Respondent is entitled to employ all legal means at her disposal in order to get what is rightfully owed to her. The Applicant has submitted that the substantial loss likely to be suffered is that the liberties of the Applicant’s directors are likely to be curtailed due to the existing warrants of arrest.
41. Warrants of Arrests are permitted in law to compel compliance with Court orders and in this case execution orders. There is no dispute that the warrants of arrest were regular nonetheless in proving substantial loss on the party of the Applicant, the same has to be brought out clearly.
42. In *Stephen Njau Kamau v Erick Jacques Jean Maries & 3 others* [2015] KEHC 3825 (KLR) as cited in *Tropical Commodities Suppliers Ltd & Others v international Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 the Court 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.”
43. The Judgement delivered on 7<sup>th</sup> November, 2023 and the decree dated 11<sup>th</sup> June, 2024 is for a substantial amount against the Applicant and not the directors of the Company. The Respondent moved to lift the veil of incorporation citing frustrations in executing the decree.
44. The Applicant has not demonstrated how it is likely to suffer substantial loss should the Respondent proceed with execution against its directors. It was only in the submissions that it brought out that executing against the directors and having them arrested will surely cause the directors substantial loss.
45. The directors are not the Applicants herein and merely stating that substantial loss will be met is not sufficient. Executing against the directors although linked to the Applicant company is not a substantial



loss that has been linked to the Applicant directly or that it affects the Applicant's chance of the appeal being determined on merit.

46. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR) the Court observed that:

“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.”

47. This limb has not been met.

### **Security for Costs**

48. There is decree dated 11<sup>th</sup> June, 2024 for the sum of Kshs. 611,843. The Respondent has argued that the Applicant has not intimated the desire to provide security or otherwise. I have perused the Supporting Affidavit and the Applicant has not offered any terms of security but averred that it was willing to abide by the Court's direction with respect to security.
49. The issue of costs is at the discretion of the Court. The kind of security for due performance of the decree to be provided by a party is to be considered on a case-to-case basis. The right of appeal of the Applicant must be weighed against the right of the Respondent to enjoy the fruits of the judgment delivered in her favour.
50. The Applicant has expressed that it was ready to furnish security on the conditions of the Court, it even deponed that it has already paid part of the decretal amount of Kshs. 350,000 which has not been disputed by the Respondent. The Court in exercising its discretion can direct the Applicant regarding the security of costs to be offered and give conditions within which to do so.
51. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act* and *the Constitution*, the proper approach is to do justice to all with the interest of justice in mind.
52. If there is a chance that the Respondent risks harm that is irreparable then stay ought not to be issued. On the other hand, if there is a risk that the Applicant may suffer irreparable loss which would ideally not be redeemable if the appeal does succeed then stay ought to be granted. In balancing the rights of each party, the Court at this point cannot delve on the merit of the appeal. Nonetheless, in the event that there may be some merit in the appeal the Respondent is likely to suffer lower prejudice if stay of execution is allowed, the said prejudice can also be compensated by costs.
53. Pertaining prayer No. 2 and No 4, and taking all relevant factors into consideration, I see no compelling reason why the same should not be allowed.
54. Accordingly, I hereby allow the Application dated 2<sup>nd</sup> September, 2023 and direct as follows: -
- a. Leave is hereby granted to the firm of Odindo & Company Advocates to enter Appearance on behalf of the Appellant/Applicant herein.
  - b. An order of stay of execution is hereby issued against judgement and decree delivered 7<sup>th</sup> November, 2023, the ruling delivered on 18<sup>th</sup> April, 2024 and its subsequent orders and the ruling of 27<sup>th</sup> May, 2024 and its subsequent orders all in Nakuru SCCC No. E109 of 2023 pending the hearing and determination of the Appeal.



c. An order of stay of execution of the warrant of arrest issued against the directors of the Appellant on the 11<sup>th</sup> June, 2024 is hereby issued pending hearing and determination of the appeal.

d. The Applicant shall deposit the balance of the decretal amount in the sum of Kshs 261, 843 into an interest earning joint account in a bank, to be held by both advocates for the parties within thirty (30) days of this Ruling;

e. The Respondent's shall have costs of the Application assessed at Kshs. 20,000 to be paid within thirty (30) days of this Ruling;

f. In default of (d) and (e) above this Application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute

g. The Appellant to file and serve a record of appeal within sixty (60) days of this Ruling;

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 19<sup>TH</sup> DAY OF MARCH 2025**

.....

**MOHOCHI S. M.**

**JUDGE**

