



**Wanjohi v Timau Ventures Limited (Civil Appeal E256 of 2024)  
[2025] KEHC 2353 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2353 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E256 OF 2024  
FN MUCHEMI, J  
MARCH 6, 2025**

**BETWEEN**

**PATRICK MUCHEMI WANJOHI ..... APPLICANT**

**AND**

**TIMAU VENTURES LIMITED ..... RESPONDENT**

**RULING**

1. The application dated 27<sup>th</sup> September 2024 seeks for orders of stay of execution in respect of the ruling in Thika SCCCOMM No. E295 of 2023 delivered on 26<sup>th</sup> September 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 9<sup>th</sup> October 2024.

**Appellant's/Applicant's Case**

3. The applicant states that the ruling in Thika SCCCOMM No. E295 of 2023 was delivered on 26<sup>th</sup> September 2024 whereby the court dismissed its application for review and setting aside of the judgment entered on 25<sup>th</sup> May 2023. Being aggrieved by the impugned ruling, the applicant states that he has filed an appeal.
4. The applicant states that the respondent has obtained warrants of arrest issued on 15<sup>th</sup> August 2024 against him. The applicant avers that the respondent had taken a loan of Kshs. 60,000/- from the claimant on 17<sup>th</sup> March 2021. The claim was to the tune of Kshs. 267,000/- arising from a loan of Kshs. 60,000/- which is not only illegal, but unjustified and contrary to the law.
5. The applicant avers that it has already paid Kshs. 165,000/- towards offsetting the loan which amount is over and above any legal amount a loan would attract in all fairness.



6. The applicant argues that in the event the warrants of arrest are executed, the intended appeal would be rendered nugatory and it shall suffer irreparable harm and the appeal rendered nugatory. The applicant further argues that he stands to suffer if he is committed to civil jail for an amount that he has already been settled in excess which would amount to injustice on part of the applicant.
7. The applicant avers that his appeal has triable issues and the trial court did overlook so many substantive materials that warrant a fresh relook by the instant court on appeal. The applicant further avers that he is ready and willing to furnish security as the court deems fit pending the hearing and determination of the appeal.
8. The applicant states that the court is under a duty to preserve the subject matter of the appeal.

### **The Respondent's Case**

9. The respondent avers that it is a venture capital entity lending money and/or advancing loans to borrowers. By virtue of it being a venture capital entity, it is not governed by the Central Bank of Kenya but falls under the regulatory purview of the Capital Markets Authority (CMA) in accordance with the [Capital Markets Act](#) Cap 485A.
10. The respondent states that venture capital entities, unlike banks or deposit taking institutions, are generally not subject to the duplum rule as outlined in Section 44 of the [Banking Act](#). The respondent further states that it is regulated by the [Capital Markets Act](#) and their agreements with investees are governed by contract law and private equity regulations rather than banking laws.
11. The respondent states that the applicant entered into a contract fully aware of all its terms, including the interest rate charged, which has remained consistent throughout the loan agreement. Further, the applicant read, understood and signed the loan contract without any objections. Thus, the respondent states that the applicant cannot invoke ignorance as a defence in the matter.
12. The respondent states that the applicant continued to make payments under the loan contract without raising any complaints until the period of execution resulting to his arrest.
13. The respondent states that the applicant has made vague promises to pay the said outstanding amount but his promises have remained unfulfilled.
14. The respondent avers that after arresting the applicant in full satisfaction of the decree, he sought to be handed over a copy of the logbook which it was holding as security for the loan advanced. Subsequently, the respondent states that he was directed by the trial court to release a copy of the logbook of motor vehicle registration number KCF 270B to the applicant which had been deposited as security for the loan so that he would sell the salvage and pay the said amount as per his request but he failed to do so.
15. The respondent argues that a court of law cannot rewrite a contract as the parties are bound by the terms and conditions of the contract entered between the parties.
16. The respondent further argues that if the application is allowed it would undermine the integrity of the court process and the finality of the court's judgments.
17. The respondent states that the applicant has not deposited any security for costs for the due performance of the decree.
18. The respondent avers that since the delivery of the judgment on 25<sup>th</sup> May 2023 the applicant did not lodge an appeal, apply for review or stay of execution. However, what the applicant is seeking to stay is the execution of warrants of arrest pursuant to the said unchallenged judgment.



19. The respondent states that the applicant has not disclosed to the court that he had commenced the settlement and the issues being raised currently are an afterthought and have been brought after a period of over one year since the delivery of the judgment.
20. The respondent avers that the application has been presented in bad faith and there is inordinate delay in light of the issues raised concerning the interests.
21. The applicant filed a Further Affidavit sworn on 25<sup>th</sup> November 2024 and states that the respondent being a venture capital entity can be regulated by capital market authority but its lending activities are regulated by the duplum rule as it carries out lending businesses. The applicant further states that the duplum rule has been expended from just applying to only banks but to other unregulated lenders. Furthermore, the applicant states that a contract against public policy is illegal and should not be enforced by any court of law as a court of law should not enforce an illegality.
22. The applicant avers that he has never declined to repay the said loan and has instead paid it in excess which he claims a refund since it was paid under duress.
23. The applicant argues that although execution is a legal process, should the respondent be allowed to continue with execution before his appeal is heard and determined, the appeal shall be rendered nugatory to his detriment.
24. Parties disposed of the application by way of written submissions.

#### **The Applicant's Submissions.**

25. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of RWW v EKW [2019] eKLR and submits that the purpose of stay of execution is to preserve the subject matter. The applicant submits that he took out a loan of Kshs. 60,000/- and has currently paid Kshs. 165,000/- which is double the principle amount. The applicant further submits that he has cleared the amount owed and what is in contention is the exorbitant interest. The applicant argues that the respondent was the successful party in the lower court and has a right to fully enjoy the judgment but is also fair that he be allowed to exploit all avenues provided by law to access justice as he was dissatisfied with the judgment.
26. The applicant argues that his constitutional rights to liberty are at risk if the decision of the magistrate's court is not stayed since there are warrants of arrest already issued by the trial court dated 15<sup>th</sup> August 2024. The applicant further submits that the said application was brought timeously and that the appeal raises triable issues and has high chances of success.
27. The applicant submits that he is ready and willing to abide with the decision of this honourable court to furnish security so as to allow the prayers sought.
28. The applicant relies on the case of DGM vs EWG (no citation given) cited with approval in the case of Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others [2013] eKLR and submits that he is deserving of costs as he successfully demonstrated that he ought to be granted stay of execution.

#### **The Respondent's Submissions**

29. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR and submits that the applicant has failed to demonstrate specific harm that cannot be compensated by way of damages. He only states that his constitutional rights to liberty are at risk. The respondent refers to the case of RWW vs EKW [2019]



eKLR and argues that it has secured a favourable judgment and is therefore entitled to enjoy the fruits of its labour.

30. On the issue of security for costs, the respondent submits that the applicant has not expressed whether he is ready to offer security for costs and neither has he demonstrated the requirements necessary as to security for costs for the performance of the decree either through a bank guarantee or otherwise. The respondent thus argues that the applicant has not satisfied the requisite conditions for the grant of stay of execution.
31. The respondent relies on Section 27 of the *Civil Procedure Act* and the case of Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others (2013) eKLR and submits that as the application is not merited, costs ought to be borne by the applicant.
32. 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 applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal

33. 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.
34. 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.
35. Substantial loss was clearly explained in the case of James Wangalwa & Another v 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.

36. The applicant state that he stands to suffer substantial loss as the respondent shall proceed to execute the decree and the warrants of arrest which shall render the appeal nugatory.

37. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to its detriment this rendering the appeal nugatory. In the instant case, the applicant has not shown that he stands to suffer substantial loss. The applicant has only mentioned that should the respondent proceed with the execution, the instant proceedings and the appeal shall be rendered nugatory and be an exercise in futility. He further stated that in the event that is committed to civil jail, his right to liberty shall be infringed. Thus, it is my considered view that the applicant has not demonstrated that he stands to suffer substantial loss in the event that stay of execution is not granted.

Has the application has been made without unreasonable delay

38. The ruling was delivered on 26<sup>th</sup> September 2024 and the applicant filed the instant application on 27<sup>th</sup> September 2024. Thus, the application has been filed timeously.

### **Security of costs**

39. The purpose of security was explained in the case of Arun C. Sharma v 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.

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

41. Additionally, the 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 v 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.”

42. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises is whether there is just cause for depriving the respondent its right of enjoying its judgment. The suit in the Small Claims Court was instituted on 7<sup>th</sup> March 2023 by the respondent as against the applicant. The applicant did not file a response to the claim and neither did he participate in the proceedings despite having been served. The trial court heard the matter and rendered its decision on 25<sup>th</sup> May 2023 in favour of the respondent. The applicant on 16<sup>th</sup> August 2024 filed an application to set aside the judgment. Notably, it took the applicant 1 year and 3 months to file the application to set aside the judgment. The delay portrays the applicant as an indolent litigant. The applicant did not participate in the lower court proceedings though he had been served as required with hearing notices and mention dates. All these factors considered, it would not be in the interests of justice to deny the respondent the enjoyment of the fruits of its judgment as the applicant has all along been indolent.
43. An appeal from the small claims court must be on points of law in accordance with the provisions of Section 38 of *Small Claims Court Act*. I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise any points of law. The appeal in my view has limited chances of success given the factors brought out in this ruling.
44. It is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.
45. Accordingly, it is my considered view that the application dated 27<sup>th</sup> September 2024 lacks merit and is hereby dismissed with costs to the respondent.
46. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6TH DAY OF MARCH 2025.**

F. MUCHEMI  
JUDGE

