



REPUBLIC OF KENYA



**Absa Bank PLC v Muriuki & 3 others (Miscellaneous Civil Case E010 of 2025) [2025] KEHC 4919 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4919 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
MISCELLANEOUS CIVIL CASE E010 OF 2025**

**EM MURIITHI, J**

**APRIL 24, 2025**

**BETWEEN**

**ABSA BANK PLC ..... APPLICANT**

**AND**

**ESTHER MUTHONI MURIUKI ..... 1<sup>ST</sup> RESPONDENT**

**BERNARD KANYUGI NJIRAINI ..... 2<sup>ND</sup> RESPONDENT**

**KUTUS MUNICIPALITY PRIMARY SCHOOL, SUED THROUGH BOARD OF GOVERNORS ..... 3<sup>RD</sup> RESPONDENT**

**CHARLES MWANGI THIGA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the Court is an application dated 13/2/2025 for specific relief as follows:
  - “1. That the application herein be certified urgent and service of the same be dispensed with in the first instance.
  2. That this Honourable Court be pleased to grant an order of stay of execution of the Ruling of 9th January 2025 and all consequential Orders arising there from pending the lodgement, hearing and determination of the instant Motion/ Application and appeal.
  3. That this Honourable Court be pleased to grant an order of stay of proceedings pending the hearing and determination of the Application and the intended Appeal.
  4. That the Applicant be granted leave to appeal out of time the Ruling delivered on 9th January 2025 and the consequential orders emanating therefrom.



5. That the costs of and incidental to this Application be provided for.”
2. The grounds of the application are set out in the application as follows:
- “a) That the Honourable court delivered its ruling in the matter herein on 9th January 2025.
  - b) That the Applicant/ Appellant herein wishes to lodge an Appeal and the record whereof within the shortest available time.
  - c) The subject appeal is arguable with high chances of success for the reasons that the appeal is challenging the Honourable Court's entire Ruling.
  - d) The delay in filing the appeal was occasioned by the advocate who was in conduct of the suit leaving the law firm without proper hand over and the firm is still reconciling its records with respect to that lawyer.
  - e) The delay in lodging the appeal was purely inadvertent and is excusable.
  - f) There is a good explanation for the failure to file within the prescribed time.
  - g) The delay was not inordinate.
  - h) It is in the interests of justice that the Applicants be granted extension of time within which to file an Appeal.
  - i) That it is therefore in the interest of justice and fairness that the Prayers sought in the Application filed herewith be granted.”
3. A Draft Memorandum of Appeal attached to the application set out two issues for presentation to the appellate court as follows:

“Memorandum Of Appeal

ABSA Bank PLC the above named Appellant appeals to the High Court of Kenya at Kerugoya against the whole Ruling of the subordinate court declining to strike out the 1st Respondent's suit against the Appellant on the following grounds namely that:

1. The Learned Magistrate erred in law and fact in finding that there is a reasonable cause of action against the Applicant.
2. The Learned Magistrate erred in law and fact in failing to consider the Applicant's submissions.
3. The Learned Magistrate erred in fact in failing to discharge the Applicant from the suit.

Reasons Whereof the Appellant prays for the following orders:

- a. This Appeal be allowed with costs.
- b. The Ruling of the Honourable Chief Magistrate dated 9th January 2025 be discharged and set aside with costs to the Appellant.
- c. That the Respondents to bear the costs of this Appeal.”



4. The application was not opposed by the 2, 3 and 4 Respondents.
5. The 1<sup>st</sup> Respondent although served did not file any reply or attend court.

### **The impugned ruling**

6. In view of the arguable appeal, the remedy for the suitor Plaintiff, the respondent in this application, appears to be an order for expedited hearing of the appeal so that the issue is determined to allow his suit to proceed on the basis of the court's decision in the appeal.
7. By its ruling of 9/1/2025, which is the subject of the intended appeal, the trial court dismissed an application seeking the striking out of the suit against it 'on the ground that the applicant was improperly joined as a party to the suit, since it was only a financier and does not have any interest in the motor vehicle' which was allegedly involved in the traffic accident subject of the personal injury suit by the plaintiff.

### **Arguable case**

8. The question before the court in the proposed appeal is whether a financier of a motor vehicle may be excused from a suit for personal damages for injury caused by the motor vehicle. This is, clearly, an arguable case fit for further deliberation at the hearing of the appeal.
9. As observed in by Mwongo, J. in *Synergy Industrial Credit Ltd v Monikah Mukenyi Ndung'u* [2020] eKLR, pointing to the existence of persuasive decisions on both sides, there is a clear arguable case in " " which should permit the applicant to pursue his contention before the appellate court. An arguable case does not mean on that must succeed. See the case of *Dennis Mogambi Mang'are v Attorney General & 3 others* [2012] eKLR, where the Court of Appeal held that "An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court's consideration."
10. The balance of opinion is in favour of the applicant's case as observed in *Consolidated Bank of Kenya Limited v Mwangi & another* (Civil Appeal E056 of 2021) [2022] KEHC 3104 (KLR) (Commercial and Tax) (8 July 2022) (Judgment) (Majanja J.) as follows:

“

- “ 13. Ownership of a motor vehicle does not, of itself, establish liability for an accident. The plaintiff must prove that the owner is vicariously liable for the acts of the driver of the motor vehicle by showing that the driver is an employee or agent (see *Jane Wairimu Turanta v Gitbae John Vickery and Equity Bank Limited & Munene Don ML HCCC No 483 of 2012* [2012] eKLR). As whether the owner who has a financial interest in a motor vehicle has control over the driver, which is at the heart of this appeal, our courts have held that a financier's only interest in the security is to secure the repayment from the owner and it is not in control of the motor vehicle for that reason. In *Ali Abdi Dere v Hash Hauliers Limited & another* MKS HCCC No 16 of 2014 [2018] eKLR the court held that the position of a financier was merely to protect its interest in the motor vehicle it had financed and could not be held vicariously liable for the actions of its driver while in *Justus Kavisi Kilonzo v Coast Broadway Company Limited* MSA HCCC No 169 of 2007 [2008] eKLR the court was of the view that a financier who had been registered as a co-owner of a motor vehicle did not mean that it was a necessary party



to proceedings. The same position was taken by the Court of Appeal in *Mohammed Hassan Musa and another v Peter Mailanyi and another* NYR CA Civil Appeal No 243 of 1998 [2000] eKLR stated as follows:

There is one other aspect of this appeal that we feel we must comment on. The plaintiff is an Advocate of the High Court of Kenya but in his attempt to realize the decree he resorted to what in effect amounted to jungle law. The third defendant, Diamond Trust (K) Ltd, which had nothing to do with the accident but had merely only financed the purchase of the motor vehicle which caused the accident was wrongly sued and attached. [Emphasis mine]”

### **Appeal may be rendered nugatory**

11. To decline the stay application will render the said appeal nugatory as the trial will proceed with the applicant/appellant being compelled to defend the suit to the full hearing and determination and judgment.
12. In view of the arguable appeal and the possibility of the appeal being rendered nugatory if stay is not granted, the remedy for the suitor Plaintiff, the respondent in this application, appears to be an order for expedited hearing of the appeal so that the issue is determined to allow his suit to proceed on the basis of the court’s decision in the appeal.
13. There is no question of provision of security for the due performance of the decree as this is an application for stay of proceedings which is not affected by Order 42 Rule 6 (2) of the *Civil Procedure Rules* which provides as follows:

“ [Order 42, rule 6.] Stay in case of appeal.

6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order set aside.
- (2) No order for stay of execution shall be made under subrule (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.”

14. Consequently, this Court will in granting the application for extension of time and stay of proceedings in the trial court order an expedited preparation and hearing and determination of the Appeal. The orders in this application shall apply to the related applications Misc. Civil Applications No E011, E012 and E013 of 2025.
15. The appellant shall file the Memorandum of Appeal within seven (7) days and the Record of Appeal with thirty (30) days.

### **Orders**

16. Accordingly, for reasons set out above, the Court finds merit in the application dated 13/2/2025 and makes orders as follows:
  1. The Applicant is granted leave of the court to file appeal out of time.
  2. There shall be a stay of proceedings in the suits before the trial court pending hearing and determination of the appeal.
  3. The Memorandum of Appeal shall be filed within seven (7) days.
  4. The Record of Appeal shall be filed within thirty (30) days.
  5. In default of the orders in No 3 & 4 the order for stay shall lapse and be of no effect.
  6. This Order shall apply to the related files Misc. Civil Case Nos. E011 of 2025, E012 of 2025 and E013 of 2025.
17. The Cost of the application shall be costs in the Appeal.  
Orders accordingly.

**DATED AND DELIVERED THIS 24<sup>TH</sup> DAY OF APRIL 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. Abok for the Applicant.

Ms. Njeri for Mr. Kungú for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

Mr. Ontita for the 4<sup>th</sup> Respondent.

