



Mwiki PSV Sacco Society Limited v Mutinda & 2 others (Civil Appeal E289 of 2025) [2025] KEHC 6036 (KLR) (Civ) (24 April 2025) (Ruling)

Neutral citation: [2025] KEHC 6036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E289 OF 2025

TW CHERERE, J

APRIL 24, 2025

BETWEEN

MWIKI PSV SACCO SOCIETY LIMITED APPELLANT

AND

GEORGINA MBITHE MUTINDA 1ST RESPONDENT

**JOHN MWANGI MAINA Suing AS ADMINISTRATORS OF THE ESTATE OF
KEVIN MUTINDA MBITHE) 2ND RESPONDENT**

GEORGE KIMANI THUKU 3RD RESPONDENT

RULING

Background

1. By a ruling dated 21st June 2025, the trial court set aside an interlocutory judgment entered on 04th August 2023 against the Appellant. The ruling granted the following orders:
 - a) The firm of Chimei and Malenya Company Advocates was granted leave to come on record;
 - b) Appellant was directed to pay the Respondents throw-away costs of KES. 30,000 within 30 days;
 - c) Appellant was further directed to deposit half the decretal sum in court within 30 days;
 - d) It was ordered that failure to comply with the foregoing conditions would result in the automatic lapse of the orders setting aside the interlocutory judgment
 - e) The application for joinder of George Kimani Thuku as the 2nd Defendant was allowed.



2. By notice of motion dated 21st August 2024, the Appellant sought review of conditions (c) and (d), which was disallowed by a ruling delivered on 21st February 2025.
3. Aggrieved, the Appellant filed the notice of motion dated 11th March 2025 premised under the Article 50 of *the Constitution*, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, and Order 42 Rule 6 and Order 51 of the Civil Procedure Rules. Appellant seeks:
 - (1) Stay of the ruling dated 21st February 2025
 - (2) Stay of further proceedings in Milimani MCCC E7051 of 2020 pending appeal;
 - (3) Costs of the application.
4. The motion is supported by an affidavit sworn by Bianjo Mwaniki, the chairperson of the Appellant. He avers that the Appellant has complied with orders (a), (b) and (f) but is unable to comply with orders (c) and (d) due to financial hardship. He raised a concern that the Respondents may proceed with execution against the Appellant who is not the owner of the accident motor vehicle the subject of the trial.
5. The Respondents oppose the application, arguing that the Applicant has failed to satisfy the conditions imposed by the trial court and that the application amounts to an abuse of process.
6. From the affidavit evidence, I have identified the following issues for determination.
 - a. Whether the Applicant has established a proper basis for grant of stay of execution of the ruling dated 21st February 2025;
 - b. Whether stay of further proceedings in Milimani MCCC E7051 of 2020 should be granted pending appeal.
 - c. Who bears the costs

a. Stay of Execution

7. The ruling dated 21st February 2025 dismissed the Appellant's application for review dated 21st August 2024. In essence the impugned ruling is a negative order and is incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited v 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.”

8. Similarly, in *Kanwal Sarjit Singh Dhiman v 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 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th 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 (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).”

9. In *Raymond M Omboga v Austine Pyan Maranga Kisii HCCA No. 15 of 2010*, the Court also reiterated that a negative order is incapable of execution or being stayed, as it does not direct any party to perform a positive act. In this case, the dismissal of the Appellant’s review application does not result in any obligation that is capable of execution.
10. In light of the above, the negative order of dismissal is incapable of execution and thus the court cannot order stay its execution.

(2) Stay of Proceedings

11. The jurisdiction to stay proceedings is a delicate one. The court must act cautiously and only grant such relief where it is necessary to preserve the integrity of the appeal and prevent injustice. In *Global Tours & Travels Ltd, Nairobi HC Winding Up Cause No. 43 of 2000*, Ringera J. stated:

“The sole question is whether it is in the interests of justice to order a stay of proceedings and if it is, on what terms it should be granted.”

12. Having found that the order of dismissal is incapable of execution, the Court holds that it would not be in the interests of justice to stay the proceedings before the trial court.

Disposition

13. For the foregoing reasons, the court makes the following orders:
 1. The notice of motion dated 11th March 2025 is unmeritorious and it is disallowed.
 2. The costs of this application shall abide the outcome of the appeal.
 3. This matter shall be mentioned before the Deputy Registrar on 28th May 2025 to confirm the filing of the record of appeal

DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Appellant - Ms. Karue for Chimei & Malenya Company Advocate

For Respondent - Ms. Kisiangani for Waiganjo Wachira & Co. Advocate

