



REPUBLIC OF KENYA



**Mburu & another v Tilu (Civil Appeal E023 of 2024)
[2025] KEHC 4804 (KLR) (23 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E023 OF 2024
CM KARIUKI, J
APRIL 23, 2025**

BETWEEN

GEOFFREY CHEGE MBURU 1ST APPELLANT

PETER KAMU GITHINJI 2ND APPELLANT

AND

TITUS KITAVI TILU RESPONDENT

*(Being an application for stay of execution against the ruling and order of Hon
G Sagero (P M) delivered on 23/08/2024 in Narok CMCC NO 46 OF 2018)*

RULING

1. Before this court for determination is an application dated 25/09/2024, where the Appellants/ applicants are seeking the following orders.
 - i Spent.
 - ii Spent.
 - iii That this honourable court be pleased to stay execution of the ruling and order in Narok CMCC No 46 OF 2018 delivered on 23/08/2024 to the extent that it directed the appellant to pay thrown away costs of Kshs 100,000/= to the respondent as a condition for setting aside the ex-parte judgment pending the hearing and determination of the appeal herein.
 - iv That the costs of this application be provided for.
2. The application is premised on sections 1A, 1B, and 3A of the Civil Procedure Act and Order 42 Rule 6(1) and (2) of the Civil Procedure Rules.



3. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by a legal officer of the applicant's insurer's M/S Britam General Insurance Limited, Peter Ngola Makau on 25/09/2024.

Background

4. An interlocutory judgment was entered into against the applicants herein on 04/02/2019.
5. The applicants made an application on 16/02/2024 seeking to set aside the interlocutory judgment.
6. The trial court in its ruling dated 23/08/2024 did set aside the ex parte judgment on condition that the appellants pay throw away costs of Kshs 100,000/= to the respondent within 14 days from the date of the said ruling, failure of which the orders lapse and the judgment to be reinstated.
7. The applicants, being dissatisfied with the same, have lodged an appeal in the High Court vide Narok HCCA NO E023 OF 2024 and the application herein for stay of execution pending appeal.
8. The appellants contest that the sum of Kshs 100,000/= as assessed as thrown away costs is unduly punitive, onerous, unaffordable, and wipes away the appellant's right to be heard.
9. The appellants contend that the appeal has high chances of success, and they stand to suffer irreparable loss and damage Therefore, it would only be fair and in the interests of justice if the orders sought are granted.

Replying affidavit

10. The respondent opposed the application vide replying affidavit sworn by Titus Kitavi Tilu on 14/10/2024.
11. The respondent contends that the throw-away costs are justified and meritorious as applicants have not substantiated their claim because the ruling and orders issued on 23/08/2024 resulted from the appellants' adamant character of refusing to defend this suit despite appropriate notices Further, the costs are a true reflection of how the court observed the appellants' conduct, which was undesirable, and despite having appealed, there was a precondition to the setting aside, which was to tame their ignorance of court proceedings.
12. The respondent contends that he has spent considerable sums in preparing for the finality of this case, executing the judgment herein, which includes payment of further court fees in the sum of Kshs 70,330/= and therefore the award of Kshs 100,000/= as a throw-away cost is fair in the circumstances and should not be set aside.
13. The respondent contends that the appellants stand to suffer no reparable loss or harm as the throw away costs does not affect the subject matter of the appeal and that the costs was to tame conduct or rather ensure the winning party who participated in the suit is [properly compensated against the appellants upon instituting an appeal.
14. The respondent contends that the applicants have not demonstrated in any way that the ruling and orders granted by the lower court will prejudice them, and therefore, the same should be upheld for the interests of justice.

Further affidavit

15. The applicants filed a further affidavit sworn by Peter Ngola Makau on 23/10/2024.



16. The applicants contend that it is upon the plaintiff to pay court fees assessed on the plaint, and such fees are recoverable if at all upon conclusion of a matter Further, further court fees cannot be part of the throw-away costs At any rate, following the setting aside of the ex parte judgment, the suit is still active, and all other costs should be apportioned and paid at the conclusion of the suit, depending on the event The ruling of 23/08/2024 does not state that the throw-away costs were assessed at Kshs 100,000/= because of further court fees or inclusive of further court fees.

Directions of the court

The application was canvassed by way of written submissions.

The applicants' Submissions

18. The applicants submitted that the applicants moved the court without any unreasonable delay, and the parties have agreed elsewhere to have this matter resolved amicably The applicants relied on Order 42 Rule 6(2) of the Civil Procedure Rules, Kiambu Transporters Vs Kenya Breweries [2000] eKLR, and KAM Transporters Savings and Credit Co-Op Society Limited & Another V Grace Wairimu Wandate [2021] eKLR.
19. The applicants submitted that they stand to suffer irreparable loss and damage as their right to a fair hearing has effectively been wiped out by the exorbitant throw-away costs The applicants relied on the case of Tropical Commodities Suppliers Ltd & Others Vs International Credit Bank Ltd (In Liquidation), Misc Application No 379/2003(Unreported) cited in the case Antoine Ndiaye V African Virtual University [2015] eKLR, and Daniel Chebutulrotich & 2 Others V Emirates Airlines Civil Case No 368 Of 2001.

The respondent's submissions

20. The respondent submitted that this court should find the award of Kshs 100,000/= is tenable in law The trial court exercised its discretion properly in terms of granting the costs to compensate the respondent in all incidentals incurred during the prosecution of the suit, where a default judgment was entered in favour of the respondent The respondent relied on County Government of Tana River & another v Hussein Fumo Hiribae [2021] eKLR (Civil Appeal E004 of 2021), Idi Ayub Omani Shabani V City Council of Nairobi [1985]1KAR 681, Section 27 of the *Civil Procedure Act*, R V Rosemary Wairimu Munene, Exparte Applicant V Ihururu Dairy Farmers Co-operative Society JR No 6 of 2014, Gianfranco Manenthi & Another -vs- African Merchant Assurance Co Ltd [2019] EKLR, Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others (2019) eKLR, in the New Zealand Supreme Court case of Kacem v Bashir (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) and Pambazuka Mart (K) Ltd v Javed (Civil Appeal E018 of 2023).
21. The respondent submitted that despite the applicants filing a memorandum of appeal on the 5th day of September 2024, they waited for a period of 20 days to file this application, which was past the 14 days granted The application is an afterthought, having been brought out of the stipulated period, and should be dismissed.
22. The respondent submitted that no substantial loss will be occasioned if the stay of execution is not granted, in contrast loss that would be suffered by the respondent who has incurred expenses in prosecuting the matter and taken steps towards execution of the judgement.



Analysis and Determination

Issues

23. I have considered this application, the replying affidavit, the further affidavit, and the respective parties' written submissions. The main issue that falls for determination is whether this court should stay execution of the ruling on throw away costs.

Whether orders of stay of execution should issue

24. The court has discretionary power to order stay of execution of a decree pending appeal. In exercising the discretion to grant a stay pending appeal, the court takes a wider view of justice in determining whether there is a sufficient cause to order stay of execution, but also considers the traditional requirements in Order 46 Rule 2 of the Civil Procedure Rules, namely: -Whether the application has been made without unreasonable delay; Whether substantial loss would occur upon the applicant unless stay of execution is granted; and the provision of security.
25. The exercise seeks to attain a proportioned balance of the applicant's
Result *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR)
A successful appellant, a mere pious explorer, or a holder of barren
judgment, avoiding prejudice to any party, including rendering a
right of appeal and the respondent's right to enjoy the fruits of their
26. Was the application filed without unreasonable delay? *Vishram Ravji Halai v Thornton & Turpin*
Civil Application No Nai 15 of 1990 [1990] KLR 365
27. Ruling was delivered on 23/08/2024. The applicants filed a memorandum of appeal on 05/09/2025. The applicants filed an application herein on 25/09/2024. The conditions set in the ruling were that the throw-away costs be paid within 14 days of the said ruling. The application was filed 33 days after delivery of the ruling and about 20 days after the lapse of the 14-day period given. The applicants had an obligation to ensure timelines set out by the trial court were strictly adhered to. The Applicant ought to have been vigilant in ensuring that throwaway costs were paid within the period specified by the trial court. If the Applicant felt that it required more time to comply, then an application for extension of time ought to have been filed. This was not done.
28. In my view, the Applicant was lax and waited for over 33 days after it had been issued with the figure for throwaway costs to settle the same. Equity, it is said, will not aid the indolent. This court finds that the unreasonable delay has not been explained.
29. The applicants submitted that they stand to suffer a substantial loss. On the other hand, the respondent submitted that the applicants have not demonstrated how they would suffer a substantial loss.
30. This court notes that the applicants have not shown a willingness to deposit the costs as security in court pending the hearing and determination of the appeal.
31. This court is not persuaded that the applicants will suffer substantial loss if stay is not granted, as they may be reasonably compensated by way of damages.
- i. In the upshot, the application for stay is found to lack merit.
 - ii. However, the court orders the ksh100,000 ordered to be paid to the respondent, shall be split into two such that ksh 50,000 shall be paid to the respondent within 14 days and the other



ksh 50,000 to be deposited in court within 14 days to await conclusion of the appeal when court shall make directions on same

iii. Costs for this this application ksh 10,000 to be paid to the respondent in any case after conclusion of the appeal.

iv. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION,
THIS 23RD DAY OF APRIL 2025**

CHARLES KARIUKI

JUDGE

