



**Mulei v Ndung’u; Stephen Kariuki t/a Jostel Auctioneers (Interested Party)  
(Civil Appeal E220 of 2024) [2025] KEHC 4502 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4502 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E220 OF 2024**

**TW OUYA, J  
APRIL 8, 2025**

**BETWEEN**

**PAUL MULEI ..... APPLICANT**

**AND**

**CHARITY MBAIRE NDUNG’U ..... RESPONDENT**

**AND**

**STEPHEN KARIUKI T/A JOSTEL AUCTIONEERS ..... INTERESTED PARTY**

**RULING**

1. This is a notice of motion application for stay of execution of the decree or orders issued by the Small Claims Court in Thika SCCCOM E695 of 2024 in respect of default judgement entered by Hon. Kamau (RM/Adjudicator) on 24<sup>th</sup> June 2024.
2. The Appellant has stated that the reason for the application is that the notice of mention was not served on the Appellant being that the first mention slated for mention was 17<sup>th</sup> June 2024 did not take place as the day was declared a public holiday and the matter was redirected to 24<sup>th</sup> June 2024 but the Appellant was not informed. That the appellant only learnt of the matter when confronted with a decree when he got to know that the matter had proceeded ex-parte and judgement issued by the court.
3. The grounds advanced in support of the application are that the Applicant has an arguable appeal with a high probability of success; that the applicant was not served with the pleadings in the lower court case; and that no evidence of such service was provided by the respondent. The Applicant also argues that if stay of execution is not granted, the appeal will be rendered nugatory and the applicant will suffer irreparable damage. That the applicant was not aware of the suit as he was not served with any court documents and disputes the respondent’s allegations that service was effected upon the applicant.



4. The application is supported by an affidavit by Paul Mulei the Applicant sworn on 22<sup>nd</sup> August 2024 with a copy of memorandum of appeal annexed.
5. The Applicant prays for orders that:
  - i. Spent
  - ii. Spent.
  - iii. That this court be pleased to grant leave to the applicant to lodge this appeal out of time.
  - iv. That this court set aside the default judgement delivered on 24<sup>th</sup> June 2024 by the Small Claims Court in SCCCOMM E695 of 2024 and issue any other appropriate orders, relief or declaration that it may deem fit and just to safeguard the applicant's rights and basic fundamental freedoms.

### **Submissions**

6. This matter was canvassed by way of written submissions by counsel for both parties.

### **Applicant's Submissions**

7. The applicant's main the argument that he was not served with the court pleadings leading to the judgement in default being entered against him. His counsel points out that:

Briefly the matter before the Small Claims court SCCOMM E 965 of 2024 was filed on 31<sup>st</sup> May 2024 the Notice of the first mention was not served to the Appellants. The first mention was slated for the 17<sup>th</sup> June 2024, however the same did not take place since the said date was declared a public holiday being idd-ul-fitri (Muslim holiday) and the matter was then re-directed for another mention date for 24<sup>th</sup> June 2024, however the Respondent still did not bother to serve the Appellant with the mention notice as required and a default judgment was entered against the appellant and a decree issued on the same date.

The appellant was not aware of the said matter and it was only upon being confronted with a Decree that he learnt that the matter had proceeded ex-parte and a judgment issued by this Honourable court. The present application is not brought to set aside the ex-parte Judgment and proceedings and to allow the Defendant file his Statement of Defence and be accorded a fair chance to be heard.”

8. Counsel points out that there was no evidence of service and that counsel misled the trial court to rely on a false affidavit of service as a basis for proceeding ex-parte thereby entering judgement in default against the applicant. He argues that the respondent had all his contacts including email, postal and physical address and would have effected service through a verifiable mode.
9. The applicant states that he is likely to suffer substantial loss if the order for stay is not granted. He cites the case of Hall Equitorial Limited v Olympic Fruit Processers Nairobi HCC 5400 OF 1991 which emphasized that for an applicant to succeed in an application for stay of execution:

“He must demonstrate to the satisfaction of this court that substantial loss will ensue if the Order is not granted; that the application had been filed without delay and that he is willing and able to give security as is ordered by the Court for the due performance of the decree.”



The Applicant also argues that he is likely to suffer injustice and undue hardship should the ex-parte judgement not be set aside and he be allowed to file his statement of defence.

10. The Applicant submits that other than meeting all the above three requirements for grant of stay of execution pending appeal, he is ready and willing to furnish security as may be ordered by the court.

### **Respondent's Submissions**

11. The respondent opposes the application for bail and bases his arguments around three issues the first of which the statement of claim was served upon the applicant and return of service filed which was the material evidence relied upon to seek judgement. He argues that if the applicant disputes the service, he should have called the process server for cross examination. Secondly, the respondent posits that he who comes to equity must come with clean hands. He argues that the applicant seeks for injunctive orders for a matter that is concluded. That in seeking injunctive orders, he is lying to court that he has no capacity to pay the judgement sum.
12. Thirdly, the respondent submits that if at all the applicant's appeal is meritorious or has overwhelming chances of success, the applicant would have gone ahead to deposit the decretal amount in court or in a joint bank account.

### **Analysis**

13. The considerations to be made in granting stay of execution are laid down 42 Rule 6 of the civil procedure rules which were restated in the case of Hamisi Juma Mbaya v Amakecho Mbaya [2018] eKLR where it was held: -

“The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:

1. Substantial loss may result to the applicant unless the order is made.
2. The application has been made without unreasonable delay, and
3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

14. In the case of Butt v Rent Restriction Tribunal [1979] eKLR it was posited that the court considers the circumstances of each case before granting an order for stay of execution and emphasizes that the overarching principle guiding the court in deciding whether to grant stay is whether such an order would serve the ends of justice.
15. Be that as it may, the issue of likelihood to suffer substantial loss cannot be addressed in isolation from the issue of protection of the substratum of an appeal. In *RWW v EKW* (2019)eKLR the court laid down the principle that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered “

16. As stated earlier, the substratum of this appeal revolves around an allegation that service of the court pleadings was not effected upon the applicant and if so , no such evidence was furnished. This court



notes that respondent did not file any replying affidavit to discount this allegation and has also failed to put across any sound argument to the contrary.

17. This court is satisfied that the allegations by the applicant have substance warranting the granting of the orders for stay of execution which are sought herein, to set aside the default judgement and also to give the applicant a chance to file his defence.
18. The court holds that prayer four is not for consideration at this juncture as it is the main prayer to be considered during the appeal. Indeed a glimpse of the memorandum of appeal is a prayer for judgement/decree issued at the Small Claims court at Thika in SCCOMM E695 OF 2024 to be set aside.

### **Determination**

19. It is hereby ordered that:
  - i. Stay of execution the judgement entered against the applicant by the Adjudicator in Thika SCCOM E695 on 24<sup>th</sup> June 2024 is granted pending the hearing and determination of the applicant's appeal
  - ii. That leave is granted to the applicant to file appeal out of time
  - iii. That the applicant to deposit the entire decretal sum in court within 30 days from the date hereof failure to which the stay herein shall automatically expire.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8<sup>TH</sup> DAY OF APRIL, 2025.**

**HON. T. W. OUYA**

**JUDGE**

For Appellant/Applicant ....N/A

For Respondent.....Charity Mbaire

Court Assistant...Jackline

