



REPUBLIC OF KENYA



**Ongegu aka Nyashinski v Jedidah & another (Civil Appeal
E931 of 2024) [2025] KEHC 4886 (KLR) (Civ) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4886 (KLR)

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

CIVIL

CIVIL APPEAL E931 OF 2024

AC MRIMA, J

APRIL 24, 2025

BETWEEN

NYAMARI ONGEGU AKA NYASHINSKI APPLICANT

AND

SAM ARE ELIAPENDA JEDIDAH 1ST RESPONDENT

TECNO KENYA LIMITED 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 21st August 2024, the Appellant moved this Court under Sections 1A, 1B, 3A *Civil Procedure Act* (Cap 21), Order 51 Rule (1) of the Civil Procedure Rules, 2010 for the following orders: -
 - a. This application be certified urgent and interim orders granted ex-parte in the first instance.
 - b. Pending the hearing and determination of this Application, this Honourable Court be pleased to grant orders of stay of execution of the Ruling, delivered by Hon. Selina Muchungi of the Chief Magistrate's Court at Milimani delivered on 9th August 2024, Civil Suit No. E617 of 2023.
 - c. Pending the hearing and determination of the Applicant's Appeal, this Honourable Court be pleased to grant a stay of execution of the order granted by Hon. Selina Muchungi of the Chief Magistrate's Court at Milimani delivered on 9th August 2024, Civil Suit No. E617 of 2023.
 - d. The costs of this Application be provided for.
2. The grounds in support of the application appear on the face of the application and are mainly that the Appellant/Applicant stands to be prejudiced if the impugned ruling is not stayed since the



documents have no bearing on the dispute before Court and involve third parties where their non-disclosure is protected under agreements and the Data Protection Act. The Applicant contended that the production of the documents in the lower Court suit will instigate litigation against him by the said third parties. He, therefore, faults the trial Court on the impugned ruling and prays that he be given an opportunity to ventilate the appeal herein.

3. In support of the application is an Affidavit sworn by the Applicant's Counsel one Eddie Omondi on 21st August 2025 and Written submissions and List of Authorities both dated 29th January 2025 where several decisions were referred to.
4. The application was vehemently opposed by the 1st Respondent through a Replying Affidavit sworn on 25th October 2024, Written submissions and List of Authorities both dated 13th February 2024. Several decisions were also referred to.
5. Before considering the merit or otherwise of the application, there is an issue which was raised by the 1st Defendant on the competency of the Learned Counsel for the Applicant to swear the affidavit in support of the application. Given its nature, this Court will, in the first instance, determine that issue.
6. The general legal position on whether an Advocate representing a client may swear an Affidavit in the matter is that such an Advocate ought not to do so in instances which the Advocate may be required to give evidence as a witness. Rule 8 of the Advocates (Practice) Rules 1966 affirms the foregoing as follows: -

No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

7. Further Order 19 Rule 3(1) of the Civil Procedure Rules, 2010 speaks to the issue as follows: -

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove; Provided that in interlocutory proceedings, or by leave of the Court, an affidavit may contain statements of information and belief showing the sources and grounds thereof".
8. The Supreme Court of Kenya in *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26 September 2022) (Judgment)* equally reiterated the above position.
9. Returning to the affidavit in issue which was sworn by Learned Counsel for the Applicant and by applying the legal parameters set out above, this Court finds that the Learned Counsel mainly deposed on legal matters and put forth his understanding and interpretation of the law on discoveries. There is, therefore, nothing much that turns out on the 1st Respondent's contention more so since there is no request to cross-examine the Learned Counsel for the Applicant on the contents of his affidavit. As such, this Court finds that the legal prohibition discussed herein does not aptly apply in the circumstances of this case. The objection is, hence, overruled.



10. Turning to the main application, the applicable principles in instances where a Court is called upon to consider granting stay of execution orders are well settled. Order 42, Rule 6 of the Civil Procedure Rules provides that an Applicant must satisfy the following conjunctive requirements for the grant of stay of execution pending appeal; that is to say: -
- i. The application has been made without unreasonable delay;
 - ii. Substantial loss may result to the Applicant unless the order is made; and
 - iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.
11. It is not lost that the purpose of stay pending appeal as held in the case of RWW vs. EKW [2019] eKLR, is as follows: -
- ... 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 nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs... Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.
12. On a careful consideration of the application against the foregoing, there is no doubt that the Applicant stands to suffer loss if no orders are granted in the event the appeal succeeds. That is so because the fear the Applicant has will be long realized with no possibility of reversal. Once the documents are released on discovery, then the processes intimated to by the Applicant will automatically set in motion.
13. As there was also no delay in filing the application and the matter does not really call for any security deposit at the moment, the application ought to succeed. However, as this is an interlocutory appeal from a ruling, the Court will expedite its determination.
14. The application, therefore, satisfies the above principles and is merited. Consequently, the following final orders do hereby issue: -
- a. There be a stay of execution of the ruling delivered on 9th August 2024 in Milimani CMCC No. E167 of 2023 by Hon. Selina Muchungi [SRM] pending the determination of the appeal.
 - b. Given the nature of the pending appeal, the following orders do hereby issue: -
 - i. The Appellants shall file and serve written submissions in respect of the main appeal within 14 days of today. The requirement of filing a Record of Appeal is hereby dispensed with and the lower Court file be availed accordingly.
 - ii. The Respondents shall file and serve written submissions within 14 days of service.
- (d) This matter shall be fixed for highlighting of submissions on a date to issue.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL, 2025.

A. C. MRIMA



JUDGE

Ruling No.1 virtually delivered in the presence of:

Miss. Mugambi, Learned Counsel for the Appellant/Applicant.

Mr. Makori, Learned Counsel for the 1st Respondent.

Michael/Amina – Court Assistants.

