



REPUBLIC OF KENYA



**Teleposta Sacco Society Limited v Thuku (Civil Appeal E969 of 2024)  
[2025] KEHC 6034 (KLR) (Civ) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 6034 (KLR)

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

**CIVIL  
CIVIL APPEAL E969 OF 2024**

**TW CHERERE, J**

**APRIL 8, 2025**

**BETWEEN**

**TELEPOSTA SACCO SOCIETY LIMITED ..... APPELLANT**

**AND**

**RICHARD W. THUKU ..... RESPONDENT**

**RULING**

1. The Appellant has moved this Court by way of a Notice of Motion dated 13<sup>th</sup> March 2025, seeking an order of stay of execution pending appeal against the judgment delivered on 27<sup>th</sup> July 2024 in CTC No. 360 of 2018.
2. The judgment dismissed the Appellant's suit against the Respondent with costs, which were subsequently taxed at KES. 245,283.96 on 27<sup>th</sup> August 2024.
3. The application is supported by the affidavit of Maryanne W. Ndekei, the Appellant's Chief Executive Officer, sworn on 12<sup>th</sup> March 2025. The Appellant contends that:
  1. It is aggrieved by the judgment;
  2. The appeal has high chances of success;
  3. Their goods are under threat of attachment in satisfaction of the taxed costs.
4. The Respondent opposed the application by a replying affidavit sworn on 02<sup>nd</sup> April 2025, arguing that:
  1. The application has been filed after undue delay;



2. In the alternative, should the Court be inclined to allow the application, the Appellant should deposit the entire decretal sum as security.
5. I have considered the application in light of the affidavit on record and the issues for determination are:
  1. Whether the delay in applying is inordinate and unexplained
  2. Whether the Court can grant a stay of execution in respect of a dismissal with costs
  3. Whether the Appellant has demonstrated that substantial loss may result if stay is not granted.

### **Analysis and Determination**

#### **Delay**

6. The judgment was delivered on 27<sup>th</sup> July 2024, and costs were taxed on 27<sup>th</sup> August 2024. The Appellant did not file this application until 13<sup>th</sup> March 2025, approximately 7 months later.
7. In *Utalii Transport Company Ltd & 3 others v NIC Bank Ltd & another* [2014] eKLR, the court stated:

“Indolence and inaction on the part of a litigant is not excusable. Litigation is not a mere game of chance to be taken casually.”
8. No explanation has been provided for the delay. It is trite that equitable relief, including stay, is discretionary and must be sought promptly.

#### **Whether Stay Can Be Granted on a Negative Order**

9. It is settled law that a dismissal of a suit is a negative order that is not capable of execution, save for costs.
10. In *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union (Kenya)* [2015] eKLR, the Court of Appeal held:

“An order dismissing a suit is a negative order incapable of execution and therefore cannot be stayed.”
11. Similarly, in *Western College of Arts and Applied Sciences v Oranga & Others* [1976-80] 1 KLR 63, it was held that:

“A decree dismissing a suit is not capable of execution except for costs.”
12. In the present case, there is no positive relief granted in the trial judgment; the only executable component is the taxed costs.

#### **Substantial Loss**

13. Under Order 42 Rule 6(2) of the Civil Procedure Rules, a party seeking stay must show that substantial loss will result if the order is not granted. The Appellant contends that its goods may be attached.
14. However, the Court notes that the amount in issue is taxed party-and-party costs, and there is no evidence placed before the Court to show that the Respondent is a person of no known means or would be unable to refund the sum in the event the appeal succeeds.



15. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the Court of Appeal stated:

“The onus was on the applicant to demonstrate that the respondent would not be in a position to refund the decretal sum if paid. Once such an allegation is made, it is for the respondent to rebut it.”

16. In this case, the Appellant has made no such specific allegation, and there is no evidential basis upon which this Court can infer that a refund would be impossible. The claim of substantial loss is therefore speculative.

### **Conclusion**

17. From the foregoing analysis, the court makes the following orders:

1. The notice of motion dated 13<sup>th</sup> March 2025 is unmerited
2. The notice of motion is dismissed with costs to the Respondent
3. Mention before the Deputy Registrar on 24<sup>th</sup> April 2025 to confirm service of record of appeal and the filing of submissions on the appeal

**DELIVERED AT NAIROBI THIS 08<sup>th</sup> DAY OF April 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ubah

For Applicant - N/A for Kabugu & Co. Advocates

For Respondent - Ms. Chebet for Mbutia Kinyanjui & Co. Advocates

