



**Tarmohamed v Somji & 3 others (Civil Appeal E126 of 2024)  
[2025] KEHC 12148 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 12148 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E126 OF 2024**

**F WANGARI, J**

**APRIL 3, 2025**

**BETWEEN**

**SHAMSHUDIN TARMOHAMED ..... APPELLANT**

**AND**

**MOHAMED ABBAS SOMJI ..... 1<sup>ST</sup> RESPONDENT**

**MEHBOOB ALIBHAI ..... 2<sup>ND</sup> RESPONDENT**

**JITIHADA AGENCIES LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**EZEKIEL MKIMINZA T/A AUTOLAND AUCTIONEERS .... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This is a Ruling over an Application dated 18/05/2024. The prayers sought are as follows: -
  - a. Spent
  - b. That there be an interim injunction order restraining the Defendants/ Respondents by themselves, agents, servants and or any person acting under the authority of Defendants from interfering with the Appellants tenancy, evicting, interfering with a quiet possession, levying distress against the plaintiff and/or proclaiming plaintiff's goods in the suit property hearing pending the outcome of the appeal in HCCA No. E126 of 2024- Shamshudin Tarmohammed v Mohammed Abbas Samji and 3 others.
  - c. That the status quo on the tenancy relationship between parties hearing immediately before delivery of judgment by the trial court be maintained pending outcome of this appeal
  - d. Costs



2. The grounds upon which the Application is made is that the Respondents have embarked on levying distress to the Plaintiff and demanding payment of rent, which is the subject of this appeal. The Appellant stated that if the orders sought are not granted, the appeal will be rendered nugatory.
3. The Respondent filed Replying Affidavit dated 13/06/2024. The Affidavit sworn by the 1<sup>st</sup> Respondent stated that the appeal chances of success was nil. The Appellant was said to owe the Respondents the amount as awarded in the judgment of the lower court. The Respondents being the successful litigants in the lower court need not be denied the fruits of their judgment.
4. The Respondents nevertheless stated that in the event the court was inclined to allow the application, the Appellant be ordered to deposit the decretal amount as security and the same be deposited in an escrow account in the names of both counsels on record.
5. The court directed that the application be canvassed by way of written submissions. Both parties complied by filing the rival submissions citing authorities in support of their submissions.

### **Analysis**

6. I have perused the Application, the response thereto and submissions filed by the parties.
7. This application is generally seeking for stay of execution of lower court judgment pending the hearing and determination of this appeal.
8. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:  

“No order for stay of execution shall be made under subrule (1) unless—

  - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
9. Further to the grounds on substantial loss and security, I understand that stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay underscores the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*. The court is thus enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
10. Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
11. Therefore, an Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely
  - (a) that substantial loss may result to the applicant unless the order is made,
  - (b) that the application has been made without unreasonable delay, and



- (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
12. This being a monetary decree, and the Respondent having given room to the Appellant to deposit the decretal amount as security, I find that his application ought to have been compromised at the earliest opportunity possible to avoid spending time on interlocutory proceedings and deal directly with the appeal, as this would save on court's time.
13. In the spirit of Section 1A and 1B of the *Civil Procedure Act* as stated herein above, and for expeditious disposal of the appeal, and considering the fact that the Respondent in the Replying Affidavit indirectly conceded to the application on condition that the decretal sum is deposited as security, the application is allowed as hereunder;

#### **Determination**

14. The upshot of the foregoing is that I allow the Notice of Motion dated 18/05/2024 as follows:
- a. That temporary injunction is hereby granted as per prayer no. (b) of the application on condition that Kshs. 1,645,000 be deposited in an escrow account in the names of the advocates on record within the next 45 days.
  - b. That in default of (a) above, the interim orders granted against the Respondent shall stand vacated.
  - c. That status quo do issue as per prayer no. (c) of the application, on condition that there is compliance of order (a) above on deposit of the decretal sum.
  - d. Costs shall abide the outcome of the Appeal.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 3<sup>RD</sup> DAY OF APRIL, 2025.**

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**F. WANGARI**

**JUDGE**

In the presence of:-

Mr. Kioko Advocate for the Appellant/ Applicant

N/A by the Respondent.

M/S Salwa, Court Assistant

