



**Ahmed t/a Air Time Business Solutions v Celtel Kenya Limited (Civil Case 661 of 2007) [2025] KEHC 6865 (KLR) (Commercial and Tax) (16 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6865 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 661 OF 2007  
RC RUTTO, J  
MAY 16, 2025**

**BETWEEN**

**NASSER AHMED T/A AIR TIME BUSINESS SOLUTIONS ..... PLAINTIFF**

**AND**

**CELTEL KENYA LIMITED ..... DEFENDANT**

**RULING**

1. Before this Court for determination is a Notice of Motion dated 20<sup>th</sup> July 2023, seeking a stay of execution of the entire judgment delivered by Hon. Lady Justice Wilfrida A. Okwany on 13<sup>th</sup> July 2023, together with all consequential orders, pending the hearing and determination of the intended appeal, upon the provision of a bank guarantee as security.
2. The Application is premised on the grounds that the applicant is dissatisfied with the judgment delivered on 13<sup>th</sup> July 2023, which condemned it to pay Kshs. 40 million together with interest and costs. The Applicant contends that this is a colossal sum considering its current financial circumstances, and this would significantly impact its trading capital.
3. The dispute arose from the termination of a distribution agreement between the parties. The validity of the termination was challenged. In a prior ruling dated 27<sup>th</sup> May 2008, Hon Mr. Justice Kimaru (as he then was) made a determination on the validity of the termination notice, and that decision was not appealed against. The Applicant submits that the judgment delivered by Hon. Lady Justice Okwany contradicts the earlier findings of Hon. Mr. Justice Kimaru and also dismissed the Applicant's counterclaim.
4. The Applicant further contends that the Plaintiff/Respondent is no longer operating in Kenya and has no known attachable assets within the jurisdiction, as he is currently based in Mozambique. The Applicant avers that should execution issue, it would be extremely difficult to recover the decretal sum



- in the event the intended appeal succeeds. It is also contended that the Respondent has commenced execution proceedings by seeking to draw funds held at HFCK. The Applicant maintains that the intended appeal is arguable and raises substantial issues, and that it stands to suffer irreparable loss if the subject matter of the suit is not preserved pending the hearing and determination of the appeal.
5. The application was opposed by the Respondent through a Replying Affidavit sworn on 20<sup>th</sup> September 2023 . In summary, the Respondent deposed that he is a businessman of means, with vast business interests both within and outside the jurisdiction of the Court. He stated that the sum of Kshs.10,000,000 sought to be recovered is the amount the Court had directed to be deposited with Fidelity Commercial Bank Limited as security pending the determination of the suit, with instructions that the said funds, together with any interest accrued, be released to the successful party in the claim.
  6. The Respondent contends that since the Court dismissed the Applicant's counterclaim, there is no positive order capable of being stayed, and therefore, the Applicant cannot seek a stay of the order directing release of the said funds to the Respondent. He further stated that the ruling delivered by Hon Mr Justice Kimaru on 27<sup>th</sup> May 2008 was not only interlocutory in nature but also rendered per incuriam. The Respondent also averred that, contrary to the Court's directions for an audit of the parties' accounts, the Applicant failed to comply, resulting in the appointed auditor being unable to prepare an audit report. Moreover, since the sum of Kshs.10,000,000 is held in a joint interest-earning account, its release requires the joint signatures of the parties' advocates, which the Applicant's counsel has refused to provide despite a court order.
  7. The Respondent asserts that the Applicant has not demonstrated any real prejudice it stands to suffer if stay of execution is not granted. He therefore prays that the Court orders the immediate and unconditional release of the Kshs.10,000,000 to him. However, he notes that since the Applicant has offered to furnish a bank guarantee as security for the issuance of stay orders, should the Court be inclined to grant the stay, it should direct the Applicant to pay the decretal sum of Kshs. 15,000,000 and deposit the balance in an interest-earning joint account in the names of the parties' advocates pending the hearing and determination of the appeal.
  8. In its Supplementary Affidavit sworn on 2<sup>nd</sup> October 2023, the Applicant confirmed that it has filed Civil Appeal No. E624 of 2023, which is scheduled to be heard together with the earlier appeal, Civil Appeal No. E442 of 2020. The Applicant reiterated that the sum of Kshs. 10,000,000 was a guarantee issued by the bank to secure repayment of goods supplied to the Plaintiff/Respondent. It further stated that the trial court found the Respondent to be indebted to the Applicant in the sum of Kshs.17,897,046.23 but failed to enter judgment in favour of the Applicant as sought in its counterclaim, thereby necessitating the appeal.
  9. The Applicant argued that it would serve the interests of justice for the deposited sum to be maintained with Housing Finance until the final determination of the pending appeals. It further contended that the trial court failed to consider material evidence adduced by the Respondent regarding his performance in the months of October, November, and December 2007. On the issue of the audit, the Applicant averred that the allegation that it frustrated the audit process was not supported by the evidence on record, yet that finding underpinned the entire judgment and was the sole reason a punitive decision was rendered against it. The Applicant asserted that the Court ought to have entered judgment for the admitted sum of Kshs.17,897,046.23, rather than dismissing its counterclaim in its entirety.
  10. Pursuant to the directions issued by this Court, stay of execution was granted pending the hearing and determination of the application and parties filed written submissions. The Applicant filed their submissions dated 25<sup>th</sup> October 2023 and further submissions dated 27<sup>th</sup> November 2023, while the Respondent's submissions are dated 14<sup>th</sup> November 2023.



### **Applicant's Submissions.**

11. The Applicant began its submissions by giving a brief factual background of the case.
12. While relying on the cases of National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another [2006] eKLR and Abdinasir Yasin Ahmed & 2 Others v Ahmed Ibrahim Abass & 2 Others [2014] eKLR, the Applicant submitted that Section 112 of the *Evidence Act* places the burden on the Respondent to demonstrate that he has in his possession sufficient funds or attachable assets within Kenya to satisfy the decretal sum. The Applicant argued that there is no means of verifying the authenticity of the printout allegedly sourced from a third party's website, which was adduced to show that the Respondent remains a going concern. It was further submitted that the said printout does not resolve the concerns raised regarding the Respondent's financial ability to refund the decretal amount if the appeal succeeds. Consequently, the Applicant expressed apprehension that the Respondent may transfer the decretal sum outside the jurisdiction, thereby frustrating any claim for refund.
13. The Applicant submitted that it has already filed Civil Appeal No. E624 of 2023 and is currently awaiting directions. It stated that the Memorandum of Appeal raises fifty-one (51) substantial grounds and/or questions of law that warrant the intervention of the Court of Appeal. The Applicant further submitted that it is willing to furnish the court with a bank guarantee from a reputable financial institution as security for the decretal sum of Kshs.30,000,000 within such reasonable period as the court may direct. It also proposed that the sum of Kshs.10,000,000 currently held in the joint account at Housing Finance Company of Kenya (HFCK) remain there pending the outcome of the appeal.
14. In its further submissions, the Applicant relied on the case of Gitahi & Another v Warugongo [1988] KLR to assert that the Court of Appeal has previously accepted a bank guarantee as an acceptable mode of securing a decree. The Applicant argued that the appeal would be rendered nugatory if the decree were to be executed, particularly given that it has presented evidence showing that the Respondent has relocated outside Kenya and would be unable to refund the decretal amount. Citing the case of Ameli Inyangu & Partners v Millennium Management Limited [2020] KEHC 6776 (KLR), the Applicant submitted that if the Respondent is allowed to execute the decree, there would be nothing preventing him from exporting the proceeds or permanently leaving the jurisdiction of the court.
15. The Applicant concluded its submissions by urging the court to allow the application.

### **Respondent's Submissions.**

16. The Respondent submitted that the main issue for determination is whether the Applicant has satisfied the conditions for the grant of stay of execution of the judgment delivered by Hon. Justice Wilfrida A. Okwany on 13<sup>th</sup> July 2023.
17. While relying on the case of Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] KLR 410, the Respondent submitted that the Applicant has failed to discharge the burden of proving the substantial loss it allegedly stands to suffer. It was argued that the Applicant merely asserts that the immediate recovery of the decretal sum will "make a big dent" in its trading capital, without providing adequate or credible evidence in support of that claim. The Respondent further relied on the cases of Samvir Trustee Limited v Guardian Bank Limited [2007] KEHC 2438 (KLR) and Ameli Inyangu & Partners Advocates v Millennium Management Limited [2020] KEHC 6776 (KLR), to submit that the Applicant's failure to satisfy the prerequisite of demonstrating substantial loss, in itself, is sufficient ground to dismiss the present application.



18. The Respondent further submitted that the court cannot stay the order for the release of the sum of Kshs. 10,000,000 together with accrued interest, as the dismissal of the counterclaim constitutes a negative order which is not capable of being stayed. In support of this position, the Respondent relied on the case of Charles Mwangi Gitundu v Charles Wanjohi Wathuku [2021] KEHC 1829 (KLR).
19. With respect to the award of damages for loss of business amounting to Kshs.30,000,000, the Respondent submitted that the Applicant is misleading the court, as he is a businessman of substantial means with extensive business interests within the jurisdiction of the court, and is therefore capable of refunding the decretal amount. The Respondent further submitted that the official Safaricom and Samsung websites list his businesses among their official dealerships/outlets in Kenya. Printouts of these listings were produced and marked as annexures “NA1” and “NA2” to his affidavit. The Respondent emphasized that his business is a going concern.
20. The Respondent further submitted that the appeal before the Court of Appeal has no chance of success, as the Honourable Lady Justice Okwany rendered her decision based on the binding precedents from the Court of Appeal and the guiding decision of the High Court.
21. Regarding the issue of security, the Respondent submitted that, in the unlikely event that the court is inclined to grant the Applicant’s prayer, then the Applicant should be ordered to pay him a portion of the decretal sum amounting to Kshs.15,000,000, with the balance being deposited in an interest-earning account in the joint names of the parties’ advocates, pending the hearing and determination of the appeal.
22. In conclusion, the Respondent submitted that the application does not lay a basis for exercise of discretion by the court in favour of the Applicant and ought to be dismissed with costs, to allow the Respondent execute and enjoy the fruits of its judgment.

#### **Analysis and Determination.**

23. I have considered the rival affidavits by parties and submissions made in respect of the motion and it is my view that the only issue for determination that is, Whether the court should grant a stay of execution of the judgment entered on 13<sup>th</sup> July 2023 pending the hearing and determination of the appeal filed in the Court of Appeal.
24. The principles upon which the court may stay the execution of orders appealed from are well settled. Refer to Order 42 Rule 6 of the Civil Procedure Rules. Under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:
  - a. Substantial loss may result to him unless the order is made;
  - b. That the application has been made without unreasonable delay; and
  - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
25. These principles were enunciated in Butt vs Rent Restriction Tribunal [1979] eKLR where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
  - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.



- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
26. On the first condition, the principle requires the Applicant to clearly state and demonstrate what loss, if any, they stand to suffer if the decretal sum is paid to the Respondent. In *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -
- “...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means...”
27. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:
- “Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”
28. The Applicant contends that the Respondent has already initiated the process of execution and will proceed with the same unless this Honourable Court issues an order for stay of execution. The Applicant argues that it will suffer substantial loss and the appeal will be rendered nugatory if stay is not granted. It maintains that the Respondent’s financial standing is uncertain, and that he is unlikely to refund the decretal sum if the same is paid out, to the Applicant’s detriment. The Respondent, on the other hand, refutes these claims and states that, contrary to the Applicant’s allegation that he no longer resides in Kenya as he has relocated to Mozambique, he is a man of means with established business interests within the jurisdiction of the court. The Respondent further asserts that the Applicant has failed to demonstrate the prejudice it would suffer should the sum of Kshs.10,000,000/- be released to him.
29. It is incumbent upon the Applicant to establish reasonable grounds to demonstrate that the Respondent is incapable of refunding the decretal sum. Upon such demonstration, the evidential burden then shifts to the Respondent to rebut the claim by proving his ability to make the refund if required. *Odunga J. in George Kimotho Ilewe Annastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)* [2021] KEHC 7873 (KLR) stated that:-
- “It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant



and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant's business."

30. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent. In this case the Respondent stated that he is a businessman of substantial means with extensive business interests within and beyond the jurisdiction of the court, and is therefore capable of refunding the decretal amount if the need arises. Despite stating this, he neither provided any evidence to demonstrate his financial capabilities, nor swore an affidavit of means. His reference to being listed as a Safaricom and Samsung agent on the website is not of itself sufficient to demonstrate his means as the listing was not accompanied by any financial implication. The Court also observes that, the Applicant too has not sufficiently demonstrated the substantial loss it stands to suffer. It just stated that the payment of the decretal sum would significantly impact its trading capital.
31. This Court therefore finds that by merely asserting that the Respondent's financial status is unknown the Applicant has not shown or demonstrated the substantial and/or irreparable damage and loss they will suffer. The ground thus fails.
32. On the second condition, whether the application was made without reasonable delay, judgment herein was delivered on 13<sup>th</sup> July 2023 and temporary stay for 30 days was granted. The instant application was filed on 20<sup>th</sup> July 2023 which is within a reasonable period. As such, the application filed timeously.
33. On the third condition on security for costs, the Applicant ought to satisfy the condition of security. Notably, in his application, the applicant stated that he is willing to offer security in the form of a bank guarantee if called upon by this Honourable Court to do so. On the other hand, the respondent states that should the court be inclined to grant the Applicant's prayer, then the Applicant should be ordered to pay him a portion of the decretal sum amounting to Kshs 15,000,000, with the balance being deposited in an interest-earning account in the joint names of the parties' advocates, pending the hearing and determination of the appeal.
34. The Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, stated that:-

"Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay."
35. From the foregoing, it is evident that the issue of security and especially its form and adequacy is discretionary and it is upon the court to determine the same.
36. It is important to note that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat* [2013] eKLR where the court upheld the decision of *Portreizt Maternity vs James Karanga Kabia* Civil Appeal No. 63 of 1991 and stated that: -

"That right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."



37. From the above analysis, it is my considered view that on a balance of interests, since the applicant is willing to deposit the decretal sum, I am convinced that the fair balance would be for the respondent to be allowed to enjoy part of the decretal sum while the applicant provides a bank guarantee from a reputable bank for the remaining sum of the decretal amount.
38. In the premise, I direct that: -
- a. There be a stay of execution pending the hearing and determination of the appeal before the Court of Appeal on condition that the sum of Kshs.10, 000, 000/=, being held in the joint account by the parties together with the accrued interest be released to the respondent.
  - b. The Applicant to provide a valid bank guarantee for the remainder of the decretal sum. The bank guarantee to be provided within the next 30 days from the date hereof and in default, the application for stay shall stand dismissed.
  - c. The costs of the application be borne by the Applicant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF MAY, 2025.**

**RHODA RUTTO**

**JUDGE**

