



**Odyssey Capital Limited v Mburu & another (Miscellaneous Application E833 of 2023)
[2025] KEHC 6715 (KLR) (Commercial and Tax) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E833 OF 2023
JWW MONG'ARE, J
MAY 26, 2025**

BETWEEN

ODYSSEY CAPITAL LIMITED PLAINTIFF

AND

DAN GAIKU MBURU 1ST RESPONDENT

ANN WAMAITHA KANYUI 2ND RESPONDENT

RULING

1. On 26th July 2024 the Applicant moved this court by a Certificate of Urgency Notice of Motion application brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 42 Rule 6 of the [Civil Procedure Rules](#) seeking the following orders:-
 1. Spent
 2. Spent
 3. Pending the hearing and determination of the Appeal, this Honourable Court be pleased to stay the execution and enforcement of the Ruling and Orders of this court issued on 24th June 2024 in and any other consequential decree that ensue therefrom.
 4. The cost of this application be provided for.
2. The application is supported by the grounds set out on its face and the supporting and supplementary affidavits sworn by Michael Maina on 25th July 2024 and 25th September 2024 respectively. The application is opposed and the Respondents have filed a replying and supplementary affidavits sworn by Dan Gaiku sworn 19th August 2024 and 9th October 2024 respectively. Both parties have filed written submissions which I have carefully considered.



3. Order 42 Rule 2 of the *Civil procedure Rules* provides as follows:-

“6. Stay in case of appeal [Order 42, rule 6]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) 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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

4. The principles that guide the court in an application for stay of execution pending an appeal are grounded in Order 42 Rule 6 (2) of the Civil Procedure Rules. In order to succeed, the Applicant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application has been brought without undue delay and lastly, the Applicant must give such



security as the court may order for the due performance of the decree or order as the case may be. These principles have been buttressed by decisions of superior courts where it was added that the power to order stay of execution is discretionary and must be exercised in such a way that the appeal is not rendered nugatory and that this discretion is based on the facts and circumstances of each case (see *Halai & Another v. Thornton & Turpin* [1990] KECA 65 (KLR) and *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR)).

5. It is not in dispute that by a ruling delivered by this court on 24th June 2024 a ruling upholding the arbitral award of Kshs.773,679,325.53/=. The Respondents have admitted that indeed it is true that they have commenced preparations for execution of the decree emanating from the said judgment and urge the court to only allow this application if the decretal amount now standing at Kshs.2,252,617,475.72/= is deposited in an escrow account in the joint names of the Advocates for the parties. On their part the Applicants argue that the initial dispute was as a result of an investment of Kshs. 12.8 million shillings and they dispute the award and the accrued interest hence their appeal.
6. Indeed, the Applicants have offered as a security the deposit of the share certificate which they allege that will entitle the Respondents to own equity in the Applicant company. They further allege that the company valuation is Kshs.800,000,000.00/= and any order from the court to deposit the sum of Kshs.2,252,617,475.72/= as security will not only cripple the operations of the Applicant but will expose it to a litany of litigation and eventually lead to insolvency as the business model of the Applicant is heavily pegged on micro lending, offering short term credit and investment which are both secured and unsecured.
7. I have carefully considered the application before this court and note indeed the same was brought without inordinate delay as the ruling from which the stay application emanates from was delivered on 24th June 2024 while this application was filed on 26th July 2024. I further note from the pleadings the Respondent has deponed that it holds a decree for the sum of Kshs.2,252,617,475.72/= as at the time of filing this application. I agree with the Applicant that the said sum is colossal by any standard and if the Applicant is directed to pay the same at this stage of the proceedings, it is indeed likely to occasion it financial hardship.
8. Be that as it may, the court is alive to the fact that the Respondents have a decree and a legitimate expectation to enforce the said decree and recover their entitlement legally. The power granted to the court in making an order for security for costs pending an appeal albeit discretionary must therefore be exercised judiciously to ensure that the same does not fetter a party's access to justice as guaranteed by the *constitution*. I have therefore considered the interest of the litigating parties and also the form of security being proffered by the Applicants to this suit. I note that the supplementary award being challenged is for the sum of Kshs.773,679,325.53/=. It is difficult to persuade a party holding a money decree to exchange the same with a share certificate which amounts to ownership of the equity in the Applicant company and without a valuation report it is difficult for the court to determine the value of the said equity in monetary terms. I therefore find it is only proper that the Respondent be assured that there is made available a sufficient security should the appeal collapse. I therefore find that a deposit of 50% of the amount in the arbitral award is sufficient security in the circumstances. I direct therefore the Applicant do deposit in an interest earning account in the joint names of the advocates for the parties the said 50% being Kshs.386,839,662.76/=. The said sum of money should be deposited within 60 days from the date of this ruling. In the alternative, the Applicant may provide a bank guarantee to the Respondents for the said sum of Kshs.386,839,662.76/= from a reputable local bank. The security so provided shall be held for the period of the appeal.



9. Costs follow the event. The application before this court though successful is conditional upon the satisfaction of some conditions set out by the court. I therefore find it is only proper that each party bear their own costs of this application. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MAY 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Nimo Adan holding brief for Mr. Guto Mogere for the Applicant.

Mr. Okwach for the Respondent.

Amos - Court Assistant

