



**Pentagon Agencies Limited v Mutemi (Civil Appeal E406 of 2025)
[2025] KEHC 12224 (KLR) (Civ) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12224 (KLR)

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

CIVIL

CIVIL APPEAL E406 OF 2025

TW CHERERE, J

MAY 15, 2025

BETWEEN

PENTAGON AGENCIES LIMITED APPELLANT

AND

NICODEMUS MALUKI MUTEMI RESPONDENT

RULING

The law exists not to punish, but to ensure fairness, and it is through the careful balancing of competing rights that true justice is achieved.”

1. The Appellant, by Notice of Motion dated 04th April 2025, brought under Articles 50 and 159(2)(d) & (e) of *the Constitution*, Sections 1A, 1B, 3A, and 63(e) of the *Civil Procedure Act*, and Order 22 Rule 22, Order 42 Rule 6, and Order 51 Rules 1 and 15 of the Civil Procedure Rules, seeks the following orders:
 1. A stay of execution of the judgment and decree in Milimani CMCC No. E6051 of 2022 pending the determination of the appeal;
 2. That costs of the application be provided for.
2. The application is supported by the affidavit of Stephen Waigwa Murage, sworn on 04th April 2025, and is premised on the grounds that:
 1. The Appellant is aggrieved by the judgment in MILIMANI MCCC E6051 OF 2022
 2. Appellant has filed this appeal which has high chances of success



3. The Appellant stands to suffer substantial loss as the decretal sum is substantial
 4. There is an imminent danger of execution
 5. The court has discretion to order stay of execution without requiring the deposit of security
3. The Respondent opposed the application through a Replying Affidavit sworn on 11th April 2025, asserting that:
1. The appeal has no reasonable prospect of success;
 2. The Appellant has failed to meet the requirements for stay under Order 42 Rule 6;
 3. No sufficient demonstration of substantial loss has been made;
 4. The Appellant is not willing to provide adequate security.

Issues for Determination

4. I have considered the application in light of the affidavits on record and the following issues arise for the court's determination:
 1. Whether the application was filed without unreasonable delay;
 2. Whether the Appellant has demonstrated substantial loss;
 3. Whether the appeal raises arguable legal issues;

Analysis and determination

1. Timeliness
5. The application was filed promptly on 04th April 2025, shortly after judgment was delivered on 12th March 2024. The court is satisfied that the Appellant has complied with the requirement in Order 42 Rule 6(2)(a), which mandates that the application for stay be filed without unreasonable delay.
- 2) Substantial Loss
6. The Appellant contends that execution of the decretal sum plus costs and interest will result in substantial loss. However, the Appellant has not made any allegation or provided any evidence to suggest that the Respondent would be unable to refund the decretal amount if the appeal is successful. As was stated in *Machira t/a Machira & Co. Advocates v East African Standard (No. 2)* [2002] KLR 63, it is not enough for an applicant merely to assert that the decretal sum is substantial; the applicant must prove that execution of the decree would render the appeal nugatory.
3. Whether the appeal raises arguable legal issues
7. The Appellant has annexed a memorandum of appeal that raises an important legal issue: that the trial court erred in presuming automatic indemnity by a third party based solely on the issuance of a Third Party Notice.
8. In *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, the Court of Appeal held that one arguable issue is sufficient to justify granting stay pending appeal. The present appeal clearly raises a bona fide legal question that warrants consideration at the appellate level. Consequently, the



court finds it prudent to grant conditional stay of execution pending the hearing and determination of the appeal.

3. Security for Due Performance
9. Pursuant to a prior court order for conditional stay, the Appellant has deposited KES 200,000 in court as security. The Appellant has complied with the previous order, which was made to protect both parties' interests. In line with the principle outlined in *Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another* [2018] eKLR, which emphasizes the need to strike a balance between the interests of the parties, the court orders the Appellant to top up the deposit to KES 400,000.

Disposition

10. Accordingly, the court issues the following orders:
 1. A stay of execution of the judgment and decree in Milimani CMCC No. E6051 of 2022 is hereby granted pending the hearing and determination of the appeal, on condition that the Appellant shall deposit into court a further KES. 200,000 to top up the existing deposit to KES 400,000
 2. In default of compliance with order (1) above, the stay order shall lapse automatically
 3. Costs of the application shall abide the outcome of the appeal.
 4. Mention before the Deputy Registrar on 26th June 2025 to confirm the filing and the service of the record of appeal

DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Abdirizack

For Appellant - Mr. Kaburu for Ngari & Kaburu Advocates

For Respondent - Mr. Nyengenyne for Calistus & Co. Advocates

