



REPUBLIC OF KENYA



**Technical University of Mombasa Enterprises Limited v Milmar Marketing & Management
(Commercial Appeal E018 of 2024) [2025] KEHC 12103 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL APPEAL E018 OF 2024**

F WANGARI, J

MAY 8, 2025

BETWEEN

**TECHNICAL UNIVERSITY OF MOMBASA ENTERPRISES
LIMITED APPELLANT**

AND

MILMAR MARKETING & MANAGEMENT RESPONDENT

RULING

1. For ruling is the Appellant's application dated 11th November, 2024 brought under the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules* and all other enabling provisions of the law. It seeks as hereunder: -
 - a. Spent;
 - b. Spent;
 - c. That this Honourable Court be pleased to order stay of execution of the decree issued on the 7th day of November, 2024 and all other consequential orders and proceedings thereof pending the hearing and determination of High Court Appeal No. E018 of 2024, Technical University of Mombasa Enterprises Limited v Wesonga & Associates Advocates; and
 - d. That costs of the application be provided for.
2. The grounds in support of the application are that the court delivered its judgement on 30th September, 2024 where it was ordered to pay the Respondent a sum of Kshs. 725,000/=. It contends that it entered appearance, filed a response, appeared for pre-trial through an advocate and expressed its challenges to the pleadings and access to the CTS but was neither served with a hearing notice nor notice of judgement.



3. It states that it preferred an appeal on 3rd October, 2024 against the Small Claims Court judgement delivered on 30th September, 2024 being High Court Appeal No. E018 of 2024, *Technical University of Mombasa Enterprises Limited v Wesonga & Company Advocates*. It goes ahead to state that it made an application under certificate of urgency seeking stay of execution before the Small Claims Court on 10th October, 2024 and the same was determined on 6th November, 2024. The Small Claims Court is said to have directed the Applicant to make the application for stay before this court as it (Small Claims Court) was functus officio.
4. It is the Appellant's contention that the decree on the matter was issued on 7th November, 2024 and with the decree, the Respondent has proceeded to instruct Alfajiri Auctioneers to attach its goods which in essence belongs to a public entity, the Appellant being a subsidiary to a public institution to wit Technical University of Mombasa by dint of *State Corporations Act*, Chapter 446, Laws of Kenya.
5. The Appellant's position is that unless the stay orders are issued, it stand to suffer irreparable harm as execution shall proceed against public property. Further, it states that the actual identity of the Respondent is unknown as the Respondent is both the advocate on record and a Legal Representative of a Claimant there is imminent danger that public property will be lost and shall be impossible to recover the same thus rendering the appeal nugatory. It concludes that no prejudice shall be suffered by the Respondent if the orders are granted.
6. The application is supported by the affidavit sworn by one Bernard Nyakundi, the Appellant's Managing Director. It restates more or less the grounds in support of the application and thus I see no usefulness in rehashing the same.
7. The application is opposed through a replying affidavit dated 21st November, 2024 sworn by one Clement Oriang Ombok Sheikh, the Respondent's sole proprietor. He deposes that he authorized the firm of E.E. Wesonga & Associates to bring a claim on his behalf in the Small Claims Court at Mombasa. The claim was heard and judgement entered in his favour for a sum of Kshs. 725,000/=.
8. He states that the Appellants raised the issue of his representation and the same was thoroughly canvassed by the Small Claims Court and the same determined through the judgement delivered on 30th September, 2024. He further states that the Small Claims Court not being a body fettered by the strict rules of evidence and procedure, the firm of Wesonga & Associates was properly on record.
9. Making reference to Article 159 of the *Constitution*, he states that the Appellant's application and appeal offends the cited Constitutional provision as according to him, the application is not brought on any merit but on a technicality of representation in a Small Claims Court. He further avers that the application is an afterthought as the Appellant is forum shopping for favourable orders despite the Small Claims Court declaring itself and that no proper defence was put on record by the Appellant.
10. He further deposes that the Memorandum of Appeal subject to which stay is being sought is fatally defective and cannot be cured since the Memorandum of Appeal dated 3rd October, 2024 at prayer (b) seeks for orders against judgement by Senior Principal Kadhi, a matter he never participated in. He adds that the intended appeal is not only misconceived but also lacks merit and has no chance of success save to engage the court in an academic exercise since the defence placed before the Small Claims Court were mere denials.
11. He concludes that the Appellant's aim is to frustrate him to give up on his dues for which he is rightfully entitled since his machines are still being used by the Appellant who cannot claim equitable remedy while there is a continuing breach. Lastly, the Respondent states in the event the court is inclined to grant stay, the decretal amount ought to be deposited in court pending the hearing and determination



of the appeal. Otherwise, his position is that the application is an abuse of court and the same ought to be dismissed.

12. Directions were given to have the application canvassed by way of written submissions. The Appellant filed its submissions dated 22nd November, 2024. In a nutshell, the Appellant addresses the conditions precedent to grant stay of execution among them substantial loss, delay and security. The Respondent opted to rely on his response and thus did not file any submissions.

Analysis

13. This Court has carefully considered the application as a whole, the replying affidavit, Appellant's submissions, the authorities cited and the law and the only issue that falls for the Court's determination is whether this court should grant stay of execution of the Judgment/Decree dated 7th November, 2024 issued in Mombasa SCCCOMM No. E670 of 2024.

14. Stay of Execution is provided under Order 42 Rule 6 of the [Civil Procedure Rules 2010](#) as follows: -

- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 sub rule (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.”

15. The three conditions to be fulfilled can therefore be summarized as follows: -

- a. that substantial loss may result to the applicant unless the order is made;
- b. application has been made without unreasonable delay; and;
- c. security as the court orders for the due performance.

16. These principles were enunciated in [Butt v Rent Restriction Tribunal](#) [1979] eKLR, 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.
17. Having set out the above, I now turn to put the Appellant's application in context of the conditions for stay. On substantial loss, it is submitted that the Appellant being a subsidiary of the Technical University of Mombasa is a public entity hence under the *State Corporations Act*. As such, if execution is allowed to continue, public property is likely to be lost.
18. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court expressed itself as hereunder: -
- “...No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory...”
19. The Appellant raised the issue of the Respondent's ability to pay back the decretal sum in the event it is ordered to pay him. I note that the Respondent in his replying did not indicate his ability to pay back the decretal sum in the event the appeal succeeds. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (2006) eKLR, the Court of Appeal while addressing this issue held as follows: -
- “...Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge...”
20. Guided by the above authorities and in the absence of the requisite proof from the Respondent that he is a person of means, I find that the Appellant has satisfied this court that it will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.
21. On undue delay, the judgement subject of the appeal was delivered on 30th September, 2024. The appeal was filed on 3rd October, 2024, that is, three (3) days after. Section 38 of the *Small Claims Court*



Act as well as Rule 30 of the Rules thereunder are silent on the timelines to lodge an appeal from the Small Claims Court.

22. However, Rule 30 of the Small Claims Rules states that a person aggrieved by the judgement or order of the court may pursuant to section 38 of the Act appeal to the High Court in accordance with Order 42 of the Civil Procedure Rules. The parent Act to the Civil Procedure Rules is the Civil Procedure Act which at section 79G provides as follows: -

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: -

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

23. The Small Claims Court is a subordinate court and as such, I have no hesitation to find that the period to file an appeal from the Small Claims Court to the High Court is thirty (30) days. Having found as herein, I find that the application was timeously filed.
24. On the issue of security, I note that the Appellant has not offered any form of security but sought to ride on the fact that it is a public entity as per the State Corporations Act. As such, it is seeking that the requirement for security be waived.
25. In Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd [2019] eKLR it was held that: -

“...The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls. Further, Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal...”

26. It is not in dispute that a debt is already owed. However, the Appellant wishes to ride on the issue of being a public entity. This is not an idle argument and as such, this court has a duty to consider whether this argument holds water. Order 42 Rule 8 of the Civil Procedure Rules states as follows: -

“No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.”

27. In order to resolve the issue of security, it is imperative to answer the question whether the Appellant falls within the definition of government. As correctly submitted by the Appellant, it is a subsidiary



of the Technical University of Mombasa which is a creature of an Act of Parliament and falls under the State Corporations Act.

28. This being the case, in the event execution is allowed to proceed, will the Respondent be required to comply with section 21 of the Government Proceedings Act and Order 29 of the Civil Procedure Rules?

29. This is answered by the case of Greenstar Systems Limited v Kenyatta International Convention Centre (KICC) & 2 others [2018] eKLR. Technical University of Mombasa is created pursuant to the Universities Act, No. 42 of 2012.

30. In Greenstar Systems Limited (supra), the court having considered the definition of a state corporation under section 2 of the State Corporations Act proceeded to hold thus: -

“...The Applicant does not fit within the confines of this definition. The Applicant is a tourism agency established under the Tourism Act. It is not a Government department. The fact that the Applicant is a State Corporation cannot lead to the inference that it is a government department as envisaged by the Government Proceedings Act...”

31. I find succor in the above decision and proceed to hold that the Appellant herein is not among those contemplated under Order 42 Rule 8 of the Civil Procedure Rules. Having arrived at this conclusion, the request to waive security is thus declined.

32. On costs, the court reserves discretion on awarding the same. This being an interlocutory application, costs shall abide the outcome of the appeal.

33. The upshot of the foregoing is that the court renders itself as hereunder: -

a. The Notice of Motion Application dated 11th November, 2024 has merit and it is allowed in the following terms: -

i. Stay of execution of the Judgement/Decree issued on 7th November, 2024 is hereby allowed on terms that the Appellant furnishes security in the sum of Kshs. 725,000/= within the next forty-five (45) days from the date hereof;

ii. The Appellant to compile, file and serve a Record of Appeal within sixty (60) days from the day hereof; and

iii. In default of either (i) or (ii) above, the Notice of Motion Application dated 11th November, 2024 shall stand dismissed and the Respondent shall be at liberty to proceed with execution.

b. Costs shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MAY 2025.

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F. WANGARI

JUDGE

In the presence of;

N/A for the Appellant;

Mr. Wesonga Advocate for the Respondent;



Ms. Norah, Court Assistant

