



REPUBLIC OF KENYA



**Foremost Limited & another v Premier Bank Limited & another (Civil Suit 101 of 2018) [2025] KEHC 12127 (KLR) (9 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12127 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 101 OF 2018  
F WANGARI, J  
JUNE 9, 2025**

**BETWEEN**

**FOREMOST LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**KASSAM ABDULKADER DADA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PREMIER BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**GARAM INVESTMENTS AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Applicant/ Plaintiff's suit was dismissed with costs to the Respondents/ Defendants. The Applicant filed a Notice of Motion applications dated 13/11/2024 seeking stay of execution orders against the Judgement of this court delivered on 16/10/2024.
2. The Application is supported on grounds inter alia that the Applicant was dissatisfied with the judgement of the court, and intends to file an appeal which has high chances of success.
3. The Respondent opposed the Application materially on the ground that the Applicant had not satisfied the conditions for grant of stay of execution, and that the grounds raised in the appeal are issues raised in the main suit and which were dismissed.
4. The application was canvassed by way of submissions. The Applicant complied by filing its submissions while the Respondent relied on the Replying Affidavit filed.

**Analysis**

5. I have analyzed the Application, response and the submissions and authorities filed in support and opposition to their respective positions. The issue for determination is whether the Appellant has demonstrated that the orders it seeks pending Appeal are merited.



6. 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.
7. . 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).
8. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”

9. In the instant case, the Applicant aver that they stand to suffer substantial loss. It was not stated what loss would be suffered if stay orders were not granted. The Applicant instead raised grounds upon which the intended appeal would be successful. This court is not sitting on appeal of its own orders. The issues being raised should be argued on appeal against the judgment of this court.
10. As much as the application was filed in time, the grant of stay of execution of judgement is discretionary. The court considers the fact that the conditions for stay granted pending the hearing and determination of this application were not complied with by the Appellant. I do agree with the Respondent that this application was brought in bad faith and meant to delay the execution of the judgment of this court.
11. The Appellant has not even lodged an appeal before the court of appeal. All that was lodged was the Notice of Appeal. In the event the appeal is lodged and the Appellant succeeds in the appeal, the Respondent has the capacity to compensate the Appellant for the loss suffered. I find that by denying the Appellant the orders sought for, no prejudice shall be occasioned upon the Appellant.

### **Determination**

12. In the circumstances this court makes the following Orders;



- a. That the application dated 13/11/2024 has got no merits and is hereby dismissed.
- b. Costs of the Application to abide the outcome of the intended Appeal if any.

It is so ordered

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9<sup>TH</sup> DAY OF JUNE, 2025.**

.....

**F. WANGARI**

**JUDGE**

In the presence of: -

N/A by the Applicant

Ms. Orenge Advocate h/b for Mr. Makori Advocate for the Respondents

Ms. Getrude, Court Assistant

