



**Miriti v Kamau & another (Commercial Appeal E212 of 2024)  
[2025] KEHC 8638 (KLR) (3 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8638 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL APPEAL E212 OF 2024  
JWW MONG'ARE, J  
JUNE 3, 2025**

**BETWEEN**

**LAWRENCE MWENDA MIRITI ..... APPELLANT**

**AND**

**DUNCAN KIMANI KAMAU ..... 1<sup>ST</sup> RESPONDENT**

**JAMES KURIA KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. On 30<sup>th</sup> September 2024, the Appellant moved this Honourable Court by a Notice of Motion application filed under a Certificate of Urgency and brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#); Order 22 Rule 5, Order 42 Rule 6, Order 10 Rule 11 and Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking the following orders:-
  1. Spent
  2. Spent
  3. Spent
  4. That the Honourable Court be ad is hereby pleased to stay Ruling entered on 1<sup>st</sup> August 2024 against the Appellant/Applicant herein in Civil Case Number E585 of 2022; Lawrence Mwenda Miriti versus Duncan Kimani Kamau and James Kuria Kamau pending the hearing and determination of the Appeal.
  5. That costs of this application be provided for.
2. The application is supported by the grounds set out on its face and the supporting affidavit of Lawrence Mwenda Miriti sworn on the 30<sup>th</sup> September 2024. It is opposed and the Respondents have filed a notice or Preliminary Objection dated 3<sup>rd</sup> December 2024 and a replying affidavit sworn by Duncan



Kimani Kamau on 21<sup>st</sup> January 2025. At the directions of the Court, both parties have filed written submissions which I have carefully considered.

3. I note from the record this application was inadvertently dismissed by the court leading to the Applicant to file an application for its reinstatement on 7<sup>th</sup> November 2024 that was compromised with the court directing that this application be reinstated and be heard on merit. Consequently, and since the Preliminary objection was on the filing of the second application that sought the order of reinstatement and the substantive prayers in the application of 30<sup>th</sup> September 2024, this court will not consider the Preliminary objection but will examine whether the application of 30<sup>th</sup> September 2024 is merited.
4. The Appellants have filed a Memorandum of Appeal dated 13<sup>th</sup> August 2023 in which they seek to appeal the decision of the trial court to award costs to the Defendants after the Plaintiff filed a Notice to withdraw the suit against the decision which order, according to the Appellant/Applicants was allowed with no orders as to costs. They argue that the application filed to review the said orders coming almost 4 months after the suit was marked as withdrawn was erroneous and that the court failed to consider that costs are awarded at the discretion of the court and not an automatic right of a party before the court. They argue that the award of costs against them will greatly prejudice them as having had the suit withdrawn with no orders as to costs, they did not anticipate the court to review its own decision almost two years later and condemn them to pay costs to the Defendants. They urge the court to allow the application for stay pending appeal, which appeal they consider has likelihood of success.
5. In opposing the application, the Respondents argue that since the appeal is against an order for costs, the appeal is unlikely to succeed as an order for costs is issued at the discretion of the court. The Respondents argue that the present application is aimed at denying them the costs of Kshs.136,300 that were properly awarded after due consideration of the matter by the court and that the applicant will not suffer any substantial loss if he pays the said costs. He further argues that he is a man of means and is capable of refunding the said costs should the Appellant succeed in his quest to overturn the decision of the court on the same and faults the applicant for not offering security for costs in line with the rules.
6. I have considered carefully the application as fled and the responses thereto. Order 42 Rule 6 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.”

7. I have considered carefully the averments in the application and noted the grounds set out by the Appellant in his Memorandum of Appeal. I am satisfied that the appeal raises pertinent issues for consideration by the court and it stands a high chance of success. I note that both the Memorandum of Appeal and the present application were filed without inordinate delay. I also note that the award of costs that is disputed is for the sum of Kshs.139,300 and by and large considering the subject matter of the suit from whence this dispute arose, is not substantial. I am persuaded that this is a case where the court can grant an order for stay pending appeal without requiring that the applicant furnish security for costs as the disputed award is one where the court made an order for costs. I also note from the averments by the Appellant and the Respondents; both affirm that they are men of means and will not be unable to pay the disputed sum if the appeal is defeated. I therefore find merit in the present application. The same is allowed. Costs of this application will abide the outcome of the main appeal. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 3<sup>RD</sup> DAY OF JUNE 2025**

.....  
**J.W.W. MONGARE**

**JUDGE**

In the presence of:-

1. Ms. Kyenze for the Appellant/ Applicant.
2. Mr. Oduor for the Respondent.
3. Amos - Court Assistant

