



**Leeuw v Mulie (Sued as the Executor and Legal Representative of the Estate of the Late Benhard Martens) & 4 others; Unen (Interested Party) (Civil Case 830 of 2021) [2025] KEHC 12651 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12651 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 830 OF 2021**

**F GIKONYO, J**

**JULY 31, 2025**

**BETWEEN**

**MATHILDA CORNELLA DE LEEUW ..... PLAINTIFF**

**AND**

**ROBERT MAX MULIE (SUED AS THE EXECUTOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE BENHARD MARTENS) ..... 1<sup>ST</sup> DEFENDANT**

**SABINE HENRIETTE MARTENS ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RYETS CONNEIE MEULDIJK ..... 5<sup>TH</sup> DEFENDANT**

**AND**

**GRIETJE ALBERTA VAN UNEN ..... INTERESTED PARTY**

**RULING**

1. This ruling determines two applications seeking a stay of execution pending the hearing and determination of an appeal against the judgment dated 29<sup>th</sup> January 2025, delivered on 3<sup>rd</sup> February 2025.
2. The underlying dispute involved the shareholding of Lulumizi Limited (the company). The court found that the plaintiff was allotted 98 shares in the company for a consideration of €50,231 advanced to the Late Bernhard Martens (the deceased).



3. The court also found that the Watamu property (LR. No. 8596) belongs to the company and that a portion of the property (the guest house) has been in continuous occupation by the plaintiff, due to the fact that she was a shareholder.
4. The court further noted that the main house was always in use by the deceased or his guests. The court found that the plaintiff had the right to live in and occupy the property. It dismissed the claim that she was living in the property as a tenant-at-will or licensee.

### **The 1<sup>st</sup> Defendant's Application**

5. The first application, by the 1<sup>st</sup> defendant, is dated 21<sup>st</sup> February 2024. It is supported by the annexed affidavit sworn by the 1<sup>st</sup> defendant on the same date. It also filed written submissions dated 11<sup>th</sup> April 2025.
6. The grounds are that the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants and the interested party, being aggrieved by the court's judgment dated 29<sup>th</sup> January 2025, have filed a notice of appeal dated 14<sup>th</sup> February 2024.
7. The 1<sup>st</sup> defendant highlighted that the dispositive part of the judgment, couched in mandatory terms, unfairly, unjustly and erroneously divests the Estate of the Late Bernhard Martens (the deceased) and its beneficiaries of 98% shareholding in (the company), and by extension, divests and deprives, the Estate and its beneficiaries of their right and interest in LR. No. 8596.
8. The 1<sup>st</sup> defendant argued that the applicants have arguable appeals. It also argued that if the stay is not granted, the Estate stands to suffer irreparable damage and loss as the plaintiff might proceed to enforce the terms of the judgment. It asserted that changes in the shareholding may affect the Watamu property, resulting in the detriment of the heirs of the Estate, who will not be able to recover Lulumizi Limited in its current status.
9. The 1<sup>st</sup> defendant highlighted that the status quo obtaining was that the plaintiff resides in the guest house while the 2<sup>nd</sup> defendant manages the main house, used as a holiday house. It posed that allowing the application would not prejudice the plaintiff as she would continue to reside on the suit property for the duration of the appeals.
10. The 1<sup>st</sup> defendant contended that the plaintiff has not demonstrated that she is a person of means and therefore, there is reasonable apprehension that the Estate would not be able to recover the suit property in the event that the appeal is successful.
11. The 1<sup>st</sup> defendant pointed out that during cross-examination, the plaintiff indicated that she retired in 1989 and that she sold her property in the Netherlands in the 1980s. Thus, the 1<sup>st</sup> defendant submitted that the plaintiff has no income that she has not disclosed that she has any properties that would enable them to pursue as a means of recovery in the event that the appeals succeed.
12. The 1<sup>st</sup> defendant relied on:-
  1. [\*Obadiab Mugambi v Joyce Ncoro\* \[2021\] eKLR](#)
  2. [\*Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others\* \[2013\] eKLR](#)
  3. [\*Apungu v Justinice Limited\* \[2024\] eKLR](#)
  4. [\*Equity Bank Limited v Taiga Adams Company Limited\* \[2006\] eKLR](#)
  5. [\*Xplico Insurance Company Ltd v Obsidion Investments Ltd & 4 others\* \[2019\] eKLR](#)
  6. [\*National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another\* \[2006\] eKLR](#)



7. [\*Rosengrens Ltd v Safe Deposit Centers Ltd\*](#) [1984] 3 All ER
8. [\*Ellen Wangari Mburu v Patrick Kinuthia Kiiga\*](#) [2021] eKLR
9. [\*Ochieng v Baya\*](#) (Miscellaneous Application E114 of 2023) [2024] eKLR

## **2<sup>nd</sup> Defendant and the Interested Party's Responses**

13. The 2<sup>nd</sup> defendant and the interested party support the 1<sup>st</sup> defendant's application. They filed replying affidavits sworn on 19<sup>th</sup> March 2025 and 12<sup>th</sup> March 2025 respectively. They also filed written submissions dated 8<sup>th</sup> April 2025 and 2<sup>nd</sup> April 2025 respectively.
14. The 2<sup>nd</sup> defendant averred that she is the daughter of the deceased, a shareholder in the company and that took care of the company's property upon the demise of the deceased. He indicated that he was also dissatisfied with the judgment. He exhibited a copy of its notice of appeal dated 17<sup>th</sup> February 2025 and Grounds of Cross Appeal, to support the position that its intended cross appeal raises arguable points with a good chance of success.
15. The 2<sup>nd</sup> defendant deposed that he is apprehensive that the plaintiff will take steps to change the board structure by changing current directorships and introducing new directors to convert or transfer the shares and sell the company property or portions thereof.
16. The 2<sup>nd</sup> defendant relied on [\*Antoine Ndiaye v African Virtual University\*](#) [2015] eKLR and [\*Gianfranco Manenthi Ltd and another v African Merchant Assurance Co. Ltd\*](#) [2019] eKLR.
17. The interested party averred that she was the common law wife and an heir of the deceased. She recounted the succession proceedings, which are still underway. She exhibited a copy of her draft memorandum of appeal, to support the position that her intended appeal has reasonable chances of success.
18. The interested party asserted that she stands to suffer substantial loss if a stay is not granted because she will be disinherited as the 98 shares vested in the deceased's estate shall be removed from the Estate's assets. She elaborated that if the plaintiff proceeds to execute the judgment, there is a risk that she will be compelled to settle costs and accrued interest.
19. The interested party contended that no order ought to be made for security to be given for the undue performance of the judgment as a condition for a stay as the judgment was not pecuniary in nature.
20. The interested party relied on *Nation Media Group Limited v Faith Muthoni Njiru* [2021] eKLR and [\*Machira t/a Machira & Co. Advocates v East African Standard\*](#) [2002] eKLR.

## **5<sup>th</sup> Defendant's Application**

21. The 5<sup>th</sup> defendant's application dated 11<sup>th</sup> March 2025, is supported by her affidavit of the same date. She also filed written submissions dated 11<sup>th</sup> April 2025. She is the deceased's ex-wife. She has also lodged an appeal. She exhibited her draft memorandum of appeal dated 6<sup>th</sup> March 2025, arguing that the appeal raises arguable points.
22. The 5<sup>th</sup> defendant argued that she stands to suffer substantial loss if a stay is not granted as the plaintiff has initiated extraction of decrees and will soon execute, obtain shares and sell the company's property.
23. The 5<sup>th</sup> defendant further asserted that the plaintiff has no means of income or assets.



24. The 5<sup>th</sup> defendant relied on *Peter Nakupang Lowar v Nautu Lowar* [2022] eKLR, *RWW v EKW* [2019] eKLR, *Nairobi City Council v Tom Ojienda & Associates* (Civil Appeal (Application) E080 of 2022 (2022) KECA 1326 (KLR) 2 December 2022 (Ruling) and *Stanley Kajanya Wainaina & Another v Ridon Ayangu Mutubwa* Nairobi HCCA 427/2015.

### Plaintiff's Response

25. The plaintiff opposed the applications through a replying affidavit sworn on 13<sup>th</sup> March 2025 and a further replying affidavit sworn on 28<sup>th</sup> March 2025.
26. The plaintiff indicated that the rectification of the register of members was effected as at 26<sup>th</sup> March 2025, reflecting that the plaintiff is a director/ shareholder. She submitted that the issue of stay pending appeal has been rendered moot.
27. The plaintiff contended, without prejudice to the foregoing, that the applicants have not demonstrated that they will suffer substantial loss if a stay is not granted. Regarding the allegation that the decision was unjust and erroneous, she argued that the court is *functus officio* and cannot revisit the merits of the decision. She added that an interrogation of the perceived arguable points would amount to the court sitting in appeal over its own decision and usurp the court's jurisdiction.
28. The plaintiff asserted that she will be prejudiced if a stay is granted as she will continue to be deprived of her shares in the company and the state of ownership of the shares will be left in flux, negating the purpose of the judgment.
29. The plaintiff also indicated that she stands to be evicted, deprivation of her right to property, should the 1<sup>st</sup> and 2<sup>nd</sup> defendants decide to alter directorship and shareholding of the company pending the hearing and determination of the appeal.
30. The plaintiff relied on:-
1. *Institute for Social Accountability & another v National Assembly & 5 others* [2022] KESC 39 (KLR)
  2. *National Assembly & another v Okioti & 55 others* (Civil Appeal E003 of 2023 & E016, E021, E049, E064 & E080 of 2024 (Consolidated)) [2024] KECA 876 (KLR)
  3. *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] KEHC 2059 (KLR)
  4. *William Lerikan Konchellah & another v Julius Tabarai Ole Maito Tampushi* [2014] eKLR
  5. *Stephen Kipkebut t/a Riverside Lodge and Rooms & another v Natali Ogola & another* [2013] eKLR
  6. *New Nairobi United Services Ltd & another v Simon Mburu Kiiru* [2021] KEHC 674 (KLR)
  7. *Luxus Woods (K) Limited v Patrick Amugune Kamadi* [2016] KEHC 4926 (KLR)
  8. *Obadiab Mugambi v Joyce Ncoro* [2021] eKLR
  9. *Halai & another v Thornton & Turpin* (1963) Ltd [1990] KECA 65 (KLR)
  10. *Antoine Ndiaye v African Virtual University* [2015] KEHC 6783 (KLR)
  11. *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others* (2013) eKLR



12. [\*Apungu v Justinice Limited\*](#) (2024) eKLR
13. [\*Ochieng v Baya\*](#) (Misc. Application E114 of 2023) [2024] eKLR
14. [\*Butt v Rent Restriction Tribunal\*](#) [1982] KLR 417
15. [\*Nesco Services Limited v CM Construction \(EA\) Limited\*](#) [2019] KEHC 11822 (KLR)
16. [\*Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others\*](#) [2015] KEHC 6121 (KLR)
17. [\*James Wangalwa & Another v Agnes Naliaka Cheseto\*](#) [2012] KEHC 1094 (KLR)
18. [\*Samvir Trustee Limited v Guardian Bank Limited\*](#) [2007] eKLR
19. [\*Nation Media Group Limited v Faith Muthoni Njiru\*](#) [2021] KEHC 3884 (KLR)

### **Analysis and Determination**

31. The issue for determination is whether the applicants have met the conditions for stay pending appeal under Order 42 Rule 6 of the [\*Civil Procedure Rules\*](#).
32. Substantial loss occurring unless stay is granted is the cornerstone of exercise of discretion of the court to grant stay. The court will also consider provision of security and whether the application has been made without inordinate delay.
33. The judgment was delivered on 3<sup>rd</sup> February 2025 and the applications were filed on 21<sup>st</sup> February 2025 and 11<sup>th</sup> March 2025. Therefore, I find that the applications were brought without inordinate delay.

### **Substantial loss**

34. In [\*James Wangalwa & Another v Agnes Naliaka Cheseto\*](#) [*supra*], the court observed that: -
 

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
35. The applicants argued that they stand to suffer substantial loss if a stay is not granted. The applicants expressed their apprehension that the plaintiff will soon execute, obtain shares and sell the company’s property.
36. The present case involves the ownership of shares. Through the impugned judgment, the court issued a mandatory injunction compelling the Chief Registrar, Companies Registry to rectify the entries to the Register of Companies in respect of Lulimizi Limited registration number C.75xxx to show that the plaintiff owns 98 shares and that she is a director of Lulumizi.
37. According to the plaintiff, the changes in the register have been done and that the quest for stay or injunction thereto is moot or has been overtaken by events.
38. To my mind, the applicants’ apprehension is that the plaintiff may sell the company’s property. There is no evidence that the plaintiff may sell or that any sale of the property of the company is in the offing. They merely speculate that she may sell the shares and the company’s assets. In any event, the apprehension will be prevented by issuing an injunction against transfer of shares to third parties or sale or dissipation of the company property by plaintiff or any person. I say so truly aware of the rights of the parties; the plaintiff’s right to the fruits of judgment; and the defendant’s right of appeal; which should be held in a proportioned balance not to rout any of the rights. The claim by the plaintiff that



she will be denied the right to property-shares in a company- and will be living at the mercy of, and may be evicted by the defendants if stay is granted, are not trifle arguments or concerns. From the judgment the applicants argued that the plaintiff was a tenant at will or a licensee-an argument the court rejected. But, is significant because, from the averments by the defendants, although they suggest that the plaintiff shall continue to occupy the guest house, their desire is to retain and remain in total control of the company's affairs and assets whilst they pursue their appeal without much consideration of the plaintiff's right to the fruits of judgment.

39. I do note also that, once an order preventing sale of the company assets is issued, the issue of whether the plaintiff would be able to compensate the applicants, is neither here nor there.
40. Therefore, the defendants will not suffer any substantial loss to warrant a stay of execution.
41. Accordingly, the order that commends itself to the court is an injunction to restrain any sale of the property of or shares in the company pending the determination of the appeal.

### **Conclusion**

42. The test of whether to grant stay of execution or proceedings pending appeal, in the High Court, is under Order 42 rule 6. *Mukiri v Mutie & 2 others* (Civil Appeal E026 of 2022) [2022] KEHC 11344 (KLR) (30 May 2022) (Ruling)
43. The rectification of the register of members was effected as at 26<sup>th</sup> March 2025, reflecting that the plaintiff is a director/ shareholder. The prayers for an order for a stay have been overtaken by events.
44. As stated and found earlier, an injunction against dissipation of the company assets and shares removes any possibility of substantial loss to the applicants. Therefore, the application does not pass the test in Order 42 Rule 6 of the *Civil Procedure Rules*.

### **Disposal**

45. In conclusion, the applications dated 21<sup>st</sup> February 2025 and 11<sup>th</sup> April 2025 are not merited and are declined. Except, the court makes the following orders: -
  - a. An injunction is issued restraining the plaintiff and/ or Lulumizi Limited, whether by themselves, their agents or servants from selling, transferring, charging, leasing or otherwise dissipating the Watamu Property (LR. No. 8596) until the appeal is determined.
  - b. As the plaintiff confirmed that the register of members of the company has been altered, I issue an injunction restraining the plaintiff and/ or Lulumizi Limited, whether by themselves, their agents or servants from selling, transferring, charging, assigning or otherwise dissipating the 98 shares of the company granted to the plaintiff in the judgment herein to third parties pending determination of the appeal.
  - c. Costs of the application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 31<sup>ST</sup> DAY OF JULY 2025**

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**F. GIKONYO M**

**JUDGE**

In the presence of: -



Ms. Sadia for 2<sup>ND</sup> Defendant

Litoro for 5<sup>th</sup> defendant

Mbaluto for 1<sup>st</sup> defendant

Ndungu for plaintiff

Wakhisi for Mogere for Interested party

CA Kinyua

