



REPUBLIC OF KENYA



**Malibu Pharmacy Limited v Ouko (Civil Appeal E686 of 2024)  
[2025] KEHC 9637 (KLR) (Civ) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9637 (KLR)

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

**CIVIL**

**CIVIL APPEAL E686 OF 2024**

**JN MULWA, J**

**JULY 3, 2025**

**BETWEEN**

**MALIBU PHARMACY LIMITED ..... APPELLANT**

**AND**

**NANA OUKO ..... RESPONDENT**

**RULING**

1. Before the court is the Appellant's Motion dated 10/06/2024 predicted upon Articles 47, 50 and 159 of *the Constitution*, Sections 1A, 1B, 3A, 78(1) (d) of the *civil Procedure Act*, and Order 51 Rule 1; Order 42 Rule 6 of the civil Procedure Rules (CPR).
2. The Applicant who is the Appellant seeks orders:-
  1. Spent
  2. Spent
  3. That the Hon. Court be pleased to grant the applicant leave to adduce and file additional evidence by way of Affidavit as espoused in the Supporting Affidavit.
  4. That pending and determination of the appeal, the court be pleased to issue a stay of execution of the final decision and enforcement Notice of Protection Commissioner Immaculate Kassait delivered n 11/05/2024 in ODPC Complaint No. 0280 of 2024
  5. That the costs of the application abide the outcome of the appeal.
3. On the 11/06/2024, Hon. Ongeru J. granted to the Applicant temporary stay orders of execution of the decision pending hearing and determination of the present application. It is in force.



4. Also filed by proposed interested party Pharmaceutical Society of Kenya is a Motion dated 29/10/2024 in which it seeks an order to be joined in the proceedings as an interested party pursuant to Order 1 Rule 10(2) of the Civil Procedure Rules.
5. On 15/01/2025, the Respondent told the court that she is not opposed to the motion but the appellant was directed to file its response and short submissions.  
The court will come back to this motion later in this ruling.
6. The motion dated 10/06/2024 is opposed by a replying affidavit sworn by the Respondent Nana Ouko on 12/07/2024.  
Both parties have filed submissions, which the court has duly considered alongside their affidavit evidence.
7. The Data Commissioners judgment dated 11/05/2024 stated that:-
  - i. The respondent is hereby found liable for unlawfully processing the complainants personal data relating to health.
  - ii. The respondent is ordered to compensate the complainant Kshs. 700,000/= for the unlawful processing of the complainants health data.
  - iii. An enforcement notice be and is hereby issued against the respondent
  - iv. Parties have the right to appeal this determination to the High Court of Kenya within 30 days.
8. Also provided to this court as Applicants annexure No. 4 is the enforcement Notice by the Data Commissioner, pursuant to Section 58 of the Act. It is dated 11/05/2024 as well.  
By the above notice, the Applicant was granted 30 days upon service of the enforcement Notice to rectify or put in place structures which are clearly stated in the Notice for implementation and to demonstrate the measures taken/compliance taken to the office.
9. Pursuant to Section 58(2) (d) and 64 of the Act and Regulation 19 of the Enforcement Notice, the applicant has a right of Appeal to this Court within 30 days of service of the Notice.
10. Consequences for non-compliance with the Enforcement Notice are also stated at Section 62 of the Act and Regulation 16(2) and 20(4) of the Enforcement Regulations or Issuance of an administrative fine pursuant to Section 63 of the Act provided with penal consequences on conviction to a fine not exceeding Kshs. 5 Million or to imprisonment for a term not exceeding two years or both.
11. Having the above in mind and being dissatisfied with the entire judgment and the Enforcement Notice, the Applicant/Appellant preferred the appeal herein by a Memorandum of Appeal dated 7/06/2024 raising grounds of appeal on grounds that:-
  - a. on the refrainment of the appellants right to be heard.
  - b. Unlawful remedies awarded to the respondent
  - c. Extraneous evidence touching on the motive by the complainant
  - d. And proposing that the appeal be allowed with costs and the determination of the Data Commissioner be set aside as well as the enforcement notice.
12. On the onset, this court shall deal and determine prayer No. 4 for an order for stay of execution of the decision of the Data Commissioner including the enforcement Notice only for the following reason,



that soon after the application was filed and directions taken on its disposal a new division was created out of the main Civil Division namely Civil Appellate Division to handle appeals from the Magistrates Courts, Tribunals, Commissions and small court claims appeals.

13. To that extent therefore, this Court (Janet Mulwa J.) now serving in the Main Civil Division, will not be able to interrogate and determine the second arm of the motion, wherein the appellant seeks, by its prayer no. 3 leave to adduce and file additional evidence by way of affidavit as espoused in the Supporting Affidavit.

14. It is the considered view that this aspect of the application will better be handled by a judge of the Civil Appellate Division who will be hearing the appeal to determine the prayer.

Back to prayer no. 4 for stay of execution pending hearing and determination of the appeal.

The Applicant's submissions are dated 22/08/2024 whereas the Respondents are dated 30/09/2024.

15. The Applicant/Appellant seek stay of execution of:

- a. The award for compensation
- b. Enforcement Notice

It is a monetary award and non-compliance with the enforcement Notice would have far-reaching penal consequences including hefty fines and imprisonment as stated statute at Section 63 of the Act.

16. The issue that this court has flagged for determination is:-

Whether the Applicant should be granted an order of stay of execution.

17. Order 42 Rule 6 92) of the CPR provides:-

“No order of 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 orders 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.

18. It is trite; by dint of Section 64 of the Data Protection Act that an aggrieved party by the Data Commissioners decisions has a right of appeal to the High Court within 30 days of the decision or as may be determined upon application for extension of such period.

19. For the court to grant such an order three conditions must be met by the applicant:-

1. Demonstration that the applicant has moved to court without unreasonable delay.
2. That substantial loss will be suffered by the applicant if the order is not granted.
3. Provision of adequate security as the court may order.

20. Further, it is important to state that an order of stay of execution will only be granted where there is already an appeal filed pending hearing in the higher court as held in the case of Turbo Highway Eldoret Ltd vs. Muniu (Civil Appeal E. 040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022).

Without a doubt, there is a pending appeal in this court and the application was brought expeditiously without unreasonable delay.



21. Substantial loss is the cornerstone in an application for stay pending appeal. Hence, substantial loss is what has to be prevented by preserving the status quo as such loss may render the appeal nugatory. As stated in the case of James Wangalwa (supra) execution is a lawful process. Therefore, a party seeking stay must establish other factors, which would show that execution may result to irreparable effects and may negate the essential core of the applicant as the successful party in the appeal.
22. In the matter of provision for security, it is provided at Order 42 Rule 6(2). Its purpose is to guarantee the due performance of the decree and not to punish the judgment debtor but guarantees the due performance of the decree as stated in the case of Arun C. Sharma v. Ashana Raiku Ndalia t/a Rairu Ndalia & Co. Advocates & 2 others [2014] eKLR.
23. Here, it is not a financial loss, but mental and emotional suffering to the Respondent. Further the court being urged that the Respondent is a person of means and capable of refunding the decretal sum if paid pending determination of the appeal.
24. The court pauses here to ask itself, whether payment of the decretal sum to the respondent will alleviate the mental and emotional suffering as alleged.

It is also the position that if the Appellant fails to succeed in the appeal, there could be no return to status quo on the part of the Respondent to initiate execution proceedings wherein there is a money decree as the court would then only order release of the money deposited as security. The interests of both parties must be considered.

25. The court in the case of Gianfranco Manenthi & Another V. Africa Merchant Assurance Co. Ltd [2019]e KLR observed that:-

“ Thus the objective of legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexation and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determination....”

26. It is however noted that the Applicant is ready and willing to deposit the award of compensation in an interest earning account in joint names of the parties advocates or as the court may determine.
27. Having observed earlier on this ruling that the Appellant has stated the main area by flagging the triable issues of appeal in its memorandum of appeal and stating that the appeal has high chances of success, it would be unjustifiable to deny the Appellant orders of stay pending hearing and determination of the appeal. Conversely it would also be unfair to the Respondent should the appeal not succeed to be returned to square one for her to initiate execution proceedings from that point.
28. For the foregoing, the Applicant’s Notice of Motion dated 10/06/2024 for an order of stay of execution pending hearing and determination of the appeal is allowed upon the Applicant depositing the sum of Kshs. 700,000/= ordered as compensation to the Respondent in a joint interest earning account in joint names of the Advocates within 30 days of this ruling. In default, the stay orders shall lapse unless otherwise ordered by the court.
29. Costs of the application shall abide outcome of the appeal.
30. In respect of Prayer No. 3 of the application, the matter shall be listed for mention for directions before the Hon. Kassan J. Civil Appellate Division on 29/07/2025.

Orders accordingly.



DELIVERED DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF JULY, 2025

.....

JANET MULWA.

JUDGE

