



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mohammed & another v Mwembe (Civil Appeal E012 of 2025)  
[2025] KEHC 9527 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9527 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E012 OF 2025  
AN ONGERI, J  
JULY 2, 2025**

**BETWEEN**

**ABDI ABDULLAHI MOHAMMED ..... 1<sup>ST</sup> APPELLANT**

**SHIRWA LOGISTICS LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**TSIMBU DZITU MWEMBE ..... RESPONDENT**

**RULING**

1. The application coming for consideration in this Ruling is the one dated 11<sup>th</sup> February 2025 brought under Order 42 Rule 6, Order 57 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3 and 3A of the *Civil Procedure Act* and all the enabling provisions of the law seeking the following prayers:-
  - i. That this application be certified urgent and the same be heard ex parte in the first instance.
  - ii. That pending hearing and determination of this application, the Honourable Court be pleased to grant the Appellants/Applicants stay of execution of the Ruling delivered on 4<sup>th</sup> February 2025 in Voi CMCC No. 156 of 2019.
  - iii. That this Honourable Court be pleased to grant the Appellant/Applicants stay of execution of the Ruling delivered on 4<sup>th</sup> February 2025 in Voi CMCC No. 156 of 2019 pending hearing and determination of this Appeal.
  - iv. That costs of this application be provided for.
2. The application is based on the following grounds:-
  - i. That the Ruling in Voi CMCC No. 156 of 2019 was delivered on 4<sup>th</sup> February 2025.



- ii. That the Ruling arises out of a Notice of Objection to attachment, in execution of a Decree of goods belonging to the Appellants/Applicants under Order 22 Rule 51 of the Civil Procedure Rules and application to set aside the attachment.
  - iii. That the Appellants/Applicants were not parties to the suit and decree in Voi CMCC No. 156 of 2019.
  - iv. That the goods attached through a proclamation that was the subject of the said Notice of Objection and application do not belong to the Defendant/Judgement Debtor in Voi CMCC No. 156 of 2019.
  - v. That being dissatisfied with the said Ruling, the Appellants/Applicants sought leave of the Court to appeal against it which leave was granted.
  - vi. That the Appellants/Applicants applied for temporary stay to enable them lodge this appeal which stay was granted for a period of 14 days.
  - vii. That the Appellants/Applicants timeously filed the appeal on 6<sup>th</sup> February 2025.
  - viii. That the Appellants/Applicants not having been parties to the suit and being registered and being lawful owners of the goods sought to be carted away and sold in the execution of the decree they were not party to will create a state of affairs that will irreparably affect them and negate the essential core of their business.
  - ix. That the Appellants/Applicants appeal has overwhelming chances of success based on the grounds of the appeal raised.
  - x. That unless a stay of execution is granted, the Respondent would embark on an execution process which could be highly prejudicial to the Appellants/Applicants and that would render this appeal nugatory.
  - xi. That if allowed to execute, the Respondent would not be financially able to repay back should the appeal succeed.
  - xii. That execution if allowed to proceed will alter the status quo to the detriment of the Appellants/Applicants therefore rendering the appeal nugatory.
  - xiii. That it is in the interest of justice that this Honourable Court preserves the status quo by staying the execution of the Ruling delivered on 4<sup>th</sup> February 2025 pending hearing and determination of the appeal.
3. The Respondents filed a Replying Affidavit I have duly considered.
  4. The parties filed written submissions as follows;
  5. The appellants/applicants submitted that they are seeking a stay of execution pending the hearing and determination of their appeal against the ruling of the Principal Magistrate in Voi CMCC No. 156 of 2019.
  6. The original suit involved Tsimba Dzitu Mwembe (plaintiff) and Gure Foodstuff Ltd (defendant), with the appellants joining as objectors after their properties—motor vehicles KCF 351M and KCR 235W, along with foodstuffs—were wrongfully proclaimed for attachment by Trophy Auctioneers on 14<sup>th</sup> March 2024.



7. While the magistrate ruled that the attachment of KCR 235W was wrongful, the court upheld the proclamation of KCF 351M and the foodstuffs, prompting the appellants to appeal.
8. The appellants argued that their appeal has a high chance of success, as they provided documentary evidence—including NTSA records and a tenancy agreement—proving ownership of the attached properties, which the respondent failed to rebut.
9. They contended that execution would cause them substantial loss, as the properties hold significant value, and the respondent’s inability to compensate them if the appeal succeeds would render the appeal nugatory.
10. They further asserted that the application was filed without delay and that the requirement for security for due performance of the decree does not apply to them, as they were not parties to the original suit and no evidence links the properties to the judgment debtor.
11. Relying on precedents such as *Matata & Another v. Rono & Another* and *Tawakal Airbus Ltd v. Irene Muthoni Njirati & Another*, the appellants emphasized that the attachment was procedurally improper and that preserving the status quo is essential to prevent irreparable harm.
12. They urged the court to grant the stay to ensure justice is served pending the appeal’s determination.
13. The Respondent opposed the Appellants’ application for a stay of execution, arguing that it lacks merit and fails to meet the legal threshold under Order 42 Rule 6 of the Civil Procedure Rules.
14. They contended that execution is a lawful process and stress that the Appellants have not demonstrated substantial loss, a key requirement for granting a stay.
15. Further, that since the judgment is a monetary decree, the Appellants have not shown that the Respondent would be unable to repay the decretal sum if the appeal succeeds.
16. The Respondent further asserted that the Appellants, who were objectors in the lower court, failed to prove any legal or equitable interest in the attached property (Motor Vehicle KCR 235 W), as public records indicate the 1<sup>st</sup> Appellant owns 80% of the Judgment-Debtor company, Gure Foodstuff Ltd.
17. That this undermines their claim of ownership, and the Respondent relied on case law, including *New Look Estate Ltd & Anor v. Khira Omar Maalim*, which places the burden of proof on the objector.
18. Additionally, the Respondent argued that the Appellants have not offered security for costs, another mandatory condition for a stay, and characterizes the application as an afterthought and an abuse of court process designed to delay the Respondent from enjoying the judgment’s fruits.
19. Citing authorities such as *Equity Bank Ltd v. Taiga Adams Company Ltd* and *Elena D. Korir v. Kenyatta University*, the Respondent emphasized that stay orders should not be granted without sufficient cause, particularly where no substantial loss is proved.
20. They urged the court to dismiss the application with costs, maintaining that the appeal lacks merit and is merely a tactic to frustrate lawful execution.
21. The Respondent relied on their Replying Affidavit and supporting case law to demonstrate that the Appellants have not satisfied the legal requirements for a stay of execution.
22. The sole issue for determination is whether the court should grant stay of execution of the Ruling dated 4<sup>th</sup> February 2025 in Voi CMCC No. 156 of 2019 pending the hearing of appeal.



23. The duty of this court is to balance the appellants' legitimate concerns against the respondent's right to enjoy the fruits of their judgment while ensuring the appeal is not rendered nugatory.
24. The appellants have demonstrated a prima facie case of substantial loss, a cornerstone consideration under Order 42 Rule 6(2) as interpreted in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, where the court emphasized that execution would likely occasion irreparable harm.
25. Their contention that the attached properties (motor vehicle KCF 351M and foodstuffs) are their lawful assets, supported by NTSA records and tenancy agreements, finds resonance in *Tsimba Properties Limited v Deposit Protection Fund Board & 2 Others* [2019] eKLR, where the court held that third-party property should not be subject to execution against a judgment debtor.
26. The requirement for security under Order 42 Rule 6(2)(b) must be contextualized. While *G.N. Muema p/a Mt View Maternity & Nursing Home v Miriam Maalim Bishar & Another* [2018] eKLR emphasized the need for security, the appellants' unique position as non-parties to the original suit distinguishes their case.
27. The court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR recognized that strict security requirements may be relaxed where an objector demonstrates clear proprietary interest in the attached property.
28. The respondent's argument that the appellants failed to prove ownership is countered by the principle in *Mungai v Housing Finance Co. of Kenya & Another* [2018] eKLR, which places the evidential burden on the executing creditor to demonstrate the judgment debtor's interest in attached property.
29. The respondent's claim that the 1st appellant owns 80% of Gure Foodstuff Ltd requires concrete proof, as mere allegations cannot override registered ownership documents under the *Traffic Act*, as held in *Daniel Njuguna Ndung'u v China Wu Yi Limited* [2020] eKLR.
30. On the nugatory aspect, the court aligns with *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR, where it was held that selling a third party's property would create an irreversible situation.
31. The appellants' apprehension is justified, particularly given the respondent's failure to demonstrate financial capacity to compensate them should the appeal succeed.
32. The application was filed timeously following leave granted by the lower court, satisfying the urgency requirement under *Giella v Cassman Brown & Co. Ltd* [1973] EA 358.
33. While the respondent cited *New Look Estate Ltd v Khira Omar Maalim* [2021] eKLR to assert the appellants' burden of proof, the appellants have discharged this burden through documentary evidence, unlike in the cited case where the objector relied on mere assertions.
34. Ultimately, the scales of justice tilt in favor of preserving the status quo to prevent irreparable harm.
35. The appeal's arguable grounds, coupled with the risk of rendering it nugatory, warrant exercise of judicial discretion in favour of the appellants.
36. Consequently, the application for stay of execution is granted on the following terms;
  - i. Stay of execution of the ruling dated 4th February 2025 in Voi CMCC No. 156 of 2019 is hereby granted pending hearing and determination of the appeal.
  - ii. The appellants shall file and serve a record of appeal within 30 days from today's date.
  - iii. Costs of the application shall abide the outcome of the appeal.



**DATED, SIGNED AND DELIVERED THIS 2<sup>ND</sup> DAY OF JULY, 2025 VIRTUALLY AT VOI HIGH COURT.**

**ASENATH ONGERI**

**JUDGE**

In the presence of:-

Court Assistant: Millicent

.....for Appellants

.....for Respondent

