

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 399 OF 2018

(Formerly ELC Petition No. 763 of 2016)

**DEWDROP ENTERPRISES LIMITED
PETITIONER**

VERSUS

WILLIAM MUTHEE MUTHAMI1ST

RESPONDENT

THE CHIEF MAGISTRATE'S COURT,

MILIMANI COMMERCIAL COURTS.....2ND

RESPONDENT

RULING

1. This is a ruling on the application dated 10th March 2025 seeking an order of stay of execution of the decree dated 28th March 2019 pending the hearing and determination of the appeals from the

decisions dated 8th July 2021, 29th March 2023 and 7th March 2025 now pending before the Court of Appeal. The applicant also seeks stay of proceedings pending the hearing and determination of the appeals from those decisions (dated 8th July 2021; 29th March 2023 and 7th March 2025) and an order that the file be returned to the registry to expedite the typing of proceedings and the hearing of the appeals.

2. The application is premised on the grounds on its face and the supporting affidavit. The petitioner asserts that the appeals from the decisions dated 8th July 2021, 29th March 2023 and 7th March 2025 now in the Court of Appeal are arguable; that the 1st respondent has delayed the hearing and determination of the appeals by failing to file written submissions in breach of directions by the

Court of Appeal issued on 15th February 2022 and instead filed a bill of costs dated 30th March 2022.

3. It is the petitioner's position that the appeals involve a matter of public importance and an order for security for costs would impede its right of access to justice and is not, in any case, mandatory under The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (Mutunga Rules)
4. The petitioner states that the 1st respondent is unwilling to fulfill his payment obligation under the order issued by the 2nd respondent on 12th June 2013 and unless the intended execution of the decree dated 28th March 2019 is stayed, the 1st respondent may obtain additional money from the

petitioner and possibly render the appeal(s) nugatory.

5. The petitioner maintains that failure to stay the intended execution would render the result of the appeals futile in the event that any of them (appeals) succeeds; that the application has been made without unreasonable delay and the 1st respondent will not suffer any prejudice.

6. The applicant relies on the decisions in *Freedom Limited v Mbarak* [2024] KESC 36 (KLR) for the position that an arguable appeal is one that is not frivolous and *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* [2023] KESC 11 (KLR) for the contention that it should not be ordered to furnish security for costs.

Response

7. The 1st respondent has opposed the application through a replying affidavit. The respondent states that the petitioner has not raised any new and substantive issue in the appeals or a matter touching on public interest. The 1st respondent denies failing to discharge his obligations in this matter or any other matter, maintaining that the petitioner is responsible for the delay in the progress of the appeals.

8. The 1st respondent denies the petitioner's claim that the balance of convenience tilts in the petitioner's favour given the petitioner's self-induced frustration. The 1st respondent argues that a contract is not voidable because it has become financially burdensome or less convenient to perform. The petitioner having lost, must comply with the judgment and attendant costs.

9. The 1st respondent maintained that he has suffered considerable prejudice due to the petitioner's conduct. Despite judgment having been entered in his favor, the bill of costs is yet to be taxed and settled. He urges the court to dismiss the application with costs and issues directions for the immediate taxation of his bill of costs and caution the petitioner against filing further applications without leave of the court.

10. I have considered the application, the response and arguments by parties. The petitioner's application, as I understand it, seeks stay of execution pending determination of appeals it has filed in the Court of Appeal.

11. On 28th March 2019, the 2nd respondent delivered a judgment which the applicant was

aggrieved with and lodged a petition before this court which was dismissed. The applicant lodged an appeal before the court of appeal which is pending. The applicant again filed an application before this court which was also dismissed on 7th March 2025 and the applicant says it has lodged an appeal against that ruling.

12. The applicant has therefore lodged several appeals in the Court of Appeal all of which are pending. He seeks an order staying proceedings pending appeal.

13. I must state that there are no other proceedings other than taxation of the 1st respondent's party and party bill of costs which is pending before the taxing officer.

14. The respondent has opposed the application arguing that the applicant has not raised any new and substantive issue in the appeals or a matter touching on public interest and should not be allowed.

15. As pointed out, only the bill of costs has not been taxed and therefore costs have not been ascertained. This means there can be no execution before ascertainment of the costs. It is difficult to assume that execution will proceed without cost having been taxed.

16. The applicant has also not shown the prejudice it will suffer if taxation of the bill of costs proceeds since the essence of taxing a bill of costs is to ascertain and certify costs payable to enable execution to commence.

17. In the circumstances, I am not persuaded that there is any merit in this application. Consequently, the application is dismissed with cost to the 1st respondent.

**Dated and delivered at Nairobi this 26th Day of
September 2025**

**E C MWITA
JUDGE**

ORIGINAL