



**Mithamo & 3 others v Wahome & 2 others (Civil Appeal E216 of 2025)  
[2025] KEHC 13485 (KLR) (26 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13485 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E216 OF 2025  
SM MOHOCHI, J  
SEPTEMBER 26, 2025**

**BETWEEN**

**MAUREEN MUTHONI MITHAMO ..... 1<sup>ST</sup> APPELLANT  
MARION JEBET ROTICH ..... 2<sup>ND</sup> APPELLANT  
PRISCILLA SARINGI MOMANYI ..... 3<sup>RD</sup> APPELLANT  
GLORIA NASIMIYU WEKESA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**SIMION MAINA WAHOME ..... 1<sup>ST</sup> RESPONDENT  
SIMION MAINA WAHOME T/A BOOT CAMP KE.....2<sup>ND</sup> RESPONDENT  
JAMES MUCHERU KAGUOKA ..... 2<sup>ND</sup> RESPONDENT  
HISIA SAFARIS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This Appeal and interlocutory Application flows from a Small Claim in the Nakuru SCCCOMM No. E 569 of 2022 Maureen Muthoni Mithamo & 3 Others Vs Simon Maina Wahome & 3 others.
2. This Court recalls when the Small Claims Court Bill was tabled in the National Assembly on 13<sup>th</sup> of October 2015 that;

“The law was meant to give effect to Articles 48 and 169 of *the Constitution* by establishing Small Claims Court to resolve disputes informally, inexpensively and expeditiously in accordance with the principles of law and natural justice providing greater access and speedier administration of justice, especially to the poor and marginalized persons.”



3. The Small Claims Courts were created to mitigate away from the conventional Courts that were increasingly expensive and inaccessible to the majority and it was argued that they were complicated and too adversarial to provide litigants with justice they desire.
4. The Complexity of the arguments flowing from the Appeal herein makes one wonder as to whether a party who voluntarily submits to a procedure that dispenses away from the strict application of the law can thereafter on appeal be allowed to seek solace to strict application of the law? However, these are issues on appeal.
5. Another issue in focus is whether party and party costs from the Small Claims Court would be subject to the Advocates Remuneration Order? Or if it would negate the purpose of the law?
6. The Application before Court is a Notice of Motion dated 15<sup>th</sup> September 2025 filed pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules.
7. The Applicants crave for the following relief(s);
  - i. Spent
  - ii. Spent
  - iii. That, pending the hearing and determination of the appeal herein, there be a stay of execution of the judgment, decree and certificate of stated costs aforesaid against the Respondents.
  - iv. That, the costs of this application be provided for.
8. The Application is supported by the sworn affidavit of Gloria N Wekesa and is based on the following principal ground;
  - a. That, Judgement was delivered in Nakuru SCCCCOMM NO. E569 OF 2022 Maureen Muthoni Mitheme & 3 others-vs- Simion Maina Wahome & 3 others upon full trial on 30/07/2025 against the Appellants where the Court awarded.
  - b. That, the Respondents have already extracted a decree and certificate of stated costs and are ready to initiate execution against the Applicants hence putting the Applicants assets and resources at risk.
  - c. That, being dissatisfied with the judgement delivered in Nakuru SCCCCOMM NO. E569 OF 2022 Maureen Muthoni Mithamo & 3 others -vs- Simion Maina Wahome & 3 others, the Applicants have filed an appeal against the whole of the honorable Court's decision in the suit herein and is keen to pursue the same to its logical conclusion.
  - d. That, unless the application for stay of execution of the decree aforesaid is granted pending the hearing and determination of this appeal, as sought. The Applicants are bound to suffer substantial loss and irreparable loss.
  - e. That, the Applicants are ready and willing to provide security for the due performance of the decree as the Honorable Court may order.
  - f. That, in all the circumstances of the matter, this application has been filed without unreasonable delay.
  - g. That, unless the application herein is granted, the appeal herein will be rendered nugatory and therefore the interests of justice would be best served if the same was allowed.



9. Gloria N Wekesa further avers that;
- a. She verily believes that she is exposed to real and imminent threat of execution unless the order for stay of execution pending appeal as sought in this application is granted.
  - b. The suit is an appeal against the whole of the Honorable Court's decision in Nakuru SCCCCOMM NO. E569 OF 2022 Maureen Muthoni Mithamo & 3 others -vs- Simion Malna Wahome & 3 others and she is keen to have the appeal pursued to its logical conclusion.
  - c. The decretal sum in the certificate of costs set out in the extracted decree in the sum of Ksh. 134,800.00 is in her discernment a fairly substantial amount and if the same were to be paid to the Respondents in satisfaction of the decree in its favour, it would be really difficult to recover the same at all in the event that my appeal filed against the said decree were to be successful in this Court.
  - d. She is willing to comply, with a reasonable time of about 30 days, with any reasonable condition to provide security as the Honorable Court may set.
  - e. She verily believes that in the totality of the circumstances herein, the application herein has been filed without unreasonable delay.
  - f. She verily believes that the interests of justice would be best served if the application herein was allowed.

#### **1<sup>st</sup> & 2<sup>nd</sup> Respondents Case**

10. The, 1<sup>st</sup> Respondent and the proprietor of the 2<sup>nd</sup> Respondent opposed the Application and swore an Affidavit dated 23<sup>rd</sup> September 2025 terming the Application as frivolous, defective, vexatious and an abuse of Court process.
11. That, a party seeking an order for stay of execution of judgment must satisfy the Court that substantial loss would ensue unless an order of stay of execution is granted.
12. That, the Applicant seeking an order of stay of execution is enjoined to furnish such security as the Court Orders for due performance of such decree or order as may ultimately be binding on him.
13. That, the Applicant seeking an order for stay of execution of judgment must file the said application without unreasonable delay.
14. That, the judgment delivered on the 31<sup>st</sup> June, 2025 by the Trial Court in Nakuru SCCCCOMM No. E 569 of 2022 Maureen Muthoni Mithamo & 3 Others Vs Simon Maina Wahome & 3 others found that the Applicants' claim against the Respondents lacked in merit and dismissed the same with Costs.
15. That the Trial Court further rejected the Applicants' claim for breach of contract and unjust enrichment against the Respondents and observed that the purported consent produced by them was not admissible in evidence, the same having not been signed by the parties herein.
16. That, as a result of the judgment by the trial Court dated 31<sup>st</sup> July, 2025, our costs was assessed at Kshs. 71,000/= as per the attached decree and certificate of costs dated 1<sup>st</sup> September, 2025.
17. That the application for stay of execution of the judgment is intended to deny him from enjoying the fruits of the judgment and more so the costs of Kshs.71,000/= which was awarded in his favour.



18. That, the instant application was filed on the 15<sup>th</sup> September, 2025, which is about 46 days from the date of the judgment, which amounts to unreasonable delay. No reason for such unreasonable delay has been explained by the Applicants in this application.
19. That, the Applicants have not demonstrated what substantial loss they will suffer and sufficient cause for stay order to be issued.
20. That, Applicants are all Advocates of the High Court of Kenya and have not demonstrated what substantial loss they will suffer if the stay order is declined and they are ordered to pay the awarded costs of Kshs.71,000/=.
21. That, the value of the decretal costs is not indicative that substantial loss will be suffered by the Respondents.
22. That, a holder of a decree for money is entitled to enjoy the fruits of his judgment and a stay of such decree will not be lightly granted unless the Applicant stand to suffer substantial loss which has not been exhibited in the application.
23. That, the Applicants herein have not furnished this Court with any form of security for the due performance of the decree which is a key ingredient for grant of a stay order.
24. The Applicants equally have not disclosed what nature of prejudice that they will suffer if an order of stay of execution is declined.
25. The contention by the Applicants that an order of stay of execution should be granted because of the Memorandum of Appeal that they have filed before this Court is not a condition to be considered for purpose of the present application thus without merit or foundation.
26. That the 1<sup>st</sup> Respondent is a man of means and a business person capable of refunding the awarded costs of Kshs.71,000/= to the Applicants should their appeal succeed.
27. That, it is in the interest of justice, fairness and equity that the application dated 15<sup>th</sup> September, 2015 be dismissed with costs.

### **3<sup>rd</sup> and 4<sup>th</sup> Respondents Case**

28. James Mucheru Kaguora the 3<sup>rd</sup> Respondent and a director of the 4<sup>th</sup> Respondent swore Affidavit in opposition terming the Application as frivolous, defective, vexatious and an abuse of Court process.
29. That, a party seeking an order for stay of execution of judgment must satisfy the Court that substantial loss would ensue unless an order of stay of execution is granted.
30. That the Applicants seeking an order of stay of execution is enjoined to furnish such security as the Court orders for due performance of such decree or order as may ultimately be binding on him.
31. That the Applicants seeking an order for stay of execution of judgment must file the said application without unreasonable delay.
32. That, the judgment delivered on the 31<sup>st</sup> July, 2025 by the trial Court in Nakuru SCCCOMM No. E 569 of 2022 Maureen Muthoni Mithamo & 3 Others Vs Simon Maina Wahome & 3 others, the Court found that the Applicants' claim against the Respondents lacked in merit and dismissed the same with costs.



33. That, Trial Court further rejected the Applicants' claim for breach of contract and unjust enrichment against the Respondents and observed that the purported consent produced by them was not admissible in evidence, the same having not been signed by the parties herein.
34. That as a result of the judgment by the Trial Court dated 31<sup>st</sup> July, 2025, our costs was assessed at Kshs. 63,800/= as per the attached decree and certificate of costs dated 1<sup>st</sup> September, 2025.
35. That, application for stay of execution of the judgment is intended to deny him from enjoying the fruits of the judgment and more so the costs of Kshs.63,800/= which was awarded in their favour, urging the Court to reject this application on this ground alone.
36. That the instant application was filed on the 15<sup>th</sup> September,2025, which is about 46 days from the date of the judgment, which amounts to unreasonable delay. No reason for such unreasonable delay has been explained by the Applicants in this application.
37. That, the Applicants have not demonstrated what substantial loss they will suffer and sufficient cause for stay order to be issued.
38. That the 3<sup>rd</sup> Respondent is aware that the Applicants are all Advocates of the High Court of Kenya and have not demonstrated what substantial loss they will suffer if the stay order is declined and they are ordered to pay the awarded costs of Kshs.63,800/=.
39. That, the value of the decretal costs is not indicative that substantial loss will be suffered by the Respondents.
40. That, a holder of a decree for money is entitled to enjoy the fruits of his judgment and a stay of such decree will not be lightly granted unless the applicant stand to suffer substantial loss which has not been exhibited in the application.
41. That, the Applicants have not furnished this Court with any form of security for the due performance of the decree which is a key ingredient for grant of a stay order.
42. That, the Applicants have not disclosed what nature of prejudice that they will suffer if an order of stay of execution is declined.
43. That the contention by the Applicants that an order of stay of execution should be granted because of the Memorandum of Appeal that they have filed before this Court, is not a condition to be considered for purpose of the present application thus without merit or foundation.
44. That, the 3<sup>rd</sup> Respondent is a man of means and a business person capable of refunding the awarded costs of Kshs.63,800/= to the Applicants should their appeal succeeds.
45. That, it is in the interest of justice, fairness and equity that the application dated 15<sup>th</sup> September, 2015 be dismissed with costs.

### **Analysis and Determination**

46. I have considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit, the attachments and the submissions. This Court clothed with the jurisdiction to entertain the instant Application, the only issue for determination is whether the Application has merit.
47. The conditions that have to be met prior to the Court issuing stay orders pending appeal are set out under Order 42 Rule 6(2) of the Civil Procedure Rules which stipulates: -  
No order for 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 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.
48. In essence the Applicant should satisfy the Court that: -
- a. Substantial loss may result to it should the order not issue;
  - b. The application has been made without unreasonable delay; and
  - c. Such security for the due performance of such decree or order has been given as may ultimately be binding on it
49. The conditions for granting stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules should be met simultaneously.

### **Undue Delay**

50. The current application was brought, as can be seen from the record, on 15<sup>th</sup> September 2025 and the certificate of costs triggering the Application is dated 1<sup>st</sup> September 2025 and the Appeal had been preferred on 13<sup>th</sup> August 2025.
51. It is apparent that it is the execution that has triggered the instant Application
52. Following the principal laid down in the above authority and the circumstance so this case, I am persuaded that although judgement was regular and Respondents were legally ensuring they enjoys their judgment, the delay in this case despite being inordinate, cannot be faulted on the Applicant since they filed the Appeal in a timely fashion, saw no prejudice until an execution of costs commenced.

### **Substantial Loss**

53. On substantial loss, there is a decree alive and execution is a valid legal process. The Respondent is entitled to employ all legal means at her disposal in order to get what is rightfully owed to her. The Applicant has submitted that the substantial loss likely to be suffered is that it would amount to unjust enrichment by the Respondents if they were allowed to execute against a claim challenged on Appeal and that the Respondents All except one named respondent described as the one (T/A Trading as) has a known source of income.
54. In *Stephen Njau Kamau v Erick Jacques Jean Maries & 3 others* [2015] KEHC 3825 (KLR) as cited in *Tropical Commodities Suppliers Ltd & Others v international Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 the Court stated that:-
- “Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
55. The Applicants have not demonstrated how they are likely to suffer substantial loss should the Respondent proceed with execution against them there is nothing substantial in the costs being recovered.



56. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR) the Court observed that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

57. This limb has not been met.

### **Security for Costs**

58. The Respondents have argued that, the Applicants have not intimated the desire to provide security or otherwise. I have perused the Supporting Affidavit and the Applicants have not offered any terms of security but its undisclosed insurers were ready to furnish security by way of guarantee, on the conditions of the Court,.

59. The issue of costs is at the discretion of the Court. The kind of security for due performance of the decree to be provided by a party is to be considered on a case-to-case basis. The right of appeal of the Applicant must be weighed against the right of the Respondent to enjoy the fruits of the judgment delivered in her favour.

60. The Applicants has expressed that its undisclosed insurers were ready to furnish security on the conditions of the Court, this is foggy and doggy on the part of the Applicants the lack of clarity is indicative of their non-committal nature. The want of disclosure that all Applicants are advocates is telling. The Court in exercising its discretion can direct the Applicants regarding the security of costs to be offered and give conditions within which to do so.

61. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act* and *the Constitution*, the proper approach is to do justice to all with the interest of justice in mind.

62. If there is a chance that the Respondents risks harm that is irreparable then stay ought not to be issued. On the other hand, if there is a risk that the Applicants may suffer irreparable loss which would ideally not be redeemable if the appeal does succeed then stay ought to be granted. In balancing the rights of each party, the Court at this point cannot delve on the merit of the appeal. Nonetheless, in the event that there may be some merit in the appeal the Respondents is likely to suffer lower prejudice if stay of execution is allowed, the said prejudice can also be compensated by costs.

63. All in All, the Application fails for want of merit.

64. Accordingly, I hereby disallow the Application dated 15<sup>th</sup> September 2025 for want of merit, and dismiss the same, with costs to the Respondent.

65. However, this Court as a Court of equity and in balancing the interests of the parties is inclined to direct as follows: -

- a. A Conditional Order of stay against execution is hereby issued against judgment and consequent decree and certificate of costs, delivered on the 31<sup>st</sup> July, 2025 in Nakuru SCCCOMM No. E569 of 2022 Maureen Muthoni Mithamo & 3 Others Vs Simon Maina Wahome & 3 others pending the hearing and determination of the Appeal.



- b. The Applicants shall deposit in Court, the entire costs assessed and certified in Nakuru SCCCOMM No. E 569 of 2022 Maureen Muthoni Mithamo & 3 Others Vs Simon Maina Wahome & 3 others, of Kshs 134,800/= within thirty (30) days of this Ruling;
- c. The Respondent's shall have costs of the Application assessed at Kshs. 20,000 to be paid within thirty (30) days of this Ruling;
- d. In the event of default of (b) or (c) above, The Conditional Order granted shall automatically lapse, and the Respondent shall be at liberty to execute;
- e. The Appellants shall file and serve a record of appeal within sixty (60) days of this Ruling;

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2025**

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**MOHOCHI S. M.**

**JUDGE**

