

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM MISC. APPL. NO. E428 OF 2023**

MOLA, KIMOSOP & COMPANY

ADVOCATES.....ADVOCATE/RESPONDENT

-VERSUS-

RIVERSIDE VILLAS LIMITED.....CLIENT/APPLICANT

**RULING**

1. The client/applicant filed a Notice of Motion application dated 27<sup>th</sup> November 2024 pursuant to the provisions of Order 42 Rules 6(1), (2), (3) & (4) of the Civil Procedure Rules, Sections 1, 1A, 3A & 75 of the Civil Procedure Act, Article 159 2(d) of the Constitution and all other enabling provisions of the law seeking an order for stay of execution of the Deputy Registrar’s Ruling of 31<sup>st</sup> October 2023, the resultant Certificate of Costs dated 28<sup>th</sup> November 2023 and any further proceedings, pending the intended appeal to the Court of Appeal against this Court’s Ruling delivered on 22<sup>nd</sup> November 2024.
2. The application is premised on the grounds on the face of the Motion, and is supported by an affidavit sworn on the same day by Mr. Mohan Chal, the applicant’s Managing Director. Mr. Chal averred that on 22<sup>nd</sup> November 2024, this Court dismissed the applicant’s application for leave to file a Reference out of time against the Deputy Registrar’s taxation of the Advocate-Client Bill of Costs of Kshs.4,034,875.00. Dissatisfied with the said Ruling, the applicant opted to appeal against it and on 25<sup>th</sup> November 2024, it instructed its Advocates to lodge a Notice of Appeal and request for certified copies of the Ruling and Order. He stated that a Notice of Appeal was duly filed and served,

and a request for proceedings made for purposes of preparing the Record of Appeal.

3. Mr. Chal stated that there is presently no stay of execution, exposing the applicant to imminent execution of the taxed costs, which would severely disrupt and distress its business operations. He asserted that the respondent being a small entity, risks irreparable financial loss and liquidity problems if execution proceeds, rendering the intended appeal nugatory. He contended that the taxed costs have already been deposited in a joint account held by the Advocates for both parties, which remains available as security pending appeal. Further, the deposit has since been rolled over for another year. In the premise, Mr. Chal averred that in view of the existing security, the applicant will suffer no prejudice in the event the instant application is allowed.
4. In opposition to the application, the respondent filed a Notice of Preliminary Objection dated 4<sup>th</sup> December 2024 raising the following grounds –
  - i) That the application is *res-judicata* since similar orders were sought by the client in the application dated 1<sup>st</sup> February 2024 which was dismissed by this Honourable Court on 22<sup>nd</sup> November, 2024;
  - ii) That this Honourable court is *fantus officio* (sic) thus devoid of jurisdiction to entertain the client's application dated 27<sup>th</sup> November, 2024;
  - iii) That there is neither an Appeal nor grounds for an Appeal to warrant the orders sought;
  - iv) That the respondent be condemned to pay costs of this application; and
  - v) That the application should be struck out with costs to the Advocates.
5. The respondent also filed a replying affidavit sworn on 20<sup>th</sup> January 2025 by Mr. Alex W. Mola, an Advocate of the High Court of Kenya and a partner in

the respondent law firm. Mr. Mola averred that the instant application is incompetent since this Court is *functus officio* after its Ruling of 22<sup>nd</sup> November 2024 under paragraph 11 of the Advocates Remuneration Order, and the Notice of Appeal filed on 25<sup>th</sup> November 2024 is defective as leave of Court was required under Paragraph 11(3) but it was not sought. Therefore, there is no valid and/or intended appeal pending. Counsel contended that the applicant's Advocates have already moved the Court of Appeal vide Application No. E023 of 2025 to strike out the defective Notice of Appeal under Rule 84 of the Court of Appeal Rules.

6. Mr. Mola stated that the application herein improperly seeks to re-litigate issues already dismissed by this Court vide a Ruling delivered on 22<sup>nd</sup> November 2024. He averred that the letter requesting for proceedings has no legal basis since there is no valid Appeal and the instant application is only intended to delay the Advocates' enjoyment of their taxed fees. Counsel further averred that the taxed costs are already deposited in a joint advocates' account, thus the applicant stands to suffer no prejudice in the event that the application herein is disallowed. Mr. Mola asserted that the taxed fees rightfully belong to the respondent law firm and should be released to them without any further delay.
7. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 5<sup>th</sup> February 2025 by the law firm of Sheth & Wathigo Advocates, whereas the respondent's submissions were filed by the law firm of Mola Kimosop Advocates on 18<sup>th</sup> February 2025.
8. Mr. Kisila, learned Counsel for the applicant cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules and the Court of Appeal case of **Butt v Rent Restriction Tribunal** [1979] eKLR and submitted that the applicant has made out a case to warrant being granted an order for stay of execution. He

stated that the application herein having been filed approximately five days after delivery of this Court's Ruling on 22<sup>nd</sup> November 2024, it was filed timeously. Counsel relied on the decisions in **James Wangalwa & another v Agnes Naliaka Cheseto** [2012] KEHC 1094 (KLR) and **Jemaiyo v SO (Minor suing through SOO)** [2023] KEHC 20434 (KLR), and argued that execution of the taxed costs would cripple the respondent's operations and render the intended appeal nugatory.

9. Mr. Kisilah referred to the Supreme Court case of **Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others** [2016] KESC 2 (KLR) and submitted that dismissal of its Reference for non-compliance with Rule 11 of the Advocates Remuneration Order was a ritualistic application of procedure contrary to the provisions of Article 159(2)(d) of the Constitution. Counsel argued that the intended Appeal has arguable chances of success and should not be stifled. He relied on the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another** [2018] KEHC 8358 (KLR) and contended that the taxed sum is already deposited in a joint Advocates' account as security and the applicant is willing to maintain this arrangement, which ensures that the respondent suffers no prejudice.
10. Mr. Mola, learned Counsel for the respondent relied on the decisions in **E.T. v Attorney General & another** [2012] KEHC 5506 (KLR) and **Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)** [2022] KEHC 2227 (KLR), and submitted that the instant application is *res judicata* since the reliefs sought herein were previously sought in the applicant's earlier application dated 1<sup>st</sup> February 2024, which was dismissed in this Court's Ruling delivered on 22<sup>nd</sup> November 2024, making this Court *functus officio* in the matter. He argued that the instant application is a backdoor

attempt to review or appeal the Ruling of 22<sup>nd</sup> November 2024 under the guise of a stay application.

11. Counsel submitted that the only Ruling capable of being referred for stay is the one delivered on 22<sup>nd</sup> November 2024, but since the Ruling dismissed the applicant's earlier application dated 1<sup>st</sup> February 2024, it constituted a negative order, incapable of being stayed. To that end, Mr. Mola relied on the case of **Catherine Njeri Maranga v Serah Chege & another** [2017] KEHC 3173 (KLR) and the Court of Appeal case of **Kaushik Panchamatia & 3 others v Prime Bank Limited & another** [2020] KECA 418 (KLR).

#### **ANALYSIS AND DETERMINATION.**

12. I have perused the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the Preliminary Objection and the replying affidavit filed by the respondent, and the written submissions made by Counsel for the parties. The issues that arise for determination are –
  - i) **Whether the application herein is res judicata; and**
  - ii) **Whether an order for stay of execution pending appeal should issue.**

#### **Whether the application herein is *res judicata*.**

13. The doctrine of *res judicata* is provided for under the provisions of Section 7 of the Civil Procedure Act which states that –

***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court***

***competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

14. The respondent's case is that the instant application is *res judicata* since the issue of stay of execution of the Taxing Officer's Ruling delivered on 31<sup>st</sup> October 2023 was addressed in the applicant's application dated 1<sup>st</sup> February 2024, which was dismissed vide a Ruling delivered on 22<sup>nd</sup> November 2024.
15. The Supreme Court in the case of **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others** [2021] KESC 39 (KLR) addressed itself on the doctrine of *res judicata* as hereunder –

***Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010] eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.***

16. In the application dated 1<sup>st</sup> February 2024, the applicant sought for *inter alia*, an order for stay of execution and further proceedings arising from the Deputy Registrar's Ruling delivered on 31<sup>st</sup> October 2023 and the subsequent certificate

of costs issued on 28<sup>th</sup> November 2023, pending determination of the said application and the applicant's Reference. This Court notes that on 5<sup>th</sup> March 2024, it granted the applicant an order for stay of execution on condition that it deposits the decretal sum of Kshs. 4,034,875.00 in an interest earning account in the joint names of the Advocates for the parties herein.

17. This Court further notes that in its Ruling delivered on 22<sup>nd</sup> November 2024, it held that its jurisdiction to entertain the application dated 1<sup>st</sup> February 2024 had not been properly invoked. Consequently, it found the aforesaid application defective and proceeded to strike it out without addressing the issues raised therein on their merits.
18. It is equally important to note that the circumstances under which the present order for stay of execution is sought differ from those in the application dated 1<sup>st</sup> February 2024. In the instant application, the order for stay of execution is sought pending the hearing and determination of the intended Appeal, whereas in the application dated 1<sup>st</sup> February 2024 it was sought pending the hearing and determination of a Reference filed by the applicant challenging the Deputy Registrar's Ruling of 31<sup>st</sup> October 2023 and the ensuing Certificate of Costs dated 28<sup>th</sup> November 2023.
19. In view of the above, this Court finds that the order for stay of execution sought herein has not been conclusively heard and determined by this Court or any other Court of competent jurisdiction. The respondent cannot therefore successfully invoke the doctrine of *res judicata*.

**Whether an order for stay of execution pending Appeal should issue.**

20. This Court's jurisdiction to grant an order for stay of execution pending Appeal is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which state as follows –

***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.”***

21. The applicant intends to appeal against this Court’s Ruling delivered on 22<sup>nd</sup> November 2024 and states that it has already filed a Notice of Appeal dated 25<sup>th</sup> November 2024. On that basis, it urges this Court to grant an order for stay of execution pending the hearing and determination of the intended Appeal. The respondent however opposes the application herein on grounds that the Notice of Appeal filed on 25<sup>th</sup> November 2024 is defective, arguing that leave of the Court was required under Paragraph 11(3), but was never sought.
22. The challenge to the applicant’s Notice of Appeal in Application No. E023 of 2025 before the Court of Appeal is not a matter for this court to determine, and accordingly, this court will not address its merits or demerits, leaving that issue for determination by the appellate court. The above notwithstanding, it is evident from the Court record that upon delivery of the Ruling on 22<sup>nd</sup> November 2024, Mr. Muriithi, learned Counsel for the applicant sought and was granted leave to appeal against the Ruling. It therefore follows that the respondent’s contention that the Notice of Appeal dated 25<sup>th</sup> November 2024 is defective for want of leave of the Court does not apply.
23. In considering applications for stay of execution pending appeal, Courts must strike a balance between the competing interests of the parties, while bearing in

mind that an appellant has an undisputed right of appeal, and that the respondent holds a decree which it should not be obstructed from executing, save for good cause.

24. In the case of **Vishram Ravji Halai v Thornton & Turpin** [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules, 2010 is fettered by three conditions namely –

- i) establishment of a sufficient cause;*
- ii) satisfaction of substantial loss; and*
- iii) the furnishing of security.*

25. In the case of **James Wangalwa & Another v Agnes Naliaka Cheseto** (supra), the Court in determining an application for stay of execution held that –

*Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:*

- a) Substantial loss may result to the applicant unless the order is made,*
- b) The application has been made without unreasonable delay, and*
- c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.*

26. In regard to whether the applicant has demonstrated that it will suffer substantial loss in the event that the instant application is disallowed, it is trite that where the decree is a monetary decree, as is the case herein, Courts will generally decline to grant an order for stay of execution pending Appeal unless

it is shown that the decree-holder is financially unsound and therefore incapable of refunding the decretal sum should the Appeal succeed.

27. In the oft cited case of **Kenya Hotel Properties Limited v Willesden Investments Limited** [2007] KECA 401 (KLR), the Court of Appeal held that -

*Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.*

28. It is not in contest that the applicant neither averred nor suggested that the respondent would be unable to refund the decretal sum should its intended appeal succeed. Further, this Court notes that while the applicant contended that execution of the taxed costs would cripple its operations as a small entity, it failed to disclose its current financial position or demonstrate how it would be adversely affected in the event that the application herein is disallowed. In any event, the taxed costs are already deposited in a joint interest-earning account in the names of the parties’ Advocates, thereby ensuring that the respondent’s business operations will not be prejudiced in the event that the instant application is dismissed.

29. Given the said circumstances, I am not persuaded that the applicant stands to suffer any substantial loss in the event that the orders sought herein are not granted.

30. As to whether the instant application has been filed inordinately late, it was lodged barely five days after delivery of this Court’s Ruling of 22<sup>nd</sup> November 2024. This Court is satisfied that the application herein was filed without any undue delay.

31. On the issue of security for the due performance of the decree, the applicant pointed out that the taxed costs have already been deposited in a joint interest-earning account held in the names of the parties' Advocates. The applicant also relied on the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another** (supra) where it was held that -

*Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.”*

32. In the absence of proof of substantial loss, Courts will rarely grant an order for stay of execution pending appeal. See the Court's finding in the case of **Kenya Shell Limited v Kibiru** [1986] KLR 410. In this instance, I am not persuaded that the applicant has demonstrated sufficient grounds to justify being granted an order for stay of execution pending its intended appeal to the Court of Appeal.
33. In the end, this Court finds that the application dated 27<sup>th</sup> November 2024 is devoid of merits. It is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 26<sup>th</sup> day of September 2025. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Kisila for the client/applicant

Mr. Mola for the Advocate/respondent

Ms B. Wokabi – Court Assistant.

ORIGINAL