

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E278 OF 2024

AMICA SAVINGS AND CREDIT LIMITED.....APPELLANT/APPLICANT

-VERSUS-

HARUN MUIRU MACHARIA.....RESPONDENT

RULING

1. Through a Notice of Motion Application dated 8th October 2024 brought under Certificate of Urgency and expressed to be anchored under **Section 3A** of the **Civil Procedure Act** as read together with **Order 42 Rule 6 (1), (2) and 3** and **Order 51 Rules 1 and 3** of the **Civil Procedure Rules**, the Appellant/Applicant craves for judgment to be entered as against the Respondent for the following Orders:

- I.Spent.**
- II. THAT this Honourable Court be pleased to issue a stay of execution of judgment in Chief Magistrates Court at Thika MCC/E682/2022 Muiru Macharia Vs Amica Savings and Credit Limited that was delivered on 23rd September, 2024 pending the hearing and determination of this Application.**
- III. THAT this Honourable Court be pleased to issue a stay of execution of judgment in Chief Magistrates Court at Thika MCC/E682/2022 Muiru Macharia Vs Amica Savings and Credit Limited that was delivered on 23rd September, 2024 pending the hearing**

and determination of the appeal herein.

IV. THAT the costs of this Application be in the cause.

V. Any other and/or further Orders that this Honourable Court deems fit to grant.”

2. The subject Application is premised on the grounds appearing at the foot thereof and in the Affidavit sworn by *Robert Mbau* on 8th October 2024 in his capacity as Head of Credit at the Applicant company.
3. The Appellant/Applicant averred that, being dissatisfied with the decision of the trial Court dated 23rd September 2024, it lodged an appeal against the said decision as per the attached Memorandum of Appeal dated 4th October 2024.
4. That the Applicant stands to suffer irreversible loss and harm if execution of the impugned decision is not stayed by this Court because the financial position of the Respondent is unknown to the Applicant; therefore, there is no guarantee that the Respondent is not a man of straw. The Applicant further argued that in the event the appeal is successful, it may be unable to recoup the amount paid to the Respondent as costs, pursuant to the Order of the trial Court.
5. The Respondent resisted the instant application through his Replying Affidavit sworn on 25th October, 2024. The Respondent testified that he deposited the title deed to land parcel number THIKA MUNICIPALITY BLOCK 38/38 with the Applicant being security for a loan, however, the Applicant failed to advance the aforesaid loan to the Respondent as covenanted, which led the Respondent (then Plaintiff) to initiate the proceedings in **Thika Chief**

Magistrate's Civil Case No. 682 of 2022 against the Applicant (then Defendant).

6. Further, as per the Decree dated 23rd September, 2024 issued in **Thika Chief Magistrate's Civil Case No. 682 of 2022**, the Court directed the Applicant to refund Kshs.575,000 to the Respondent within 30 days from the date of the aforesaid Decree and, further Ordered that the Charge placed on parcel no. THIKA MUNICIPALITY BLOCK 38/38 on 16th August, 2021 be discharged. The Respondent urged the Court to dismiss the subject Application as it is seeking to forestall the execution of lawful Orders of the Court.
7. The Respondent refuted the Applicant's contention that he could be well be a man of straw and argued that parcel No. THIKA MUNICIPALITY BLOCK 38/38, registered in the Respondent's name, is valued at Kshs. 8,000,000 (eight million) as per the Valuation Report prepared by FIDELITY VALUERS LIMITED, annexed to his Replying Affidavit and marked as HMM2.
8. That the Respondent cannot be considered a man of straw being the registered owner of several other parcels of land, as attested to by copies of the title deeds thereto appearing as his annexure HMM4. Furthermore, the Respondent is a tea farmer who delivers about 1263.4 Kgs of tea on a monthly basis to KANYERU TEA COLLECTION CENTRE, evidenced by his annexure HMM. Furthermore, the Respondent is the registered owner of motor-vehicle registration number KBN 058X.
9. The Respondent denied claims that the Appellant/Applicant stands to suffer irreversible loss in the event execution proceeds and its intended Appeal succeeds on additional grounds, namely, that the Respondent's bank account with *Consolidated Bank*

reflects a positive balance of **Kshs. 499,597.35** as at **22nd October, 2024**, as per his annexure HMM8. He urged the Court to direct the Applicant to remit the decretal sum together with a duly Discharged title, pursuant to the Decree dated **23rd September, 2024** issued in **Thika Chief Magistrate's Civil Case No. 682 Of 2022**.

10. In his capacity as the Head of Credit of the Appellant/Applicant, Robert Mbau filed an affidavit dated 13th November 2024 in response to the Respondent's Replying Affidavit and deposed that the Respondent is not the registered proprietor of land parcels KJD/KAPUTIEI/SOUTH/4316 and KJD/KAPUTIEI SOUTH/4317 appearing as part of the Respondent's annexure HMM4 as the two parcels belong to RUTH NJERI MUIRU and MILKA WANJIRU MUIRU respectively.
11. The Appellant/Applicant further deposed that the Respondent failed to produce certified copies of the title deeds exhibited as HMM4 and also failed to supply both certificates of official search and valuation reports in respect of the same parcels of land. Furthermore, the Respondent failed to disclose to the Court whether the land parcels falling under HMM4 are encumbered.
12. That the Respondent failed to indicate the value of his motor-vehicle registration number KBN 058X and also did not state whether the said motor-vehicle is encumbered.
13. Furthermore, the Respondent failed to prove his ownership of the parcel of land located in KANGARI area of MURANG'A County where he claimed to be engaged in tea farming and also failed to prove that he is a member of KANYERU TEA COLLECTION CENTRE.

14. The Appellant/Applicant further faulted the evidence supplied by the Respondent regarding funds held with Consolidated Bank as being a joint account held by “MARY” together with the Respondent. In the upshot, the Appellant/Applicant argued that the Respondent failed to establish that he was not a man of straw.
15. The suit was dispensed by way of written submissions. The Appellant/Applicant filed written submissions dated 13th November 2024 through its Counsel. Guidance was placed in the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** and, in the holding of the Court in **Civil Appeal No. 5 of 2017 Francis Ndahebwa Vs Ben Nganyi; Butt v Rent Restriction Tribunal (1982) KLR 417; RWW v EKW [2019] eKLR; National Industrial Credit Bank Ltd V Aquinas Francis Wasike; Lantech Ltd [2006] KECA 333 (KLR)** and, **James Wangalwa & Another v Agnes Naliaka Cheseto Misc. Appl. No. 42 of 2011 [2012] eKLR**, concerning the factors to be considered by the Court in an application seeking stay of execution pending appeal.
16. The Appellant/Applicant expressed willingness to furnish such security as may be directed by the court as a pre-condition for the grant of the stay sought.
17. The Respondent filed written submissions dated 21st November 2024 through its Counsel. Regarding the conditions which a party seeking stay of executing pending appeal is required to satisfy, reliance was placed in the provisions of **Order 42 Rule 6(2)** of the **Civil Procedure Rules** and in the reasoning of the Court in the following cases: **Tropical Suppliers Limited & Others Vs International Credit Bank Limited in liquidation) (2004) 2 EA 331; Butt v Rent Restriction Tribunal (1982) KLR 417; National Industrial Credit Bank Ltd v Aquinas Francis Wasike; Lantech Ltd [2006] KECA**

333 (KLR) and, James Wangalwa & Another v Agnes Naliaka Cheseto Misc. Appl. No. 42 of 2011 [2012] eKLR

18. That, by approving a loan amount of Kshs. 5,000,000 in favor of the Respondent, the Appellant/Applicant must have satisfied itself that the Respondent was capable of repaying the same. Furthermore, since the aforesaid loan amount was never advanced to the Respondent by the Appellant/Applicant, no question can arise regarding the Respondent's ability or inability to repay the same.
19. The Respondent subscribed to the position that the decretal amount of Kshs. 499,597.35 awarded by the Court in the Decree dated 23rd September, 2024 issued in **Thika Chief Magistrate's Civil Case No. 682 of 2022** is the Respondent's own savings; and, the Appellant/Applicant has never laid claim to the same. He urged the Court to direct that entire decretal amount be released to the Respondent or, alternatively, be deposited in the parties Advocates' interest-bearing joint account.
20. With regard to the title deed for parcel number THIKA MUNICIPALITY BLOCK 38/38, which is held by the Appellant/Applicant, the Respondent submitted that since no loan was advanced to the Respondent, there is no reason why same title deed should not be released to the Respondent free of all encumbrances. Furthermore, it is unconscionable for the Appellant/Applicant to retain both the decretal amount and the Respondent's title deed.
21. Having carefully considered the pleadings, supporting annexures and rival submissions of the parties, the Court identified the main issue for determination to be: Whether the instant application is merited?

22. Stay of Execution is provided for under **Order 42, Rule 6(1)** and **(2)** of the **Civil Procedure Rules** as follows:

6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) 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.

23. For an application seeking stay of execution to be allowed by the Court, all three (3) preceding conditions need to be satisfied by applicants. In the case of **RWW v EKW [2019] KEHC 6523 (KLR)** the Court appreciated

the meaning and import of **Order 42 Rule 6(1) and (2)** as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

24. The Respondent conceded that the instant application was lodged within the stipulated timelines. The Court notes that the instant application was lodged on 8th October 2024 while the decision sought to be stayed was delivered on 24th September 2024. In the circumstances, the Court is satisfied that the instant application was brought within statutory timelines, therefore, there is no question of inordinate or undue delay.

25. The court next turns to the aspect of substantial loss, does the Applicant stand to suffer substantial loss in the event stay of execution does not issue? In the case of **Pan African Insurance Co. Ltd vs International Air Transport Association High Court No. 86 of 2006**, the Court held as follows:

“The deponent should go a step further to lay the basis upon which court can make a finding that the applicant should would suffer a substantial loss as alleged. The

applicant should go beyond vague and general assertion of substantial loss in the event a stay order is not granted.”

26. In the cause before this Court, the Appellant/Applicant is required establish the substantial loss it stands to suffer if stay of execution is not granted. It is noteworthy that the Appellant/Applicant did not claim to hold a lien over either the decretal sum or the suit property. The Respondent’s contended that since no loan amount was ever advanced to him by the Appellant/Applicant as contracted, the latter never acquired a lawful lien over both the suit land and the decretal amount. The preceding averment was not controverted by the Appellant/Applicant in the application before the Court. In the premises, the Court holds and find that the Appellant/Applicant has failed to demonstrate that it stands to suffer substantial loss if the reliefs sought are not granted.

27. Having pronounced itself on the question of substantial loss, the Court turns to the issue of security for the due performance of the Order sought to be stayed. The lower Court directed the applicant to deliver the entire decretal sum of **Kshs.499,597.35** to the Respondent and, the discharge of the title deed to the suit land. Thus, the Decree which the Applicant is seeking to be stayed is a money Decree.

28. In the case of **Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd [2019] KEHC 7586 (KLR)**, the Court held as follows:

“Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this

condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.”

29. Being guided by the dictum of the Court as above, the Court is not persuaded that the Appellant/Applicant has demonstrated any cause or reason warranting the Respondent being denied the opportunity to execute the decree and enjoy the fruits of the favorable judgment which he obtained.
30. In the upshot, the Appellant/Applicant having failed to satisfy all three conditions set out under the provisions of **Order 42, Rule 6(2)** of the **Civil Procedure Rules**, the Court finds and holds the subject application to be without merit.
31. ***The Notice of Motion Application dated 8th October 2024 is hereby dismissed with costs to the Respondent.***
32. Thirty (30) days stay of execution to apply.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 2ND OCTOBER, 2025.

**HON. T. W. Ouya
JUDGE**