



**Mulwa t/a Kangatu Bus Service v Wambua (Civil Appeal
E263 of 2024) [2025] KEHC 14408 (KLR) (14 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E263 OF 2024
NIO ADAGI, J
OCTOBER 14, 2025**

BETWEEN

JAMES KYANIA MULWA T/A KANGATU BUS SERVICE APPLICANT

AND

GEORGE MALONZA WAMBUA RESPONDENT

RULING

1. This court delivered a ruling on 10th June 2025 staying execution of the ruling of 17th November 2025 before the Chief Magistrate's Court at Machakos in CMCC No.446 of 2021 pending hearing and determination of this appeal on the following conditions: -
 - a. The Appellant/ Applicant shall deposit half the decretal sum into an interest earning account in a reputable commercial Bank, to be held by both advocates for the Parties to this appeal or give a Bank Guarantee for the same as security for costs, within forty-five (45) days of this ruling in default execution to proceed;
 - b. The Appellant shall file and serve a record of appeal within Forty-Five (45) days of this ruling;
 - c. Costs shall be in the appeal;
 - d. The appeal shall be mentioned on a date to be fixed for directions on the mode of disposal of the appeal.
2. The Appellant then filed an application dated 25/07/2025 under certificate of urgency seeking for orders that:-
 - a. Spent;



- b. An order does issue to enlarge time within which to comply with the conditional stay with regard to filing a Record of Appeal and depositing half the decretal sum as security for costs from 45 days to a further 45 days.
 - c. An order does issue to vary the conditional stay by way of depositing half the decretal sum to a lesser sum.
3. Following the filing of the above application under certificate of urgency, on 28/07/2025 the court considered the certificate application and ordered that the matter was not certified urgent. The court however allowed prayer (b) of the application and further ordered that the application be mentioned on 30/09/2025 for directions.
4. When the matter came up for directions on 30/09/2025, the Respondent's counsel informed court that the Appellant had not complied with the stay of execution conditions contained in the ruling of 10/06/2025. He submitted that the Appellant was in breach of the court orders yet he was enjoying stay orders. The Respondent's counsel asked the court to dismiss the application as it was an abuse of the court process and for the court to direct that the trial court's file be returned to the lower court for execution.
5. In response, the Appellant's counsel submitted that the application is seeking variation of this court's orders on the deposit amount to a lesser amount and for extension of time to file the Record of Appeal. Counsel submitted that they had now received the trial court's typed proceedings and ready to file the Record of Appeal. He indicated that the instant application had not been argued.
6. Upon considering the Counsel's arguments, the court directed that the issue of stay orders in place be addressed on 13/10/2025.
7. On 13/10/2025, Parties addressed court on the issue of stay of execution. The Appellant's counsel submitted that his client is not able to deposit half the decretal amount which is about Ksh.3,000,000/= but is willing and ready to deposit Ksh.500,000/- as security for costs.
8. The Respondent's counsel is opposed to the application and submitted that this court had pronounced itself on the prayer for extension of time to comply. On 28/07/2025 the court granted the Appellant 45 days to comply which lapsed on 15/9/2025 but to date nothing has been done. The Appellant has also failed to deposit half the decretal sum as ordered by the court. That despite the court extending time for compliance, the Appellant has done nothing. Counsel submitted that if the Appellant was not satisfied with the ruling of the court delivered on 10/06/2025, he ought to have appealed to the Court of Appeal. Counsel submitted that the application has not been brought under the correct provisions of the law and the same ought to be dismissed.
9. I have considered the Appellant's application dated 25/07/2025 brought under Order 50 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. I have also considered the Respondent's Replying Affidavit dated 13/08/2025 and all the rival oral arguments presented in court. The order sought to be reviewed herein was made by this court on 10/06/2025, and specifically granted the Appellant stay of execution on condition that half the decretal amount is deposited into a joint interest earning account in a reputable commercial Bank, to be held by both advocates for the Parties to this appeal or give a Bank Guarantee for the same as security for costs, within forty-five (45) days of the ruling in default execution to proceed; The Appellant was also ordered to file and serve a record of appeal within Forty-Five (45) days of the ruling;
10. In real terms, the Appellant ought to have complied with the said order by 25/07/2025. In the event of default, the natural consequence is that the stay would lapse and execution will resume. The Appellant



filed this instant application on 26/07/2025 which was a day after the said conditional stay of execution lapsed.

11. I should, therefore, determine whether this court should review or vary the orders given on 10/06/2025. Section 80 of the *Civil Procedure Act*, and Order 45 of the Civil Procedure Rules 2010. Section 80 of the *Civil Procedure Act* states as follows;

“ 80. Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

12. Order 45 of the Civil Procedure Rules 2010 also states thus:-

“ 45.1(1) Any person considering himself aggrieved-

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or
- (b) by a decree or order from which no appeal is hereby allowed

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree or order may apply for a review of judgment to the court which pass the decree or made the order without unreasonable delay”

13. The above provisions circumscribe the jurisdiction of the Court in an application for review. The conditions in Order 45 of the Civil Procedure Rules 2010 have to be satisfied although within a much wider approach expressed in Constitutional desire in Article 159 of *the Constitution* and the overriding objective in Sections 1A and 1B *Civil Procedure Act* to serve substantive justice. Now that the Appellant/Applicant came under Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*, respectively, the question is, has he satisfied the standard as stated in *Kithoi v Kioko* (1982) KLR 177, page 181, by the Court of Appeal that;

“the Civil Procedure Rules Order XLIV demands inter alia, that an application for review must be based in the discovery of new and important evidence which was not within the applicant’s knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake on the face of the record or for any other sufficient reason. The application for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, falling which the application will not be granted.” (Emphasis added)

14. My answer is, I do not think so. There is no discovery of any new and important matter or evidence. There is no mistake or error apparent on the face of the record. Perhaps, in the Constitutional desire



that courts should take a much broader approach in applying legal thresholds, the only point on which the instant application can be decided is whether there is any other sufficient reason presented before the court to warrant the court to vary the orders herein. It was the argument of the Appellant's counsel that the Appellant is unable to deposit half the decretal amount which is about Kshs.3,000,000/= and is proposing or rather willing and ready to deposit Kshs.500,000/= thus seeking to have the order varied as such.

15. The record shows that when the instant application was filed under certificate of urgency on 26/07/2025, this court though did not certify the application urgent, nonetheless it granted prayer (b) of the application which was for an order to issue to enlarge time within which to comply with the conditional stay with regard to filing a Record of Appeal and depositing half the decretal sum as security for costs from 45 days to a further 45 days.
16. The court did not make any orders on the prayer for variation of deposit of half the decretal sum to a lesser amount as the same was contradicting prayer (b) in that whereas the Applicant had sought for enlargement of time to file the Record of Appeal and deposit half the decretal sum as security for costs from 45 days to a further 45 days, he again was seeking under prayer (c) for variation of deposit of half the decretal sum to a lesser amount.
17. It should be understood that the filing of the instant application for variation was not a stay of the orders issued on 10/6/2025. Without doubt the Appellant has and still is in breach of the orders of 10/6/2025. He has neither deposited half the decretal sum nor filed the Record of Appeal as ordered by the Court. The breach notwithstanding, is there sufficient reason to vary the order of 10/6/2025?
18. The Appellant is proposing to deposit Kshs.500,000/= as security for costs against the half decretal sum being about Ksh.3,000,000. I presume since the Appellant is saying he has filed an appeal, the security they are proposing is pursuant to Order 42 Rule 6 of the Civil Procedure Rules. The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Appellant. It is not to punish the judgment-debtor. This is a civil suit where the Appellant is a judgment-debtor. In a civil process, the judgment is like a debt hence the Appellant becomes and is a judgment-debtor in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the Appellant. The security must be one which can serve that purpose. When one imagines, if it becomes necessary, the steps required to be taken for such security being offered to be realized by the decree-holder, it becomes absolutely clear that mere affidavit by the Appellant does not convert the said varied amount into any legally binding security for the due performance of such decree or order as may ultimately be binding on the Appellant. I, therefore, hold that the security offered is inadequate for purposes of Order 42 rule 6 of the Civil Procedure Rules. The Court should always remember that both the Appellant and the Respondent have rights. The Appellant has a right to his appeal and the prospects that it shall not be reduced to pious aspiration or a barren result if he pays out the decretal sum to a person who may not make a refund. The Respondent, on the other hand, has a right to the fruits of his judgment which should not be taken away; and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the Appellant. The court does not consider the amount proposed of Ksh.500,000/= as adequate to secure the due performance of such decree or order as may ultimately be binding on the Appellant in the circumstances of this case. What is also startling is that the Appellant has even deposed that he may not be possessed of sufficient means to pay the decretal sum which he terms as colossal.
19. This not being a bankruptcy cause, the said argument can only work against the Appellant/judgment-debtor as it depicts not quite bona fide intention in applying for stay. In any event, he did not provide



the court with any material to prove the difficulties he was allegedly facing in raising the decretal sum and I am not able to make any finding on those allegations. In the circumstances, the Appellant has not offered sufficient reason or alternative adequate security to warrant the court to vary its orders of 10/06/2025.

20. Even going by my orders issued on 28/07/2025 after considering the certificate of urgency under which the instant application was filed, the Appellant is guilty of breach of a court order. Thus, it will be perfect to label him as a litigant who has come to court with unclean hands. And as it were, equity will not show any love to a person who has acted mala fides in seeking its hand. For those reasons, there is not any sufficient reason on which the Court may act in favour of the Appellant.
21. Accordingly, I decline the request to vary the orders of 10/6/2025. I dismiss the request for alternative security which is improperly presented before this court.
22. The upshot is that the Appellants' application dated 25/07/2025 is dismissed. In effect, the orders of made on 10/06/2025 and extended for another 45 days on 26/07/2025 remain as ordained that the stay was conditional upon depositing half the decretal sum in Court within 45 days or offering a Bank Guarantee thereof. But in the interest of administration of justice, I am still inclined to extend the time for compliance with the orders of 10/06/2025 by another 45 days from the date hereof.
23. I make no order as to costs although the conduct of the Appellant deserved to be penalized by an award of costs against him.
24. Mention after 45 days for further directions on the appeal.
25. Orders accordingly

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS THIS 14TH OCTOBER 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 14TH OCTOBER 2025

In the presence of:

Ms. Odero hb for Mr. Kitindio for Repondent.

Mr. Muema

Millygrace..... Court Assistant

