

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISC. APPLICATION NO. E048 OF 2025

NATIONAL BANK OF KENYA.....
APPLICANT/GARNISHEE

VERSUS

MURGOR & MURGOR

ADVOCATES.....1ST
HOLDER

RESPONDENT/DECREE

THE LYNX @ NGONG ROAD

LIMITED.....2ND **RESPONDENT/JUDGMENT**
DEBTOR

RULING

1. This ruling relates to two applications; the Notice of Motion dated 17th January 2025 filed by the Garnishee/Applicant, and the subsequent application dated 20th February 2025 filed by the 1st Respondent/Decree Holder. Both applications arise from the ruling of Hon. Kiongo Kagenyo (RM) delivered on 17th January 2025 in Nairobi Small Claims Court Commercial Suit No. E7503 of 2023.

Application dated 17th January 2025

2. The Garnishee/Applicant brought the application under 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, seeking an order for stay of execution of the ruling delivered

by the Small Claims Court pending the hearing and determination of the intended appeal.

3. The application is supported by the affidavit of Chrispus Maithya, who avers that the Judgment Debtor obtained a financial facility of Kshs. 498,000,000/= from the Applicant for the purpose of purchasing L.R. No. 209/400/2 and constructing a nine-storey apartment block comprising 193 units. The facility was secured by an escrow account with the Applicant bank for deposits relating to the project.
4. It is deponed that the Judgment Debtor defaulted in repayment, leading to an outstanding debt of Kshs. 1,663,492,254.67, and thus the Applicant holds no funds due or owing to the Judgment Debtor. It is contended that execution of the garnishee order absolute will occasion substantial loss and render the intended appeal nugatory.
5. The 1st Respondent/Decree Holder opposed the application by filing grounds of opposition dated 7th April 2025, and further through his own application dated 20th February 2025, which I address below.

Application dated 20th February 2025

6. The 1st Respondent/Decree Holder's application is brought under Sections 1A, 1B, 3A, 79C, and 79G of the Civil Procedure Act, and Order 42 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. It seeks to strike out the Garnishee's Notice of Motion dated 17th January 2025 and the Notice of Appeal of even date, on grounds that both are incompetent and bad in law.

7. The application is supported by the affidavit of Ken Koskei Murgor, who avers that the Garnishee's Notice of Appeal filed before the Small Claims Court on 17th January 2025 was in contravention of Section 30 of the Small Claims Court Rules, which read together with Order 42 Rule 1 of the Civil Procedure Rules, requires that an appeal be instituted by way of a Memorandum of Appeal lodged in the High Court.
8. The Decree Holder contends that the Garnishee instead filed a miscellaneous application for stay in this Court without a properly constituted appeal, and without complying with the mandatory timelines under Section 79G of the Civil Procedure Act, which provides a 30-day limit for filing appeals. It is further argued that Section 38 of the Small Claims Court Act only allows appeals to the High Court on matters of law, and since no memorandum specifying points of law had been filed, the stay application is incompetent.
9. In response, Andrew Shabani, the Branch Managing Director of the Garnishee Bank, swore a replying affidavit on 23rd April 2025, stating that the Garnishee obtained certified proceedings from the lower court on 4th March 2025 and filed a Memorandum of Appeal on 5th March 2025 in Nairobi High Court Commercial Appeal No. E072 of 2025. It is therefore argued that the appeal is now properly before court and that the stay application should not be struck out.
10. Both applications were canvassed by way of written submissions, which I have duly considered.

Analysis and determination

11. I will first deal with the application dated 17th January 2025 seeking stay of execution. The issue for determination is whether the application is merited and whether the Garnishee has demonstrated sufficient cause for exercise of this court's discretion.
12. The law governing stay of execution pending appeal is set out under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, which provides that:
“No order for stay of execution shall be made unless—
 - (a) the court is satisfied that 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 has been given.”***
13. These principles were reaffirmed by the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417**, and **Kenya Shell Ltd v Kibiru & Another [1986] KLR 410**, where it was emphasized that stay is a discretionary remedy intended to preserve the subject matter of the dispute
14. The Garnishee contends that execution of the garnishee order would unjustly deprive the bank of its own funds, as no money belonging to the Judgment Debtor exists in the account. The Decree Holder disputes this, arguing that the adjudicator already made a finding on that issue and

that the Garnishee is essentially seeking an appeal through the backdoor.

15. Having perused the record, it is clear that the core of the Garnishee's intended appeal questions whether the Small Claims Court erred in law by finding that the bank was indebted to the Judgment Debtor despite the facility relationship being one of creditor-debtor. That question is a matter of law, properly falling within the ambit of Section 38(1) of the Small Claims Court Act.
16. If execution proceeds and the bank is compelled to pay out the sum of Kshs. 1,049,149.19, the appeal will be rendered nugatory, since recovery of such funds from the Decree Holder may not be feasible. I therefore find that substantial loss has been demonstrated.

On Delay

17. The ruling sought to be stayed was delivered on 17th January 2025, and the present application was filed the same day. This demonstrates promptness and satisfies the second requirement of Order 42 Rule 6(2)(b).

On Security for Costs

18. The Garnishee has expressed readiness to furnish security. The requirement for security is not a punishment but a condition to safeguard the successful party - See **Arun C Sharma v Ashana Raikundalia t/a A. Raikundalia & Co. Advocates & 2 Others [2014] eKLR.**

19. I therefore direct that the Garnishee deposits the sum of Kshs. 500,000.00 in an interest-earning account in the joint names of counsel for both parties within 30 days of this ruling.
20. I find that the Garnishee has satisfied all the conditions set under Order 42 Rule 6(2). The Court is persuaded that a stay is warranted to preserve the subject matter and safeguard the appellate process.
21. Consequently, the Notice of Motion dated 17th January 2025 is allowed on the following terms:

(a) There shall be a stay of execution of the ruling and orders of the Small Claims Court made on 17th January 2025, pending hearing and determination of the Garnishee's appeal.

(b) The Garnishee shall deposit Kshs. 500,000.00 in court as security within 30 days.

(c) Costs of this application shall abide the outcome of the appeal.

The 1st respondent's application dated 20th February 2025

22. The main issue arising for determination is whether the Garnishee's appeal and the corresponding application for stay of execution are incompetent and liable to be struck out for want of compliance with the law.

23. The Applicant/1st Respondent urges this Court to strike out the Garnishee's Notice of Motion dated 17th January 2025 and the Notice of Appeal of even date, contending that both are incurably defective and bad in law. It is submitted that the Garnishee failed to comply with the mandatory provisions governing appeals from the Small Claims Court, particularly Rule 30(1) of the Small Claims Court Rules, 2021, which requires that an appeal be instituted by way of a Memorandum of Appeal lodged in the High Court within thirty (30) days from the date of the impugned decision.
24. The Applicant contends that instead of complying with the said rule, the Garnishee filed a Notice of Appeal before the Small Claims Court a procedure unknown to the law and subsequently lodged a miscellaneous application for stay before this Court without an existing appeal.
25. In support of its position, the Applicant relies on the principle that jurisdiction flows from statute, as stated in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, and argues that this Court cannot assume jurisdiction in the absence of a validly instituted appeal.
26. The Court has carefully considered the rival arguments, the statutory framework, and the authorities cited. Rule **30(1)** of the **Small Claims Court Rules** provides that:
"A party desiring to appeal shall, within thirty days of the decision, file a Memorandum of

Appeal in the High Court setting out the grounds of appeal.”

27. It is not in dispute that the Garnishee initially filed a Notice of Appeal before the lower court. Such procedure, though unnecessary, does not by itself confer or oust the right of appeal. The question is whether the subsequent filing of the Memorandum of Appeal on 5th March 2025, after receiving typed proceedings on 4th March 2025, can be deemed to have cured the initial irregularity.
28. **Section 79G** of the **Civil Procedure Act** provides that every appeal shall be filed within thirty days of the decision, *“provided that the court may extend the time for filing the appeal if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”*
29. The section further allows exclusion of the time required for obtaining a certified copy of the judgment or decree.
30. The Court of Appeal in **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** clarified that the time taken to obtain proceedings may be excluded in computing limitation for filing an appeal, provided that the appellant demonstrates genuine effort to obtain them. Similarly, in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR**, the Supreme Court emphasized that procedural rules are handmaidens of justice, and not

mistresses of formality; courts must not pay homage to technicalities at the expense of substantive justice.

31. Applying the above principles to the facts before me, the Garnishee's delay in filing the Memorandum of Appeal has been reasonably and satisfactorily explained. The delay was occasioned by the administrative process of obtaining certified proceedings, which is a legitimate justification. The Court takes judicial notice that the preparation of proceedings in subordinate courts may take considerable time beyond a litigant's control.
32. Consequently, the subsequent filing of the Memorandum of Appeal on 5th March 2025, though slightly outside the thirty-day statutory period, sufficiently cures the procedural lapse. I am therefore satisfied that the appeal is now properly on record.
33. Under Section 38(1) of the Small Claims Court Act, this Court is clothed with jurisdiction to hear and determine appeals from the Small Claims Court on matters of law. At this interlocutory stage, the Court will not evaluate the merits or demerits of the appeal; it is sufficient that the Garnishee has demonstrated that an arguable appeal exists raising issues of law deserving judicial consideration. An arguable appeal need not necessarily succeed; it only needs to raise a bona fide issue worthy of determination (see the Court of Appeal in **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR**).

34. Accordingly, I find that the Garnishee's appeal is properly before this Court and that this Court has jurisdiction to consider and determine the accompanying application for stay of execution.
35. In the result, I find no merit in the 1st Respondent's application dated 20th February 2025. The procedural defect complained of has been sufficiently cured by the subsequent filing of the Memorandum of Appeal. To strike out the appeal at this stage would amount to elevating form over substance and would unjustly hinder the right of appeal.
36. Accordingly, the Notice of Motion dated 20th February 2025 is dismissed with costs to the Garnishee.

Final Orders

37. Having considered both applications, I make the following final orders:
- i. The Garnishee's Notice of Motion dated 17th January 2025 is allowed on terms set out in paragraph 21 above.***
 - ii. The 1st Respondent's Notice of Motion dated 20th February 2025 is dismissed with costs.***
 - iii. The Garnishee shall file and serve the Record of Appeal within forty-five (45) days from the date hereof.***

It is so ordered.

RULING delivered virtually, dated and signed at **NAIROBI**

This **16th** day of **October** 2025.

P.M. MULWA
JUDGE

In the presence of:

Mr. Mwango for Applicant

Mr. Ouma for 1st Respondent

Court Assistant: *Carlos*