



**Cresta Investment Limited & another v Adiungo Kenya Limited & another (Commercial Case E204 of 2023) [2025] KEHC 15587 (KLR) (Commercial and Tax) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15587 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E204 OF 2023  
JWW MONG'ARE, J  
OCTOBER 30, 2025**

**BETWEEN**

**CRESTA INVESTMENT LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**ALPKING HOLDINGS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ADIUNGO KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**IUGO CAPITAL BV ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 27<sup>th</sup> January 2025, this Honourable Court issued ruling in determining 3 applications that were pending before it by the parties and dismissed the Plaintiff's applications of 12<sup>th</sup> May 2023 and 7<sup>th</sup> November 2023 that sought injunctive reliefs and consequently vacated injunctive interim measures of protection orders that had been in force. Subsequently and vide a Notice of Motion Application filed 4<sup>th</sup> February 2025, the Plaintiffs/Applicant moved this Honourable Court under Section 1A, 1B, 3 & 3A of the Civil Procedure Act, Order 40 Rule 1 of the Civil Procedure Rules seeking the following reliefs:-

1. Spent
2. Spent
3. That pending the lodgment, hearing and determination of the intended Appeal, this Honourable Court be pleased to issue a temporary order of injunction restraining the Defendants/Respondents, its servants, agents and /or employees from selling, auctioning or in any manner interfering with the suit property identified as Unit No. 8 I.R No. 1 40014/1 on Land Reference No.195/228 Karen Hills (Suit Property)".



4. That this Honourable Court be pleased to issue any other and further orders as may be necessary to meet the ends of justice; and
  5. That costs of this application be provided for.
2. The application is supported by the grounds set out on its face and the supporting affidavit of Alfred Omwansa Momanyi sworn on 4<sup>th</sup> February 2025. In opposing the application, the Respondents filed a Replying affidavit sworn on 13<sup>th</sup> February 2025. Both parties have filed their respective submissions which I have carefully considered.

### **Analysis and Determination**

3. I note from a careful consideration of the parties' pleadings and their rival submissions what this Honourable Court is being called upon to determine is whether this Court can stay negative orders since in dismissing the two applications the Honourable Court lifted the interim measure off protection. In addition, parties have asked the Court to determine whether the application for injunction pending Appeal has merit.
4. I have looked at the arguments put forth in this application and the authorities that the parties have asked the Court to be guided by. I note that in the ruling delivered by the Court on 25<sup>th</sup> January 2025, this Court declined to allow the applications by the Respondents dated 12<sup>th</sup> May 2023 and 7<sup>th</sup> November 2023 that had sought to preserve the subject matter or suit property pending the outcome of the arbitral proceedings. I agree with the arguments put forth by the Defendants that a dismissal of an application is negative in its very nature and therefore incapable of being preserved. I further concur with the findings of the Court in Catherine Njeri Maranga V Serah Chege & another (2017) eKLR where the Court in dismissing a similar application held as follows;- "The Applicant seeks to Appeal against the order dismissing this application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the Applicant stays in the situation he was in before coming to Court and therefore the issues of substantial loss that he is likely to suffer and the Appeal being rendered nugatory does not arise."
5. This position was reinforced by the Court of Appeal in Kaushak Panchamattia & 3 others V Prime Bank Limited & another (2020) eKLR when the said Court stated as follows:-

"We are guided by the decision in Western College Farts and Applied Sciences v Orange & Others (1976) KLR 63, the Court whilst considering whether an order of stay can be granted in respect off a negative order and which we fully adopt stated as follows:-

"But what is there to be executed under the judgment, the subject of the intended Appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....

The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court to stay to enforce or restrain by injunction."

We reiterate the position taken by the Court in the above case that a negative order is incapable of being stayed because there is nothing to stay. It therefore follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for."



6. I agree with the above finding and find that there is nothing in the orders of this Court that can be stayed in the circumstance and hence the prayers for stay pending Appeal are incapable of being granted in the circumstances. That limb of the application therefore fails.
7. The second limb that this Court identified for determination was whether the prayer for a temporary injunction pending the lodgment and hearing and determination of the intended Appeal. Order 42 Rule of the Civil Procedure

Rules provides as follows:-

“6. Stay in case of Appeal [Order 42, rule 6]-

- (1) No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except 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 subrule (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.
- (3) Notwithstanding anything contained in subrule (2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an Appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of Appeal has been given.
- 5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as



it thinks just provided the procedure for instituting an Appeal from a subordinate Court or tribunal has been complied with.”

8. It therefore follows that the Court must be satisfied that there is sufficient cause to grant a stay pending Appeal. Ipso facto, the filing of an Appeal does not automatically guarantee a stay of execution of the Court’s orders. The Court must be satisfied that there is an arguable Appeal with high chances of success and that the Applicant will suffer substantial loss if the order of stay pending the determination of the Appeal is not granted. In addition, the Applicant must be willing to make available adequate security for the due performance of the decree in issue as may ultimately be binding on him or her. Justice Chepkwony in *Rentco Africa Limited & another vs Munani & another (C.A. No. 127 of 2023) (2023) eKLR*, opined as follows; - “it is not this Courts’ wish to reinvent the wheel but instead holds that an order say for example an order dismissing a suit or an application, cannot be stayed as there is substantially nothing to stay from happening or continuing to happen.”
9. In a nutshell the finding of the Court is that the orders sought to be stayed were negative in nature and therefore incapable of being stayed. In addition, the Court notes that the Applicant is yet to file their intended Memorandum of Appeal, hence denying this Court the opportunity to interrogate the same and to determine for itself whether indeed the Applicant has an arguable Appeal with a likelihood of success.

### **Conclusion and Disposition**

10. In conclusion the Court finds and hold that the application dated 4<sup>th</sup> February 2025 is without merit. The same is hereby dismissed with costs to the Respondent assessed at Kshs. 30,000/=. It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF OCTOBER 2025**

.....

**J.W.W. MONGARE**

**JUDGE**

In the Presence of

1. N/A for the Applicant.
2. Mr. Omemo for the Respondent.
3. Amos - Court Assistant

