



**Emidern Limited v Kiragu (Commercial Appeal E335 of 2024)
[2025] KEHC 15277 (KLR) (Commercial and Tax) (24 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E335 OF 2024
MN MWANGI, J
OCTOBER 24, 2025**

BETWEEN

EMIDERN LIMITED APPELLANT

AND

ERICK KIRAGU RESPONDENT

RULING

1. The appellant/applicant filed a Notice of Motion application dated 7th November 2024 pursuant to the provisions of Order 51 of the Civil Procedure Rules 2010, Section 3A of the *Civil Procedure Act* and all the enabling provisions of the law. The appellant prays for an order of stay proceedings in Milimani Small Claims Court Case No. SCCOMM E9282 of 2023 - Emidern Limited v Erick Kiragu pending the hearing and determination of this Appeal.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Eugene Luseno Hughu, a Director of the appellant company. He averred that on 4th November 2024, the Small Claims Court allowed the respondent's application dated 4th September 2024 to review and set aside a default Judgment entered on 4th March 2024 in favour of the appellant company. That being aggrieved by the said decision, the appellant filed a Memorandum of Appeal on 7th November 2024 seeking to reinstate the Judgment. Mr. Luseno asserted that unless proceedings at the Small Claims Court are stayed, this Appeal will be rendered nugatory.
3. He contended that execution of the decree had already occurred, and the respondent's goods had been sold, thus creating a risk of a claim for damages. He averred that the Trial Court erred in law by accepting the respondent's claim of a separate legal personality for Uchumi Developers without affidavit evidence or a draft defence, as opposed to a business registration search showing no such entity existed.



4. From the Court record and the Judiciary Case Tracking System, it is evident that the respondent did not file any response to the instant application. Further, on 18th December 2024, Mr. Kagiri, learned Counsel for the respondent indicated that the respondent did not intend to file any response to the said application.
5. The application herein was canvassed by way of written submissions. The appellant's submissions were filed on 28th January 2025 by the law firm of JGS Law LLP, whereas the respondent's submissions were filed by the law firm of Titus Marenye Kagiri & Company Advocates on 16th December 2024.
6. Mr. Majimbo, learned Counsel for the appellant relied on the case of Port Florence Community Health Care v Crown Health Care Limited [2022] eKLR, and submitted that this Appeal raises arguable grounds with high chances of success, thus if proceedings before the Small Claims Court are not stayed, the Appeal will be rendered nugatory. He argued that the Trial Magistrate erred in setting aside the default Judgment solely on the respondent's assertion of being a separate legal entity from Uchumi Developers Limited, without affidavit evidence or proof, and despite the appellant having produced evidence to demonstrate that no such entity existed.
7. Mr. Majimbo referred to the case of Trade Winds Express Limited another v Eurocraft Agencies Limited [2010] eKLR, and asserted that a stay of proceedings ought to be granted where as in the present case, failure to do so would render the Appeal futile. He submitted that the instant application was filed without delay and no prejudice would be suffered by the respondent in the event that the orders being sought herein are granted. In addition, Counsel submitted that an order for stay of proceedings is necessary to protect the integrity of this Appeal and to prevent potential damages' claims arising from goods already sold in execution of the decree.
8. Mr. Kagiri, learned Counsel for the respondent submitted that this Appeal is based on procedural grounds and overlooks the urgent substantive issue identified in the Ruling, that there was a triable question as to whether the respondent was a party to the contracts forming the basis of the claim, which warranted the setting aside the Judgment under Rule 11(4)(b) & (c) of the Small Claims Court Rules, 2019. He argued that the appellant even exhibited the very contracts at the center of the dispute between the parties herein, underscoring the need for a full hearing. Counsel asserted that once the Court recognized the possibility that Judgment had been entered against a non-party, it was bound to set the default Judgment aside.
9. Counsel submitted that the learned Magistrate noted that the respondent's goods were sold and held that the respondent could sue for damages, which means that the appellant's reliance on the fact that the respondent's goods had been sold in support of the instant application does not strengthen the Appeal. Additionally, Counsel contended that equity provides a remedy for such a wrong, thus both the application herein and the Appeal lack merits, warranting referral of the dispute between the parties herein to the Small Claims Court for hearing and determination.

Analysis And Determination.

10. Having considered the instant application, the grounds on the face of it, and the affidavit filed in support thereof, as well as the written submissions by Counsel for the parties, the issue that arises for determination is whether an order for stay of proceedings should issue.



11. Stay of proceedings is provided for under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010, which provides that –

“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.”

12. The Halsbury’s Laws of England 4th Edition Volume 37, pages 330 to 332, states as hereunder in respect to stay of proceedings -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”

13. The principles to be considered by a Court when dealing with an application for stay of proceedings were considered in the oft cited case of *Re Global Tours & Travel Ltd*, High Court Winding up Cause No.43 of 2000. The High Court comprising a five Judge bench in the case of *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 others* [2019] eKLR, laid out the following principles for consideration when dealing with an application for stay of proceedings pending appeal -

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.



14. Vide a Memorandum of Appeal dated 7th November 2024, the appellant filed an Appeal against the Ruling of the Small Claims Court delivered on 4th November 2024. On perusal of the said Memorandum of Appeal, it is clear that the appellant's Appeal is premised on grounds that the Trial Magistrate erred by allowing the respondent's application which was defective for not having been accompanied by a supporting affidavit, by holding that the respondent had raised a triable issue on whether he was a party to the contracts in the absence of a draft defence, and despite the appellant demonstrating that Uchumi Developers Limited does not exist, and by setting aside the default Judgment despite the appellant demonstrating that execution had already been completed and the respondent's goods had been sold.
15. From the foregoing, this Court finds that during the hearing of this Appeal, it will be necessary to determine inter alia, whether or not the respondent's application filed before the Small Claims Court was defective for want of a supporting affidavit and whether a draft defence was annexed to the respondent's application to enable the Trial Court to determine if the respondent's defence to the appellant's claim raises any triable issues. I am therefore persuaded that contrary to the respondent's submissions that the appellant's Appeal is based on procedural grounds, the said Appeal is arguable, especially so, since the Court will have to determine whether the respondent's application that resulted in the setting aside of the default Judgment entered on 4th March 2024, was fatally defective.
16. I am inclined therefore to agree with the appellant's contention that in the event that the instant application is disallowed, it stands to suffer substantial loss since the decree issued by the Small Claims Court has already been executed, thereby exposing the appellant to the risk of a claim for damages, which could compel it to refund the value of the goods to the respondent.
17. On the question of whether there exists exceptional circumstances to warrant the orders being sought being granted, this Court is alive to the fact that this Appeal herein arises from a decision of the Small Claims Court which operates within the confines of the Small Claims Courts Act. Disputes filed at the Small Claims Court ought to be determined within sixty (60) days of filing of the claim pursuant to the provisions of Section 34 (1) of the [Small Claims Court Act](#) which states that-

“ All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim.”
18. In view of the above provisions, this Court finds that there not only exists exceptional circumstances to warrant the appellant being granted the orders being sought but also in the event that the instant application is disallowed, the Appeal shall be rendered nugatory as there are high chances that the suit before the Small Claims Court will proceed to conclusion, Judgment will be delivered and possibly executed, before this Appeal is heard and determined. This Court further finds that the application herein having been filed barely three (3) days after the delivery of the Trial Court's Ruling, it was as such filed timeously.
19. This Court finds that the appellant has made out a case to warrant being granted an order for stay of proceedings pending Appeal.
20. The upshot is that the instant application is merited. It is hereby allowed in the following terms –
 - i. An order for stay of proceedings in Milimani Small Claims Court Case No. SCCOMM E9282 of 2023 - Emidern Limited v Erick Kiragu is hereby granted pending the hearing and determination of the Appeal between the parties herein; and



ii. Costs of the application herein shall abide the outcome of the Appeal.

It is so ordered.

**DELIVERED, DATED, AND SIGNED AT NAIROBI ON THIS 24TH DAY OF OCTOBER 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the appellant/applicant

Mr. Kagiri for the respondent

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

