



**Osewe v Mwala (Commercial Appeal E386 of 2024)  
[2025] KEHC 15440 (KLR) (Commercial and Tax) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15440 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E386 OF 2024  
FG MUGAMBI, J  
OCTOBER 23, 2025**

**BETWEEN**

**COLLINCE OLUOCH OSEWE ..... APPLICANT**

**AND**

**SANDRA MUKHANA MWALA ..... RESPONDENT**

*(An appeal from the Ruling at the CM's Court at Nairobi in MCOMMSU  
No. E500/2024 [Hon Cheloti] delivered on 18th December, 2024)*

**RULING**

**Introduction and Background**

1. This Court is called upon to determine the Notice of Motion dated 20<sup>th</sup> December 2024, brought under Articles, 25, 48, 50 and 159 of *the Constitution* of Kenya, Section 1A, 1B, 3A, 3B and 95 of the *Civil Procedure Act* and Order 42 Rule 6 of the Civil Procedure Rules.
2. The applicant, who is also the appellant, seeks an order of stay of execution of the judgment and decree issued on 13<sup>th</sup> December 2024 in MCOMMSU/E500/2024, as well as the consequential execution proceedings, pending the hearing and determination of the appeal.
3. The applicant contends that he has filed an arguable appeal against the impugned judgment. It is urged that unless the orders sought are granted, the substratum of the appeal will be lost, rendering the appeal nugatory as the applicant will be compelled to satisfy the decretal sum, which may not be recoverable should the appeal ultimately succeed.
4. The application is opposed through a replying affidavit sworn on 24<sup>th</sup> February 2025 by the respondent, Sandra Mukhana Mwala, on the grounds that the application is incurably defective for want of signature and ought to be struck out, that the appeal is incompetent, having been filed outside



the thirty-day period stipulated under Section 79G of the *Civil Procedure Act* and without leave and finally that the appeal discloses no arguable grounds, and the application is therefore an abuse of court process.

### **Analysis and Determination**

5. Having considered the application, affidavits, rival submissions, and authorities cited, the Court frames the following issues for determination:
  - a. Whether the preliminary objections raised by the respondent are merited; and
  - b. Whether the applicant has satisfied the requirements for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules.
6. The respondent argues that the application is fatally defective for want of signature and date. On this point, I find that while an omission to date or sign a pleading is a serious lapse, the Court must be guided by Article 159(2)(d) of *the Constitution*, which enjoins courts to administer justice without undue regard to procedural technicalities. I also note that the affidavit in support of the Motion is properly sworn, and the parties are fully aware of the substantive issues that are before the Court for determination. As such, no prejudice has been shown to be occasioned to the respondent. I therefore find that this omission is not fatal to warrant striking out of the application.
7. On the issue of time, Section 79G of the *Civil Procedure Act* provides:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
8. The judgment herein was delivered on 13<sup>th</sup> December 2024. The appeal was lodged on 20<sup>th</sup> December 2024, well within the statutory period of thirty days. The objection by the respondent on this ground is therefore without merit.
9. That said, the principles for the grant of stay pending appeal are now well settled. Order 42 Rule 6(2) of the Civil Procedure Rules provides that no order of stay shall be made unless:
  - a. The Court is satisfied that substantial loss may result unless the order is made;
  - b. The application has been made without unreasonable delay; and
  - c. The applicant has furnished security for the due performance of the decree.
10. These conditions were reiterated by the Court of Appeal in *Halai & Another v Thornton & Turpin (1963) Ltd*, [1990] KLR 365 and *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another*, [1986] KLR 410.
11. On substantial loss, the applicant avers that unless stay is granted, he will be compelled to pay the decretal sum, and recovery may be impossible should the appeal succeed. Substantial loss does not merely refer to financial hardship but to a situation where the successful appeal would be rendered nugatory if execution is allowed to proceed. I am satisfied that the applicant has demonstrated the risk of such prejudice. On delay, the application was filed on 20<sup>th</sup> December 2024, seven days after the delivery of judgment. This is prompt and cannot be termed inordinate.



12. On the issue of security, Order 42 Rule 6(2)(b) of the Civil Procedure Rules is couched in mandatory terms, requiring the provision of security as a precondition to the grant of stay. In *Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another*, [2018] eKLR, the Court emphasized that the purpose of security is to guarantee the due performance of the decree in the event the appeal does not succeed. The respondent therefore urges that should this Court be minded to grant stay, it ought to be on strict terms that the applicant deposits the entire decretal sum in a joint interest-earning account in the names of counsel for both parties. This would be a measure of safeguarding the respondent's right to enjoy the fruits of her judgment.
13. In considering the appropriate form of security, the Court must strike a balance between safeguarding the respondent's right to reap the fruits of her judgment and preserving the appellant's right of appeal from being rendered illusory.
14. Guided by the principles laid down in *Halai & Another v Thornton & Turpin (1963) Ltd*, [1990] KLR 365 and *Butt v Rent Restriction Tribunal*, [1982] KLR 417, I am satisfied that the interests of justice would best be served by directing the deposit of the entire decretal sum in a joint interest-earning account. This ensures that both parties' competing rights are adequately protected pending the outcome of the appeal.

### **Disposition and Final Orders**

15. In the premises, I find merit in the application and make the following orders:
  - a. The Notice of Motion dated 20<sup>th</sup> December 2024 is hereby allowed.
  - b. There shall be a stay of execution of the judgment dated 13<sup>th</sup> December 2024 and resultant decree in MCOMMSU/E500/2024 together with all consequential orders, pending the hearing and determination of the appeal.
  - c. The stay is granted on condition that the applicant shall deposit the entire decretal sum in a joint interest-earning account in the names of both counsel for the parties within thirty (30) days of the date hereof. In default, the stay shall lapse automatically.
  - d. Costs of this application shall abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF OCTOBER 2025.**

**F. MUGAMBI**

**JUDGE**

