

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
[MILIMANI LAW COURTS]
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
SMALL CLAIMS APPEAL NO. E020 OF 2025

-between-

ROMANA MOHAMED MUGHAL.....
APPLICANT

-versus-

PHILIP IRUNGU AHOME.....
.....RESPONDENT

RULING

1. This is a composite ruling on two applications by way of Notices of Motion dated 23rd April 2025 and 14th May 2025 respectively.
2. The background to the applications is that the Applicant, through the application dated 23rd April 2025 filed under certificate of urgency sought a stay of execution of the judgment in *SCCOMM No. E15321 of 2024* [hereinafter referred to as **'the suit'**] pending the hearing and determination of that application and the appeal. According to the Applicant, he was decreed to pay the sum of Kshs. 1,000,0000/= with costs and interest. The Court directed that the application be served for further directions and orders and also directed the parties to agree on a suitable security.
3. The application dated 23rd April 2025 came before Court on 13th May 2025, where this Court heard the Learned Counsel for the Respondent in the absence of the Learned Counsel for the Applicant who joined the virtual proceedings much later after the Court had already dealt with the matter. The Learned Counsel for the Respondent then informed this Court that indeed the decretal sum was Kshs. 586,101/06 and not Kshs. 1,000,0000/= and that since the parties had not reached any consensus on the security then the said sum be deposited in Court. The request was

allowed and an appropriate order was made. It was that order that prompted the filing of the application by a Notice of Motion dated 14th May 2025 which sought to set aside and review the order on depositing the security in Court.

4. This Court then directed that the two applications be heard together and by way of written submissions. In essence, the applications cumulatively deal with the issue on whether a stay of execution be issued in the circumstances of this matter. The Respondent did not file any response to the applications, but instead relied on his written submissions.
5. The gist of the two applications is the Applicant's quest to stay the execution of the decree in the suit without the necessity of depositing any security. To that end, the Applicant avers that his Counsel was absent when the order was made on 13th May 2025 and that the Applicant was financially constrained due to the medical expenses incurred in the treatment of her ailing mother in the United Kingdom. The Applicant averred that unless the orders sought are granted, execution will issue and she stands to suffer irreparable harm.
6. The Applicant filed written submissions dated 9th June 2025. She submitted that *Articles 48 and 50 of the Constitution of Kenya* guarantees every individual access to justice and fair hearing and as such imposing a requirement to deposit the entire decretal amount would be to elevate a discretionary formality over a constitutional guarantee. She submitted that the order for security is discretionary and that the Court has a wide discretion to impose terms that are fair and reasonable and not to pre-empt or punish a litigant for lacking financial muscle. It was also submitted that this Court was being asked to protect the constitutional right of a party who has disclosed her financial position. The Respondent also submitted that she had satisfied the legal and factual burden for grant of stay and demonstrated risk of substantial loss together with her willingness to comply with reasonable terms of partial deposit of sums as the Court may order. For these reasons, she urged this Court to grant stay

of execution and substitute the orders of 13th May 2025 with such reasonable form of security.

7. The Respondent opposed the applications through his written submissions dated 20th June 2025. He submitted that the Applicant had not met the threshold under *Order 42 Rule 6(2)(a) of the CPR* and most specifically, had not demonstrated the substantial loss she was likely to suffer should the orders sought not be granted. The Respondent submitted that the fact that the Applicant finds it burdensome to raise the security as ordered does not amount to substantial loss as she failed to demonstrate how she would suffer irreparably or how the appeal would be rendered nugatory. It was further submitted that since the Applicant had failed to comply with the requirement to provide security then, no stay order ought to be granted so as to ensure that the appellate process was not abused.
8. The Respondent also submitted that the Applicant's reliance on *Article 48 and 50 of the Constitution* to suggest that the requirement to furnish security was an unconstitutional impediment to her right of appeal was a misconceived and mischaracterization of the law. He emphasized that the safeguards under *Order 42* regulates the grant of stay of execution and does not curtail the right to appeal. In conclusion, he submitted that the right to appeal is not absolute and must be exercised within the framework of established procedural law. He reiterated that the order requiring the deposit of the decretal sum in Court is fair and a protective measure. For these reasons he prayed for the application to be dismissed with costs.
9. It is on the foregoing background that this Court has been called upon to express itself on the two applications. As earlier on stated and as demonstrated by the parties, the main issue for determination is whether the Applicant satisfied the conditions for a stay of execution of a decree under *Order 42 Rule 6* of the Civil Procedure Rules.

10. The principles precedent to grant of stay of execution cannot be overstressed. In essence, the Applicant has to satisfy that the application was filed timeously, that substantial loss is likely to be occasioned to the Applicant unless the order is granted and issue of the requirement for security for costs for due performance.
11. This Court will now apply the said principles in this matter. On the issue of when the application was filed, this Court is satisfied the same was filed without any delay. On the aspect of substantial loss, the Applicant mainly submitted her inability to raise the entire judgment sum at the moment as she was supporting her ailing mother. Although the Applicant did not demonstrate the manner in which she would suffer loss if called upon to deposit the decretal sum, nevertheless, this Court takes note of **Article 57[d]** of the **Constitution** which places an obligation on a family to accord reasonable care and assistance to older members of that family.
12. Next is a look at the issue of security for costs. The Supreme Court of Kenya in **Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others [2023] KESC 11 (KLR)** succinctly dealt with this issue and most specifically, the constitutional issue as to whether that an order for security of costs was an impediment to access to justice. The Court rendered itself well and set parameters within which such orders may be made. In buttressing the purpose of such security, the Apex Court had the following to say: -

47. *The rationale for security for costs therefore is aimed at balancing the overarching objectives in the administration of justice as expressed under Articles 48, 50 and 159 of the Constitution that courts should aim to dispense justice. As such, the costs protect the defendant or a respondent against the risk that a costs order made in its favour may be rendered ineffective by the plaintiff's impecuniosity. An order for security for costs will normally affect the interest of plaintiff's access to the court system, regardless of their financial status; shield a successful defendant from litigation costs; and conserve the courts processes: costs and security for costs may discourage frivolous claims, and encourage the parties to conduct litigation in a manner that is proportional to the matters at issue.*

13. The Court then found that the imposition of security for costs was not unconstitutional, but called for proper exercise of discretion and a balance between the right to access justice and the security for costs as follows: -

62. *Having considered the various legal provisions in Kenya and noting the jurisprudence elsewhere, this is what we make of it: **the imposition of security for costs by a court is in itself constitutional**; there are no clear guiding principles on what a court considers when making an order for security for costs; at times the amount payable is left to the discretion of the court; in other times, the amount payable is set out in statute or regulations; in other times, although the amount payable is prescribed by legislation or regulation, the court has the discretion of reducing or enhancing the same or even waiving payment of the same; a suit maybe dismissed for non-payment of security for costs; and a dismissed suit may be reinstated upon the appellant or plaintiff showing cause for the non-payment of ordered costs. We are also cognizant of the fact that different courts in our judicial system have crafted their own rules of procedure to govern them including those of security for costs. However, there are no standard guidelines on factors to be considered whilst making an order for security for costs.*

14. The Supreme Court of Kenya then developed some guiding principles to be considered by Courts on the issue of security for costs as under: -

63. *..... Thus, in determining whether it is appropriate to make an order that a party gives security for costs, the court may have regard to the following matters and such other matters as it considers relevant in the peculiar circumstances of each case: -*

- i. the prospects of success or merits of the proceedings,*
- ii. the genuineness of the proceedings,*
- iii. the impecuniosity of the plaintiff,*

- iv. *whether the plaintiff's impecuniosity is attributable to the defendant's conduct,*
- v. *whether the plaintiff is effectively in the position of a defendant,*
- vi. *whether an order for security for costs would stifle the proceedings and/or impede access to justice,*
- vii. *whether the proceedings involve a matter of public importance,*
- viii. *whether there has been an admission or payment in court,*
- ix. *whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant,*
- x. *the costs of the proceedings,*
- xi. *whether the security sought is proportionate to the importance and complexity of the subject matter in dispute,*
- xii. *the timing of the application for security for costs,*
- xiii. *whether an order for costs made against the plaintiff would be enforceable within the Republic of Kenya,*
- xiv. *the ease and convenience or otherwise of enforcing a Kenyan Court judgment or order in the country of a non-resident plaintiff or appellant.*
- xv. *if the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity.*
- xvi. *security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct.*
- xvii. *if the plaintiff fails to comply with an order under this rule, the Court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.*

- xviii. the provisions of any Act under which the court may require security for costs to be given such as the Elections Act.*
- xix. a second motion for security for costs will not succeed unless there is an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff has come into a sum of money sufficiently large that they could no longer make an impecuniosity argument.*
- xx. the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic.*
- xxi. the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant.*

64. We agree with the jurisprudence from other jurisdictions that a Court ought to take into consideration several factors before making an order for security for costs.

15. From the foregoing, it is imperative to note that an order for security for costs ought not to be made in instances which, when the various applicable principles are cumulatively considered, results to stifling one's access to justice. However, as said before, it is upon a Court to strive to balance the parties' interests and the need to promote the right to access to justice.
16. In applying the above to this matter, there is no doubt that one of the cardinal determinations on appeal is whether the Respondent was legally entitled to a commission. Since the trial Court entered judgment against the Applicant thereby resulting to the instant appeal, and coupled with the Applicant's willingness in his written

submissions to deposit part of the decretal sum and noting that Applicant's overall financial position was not disclosed, this Court, in striking a balance between the rival parties' positions, finds that the Applicant's right to access justice will not be stifled by an order to deposit part of the judgment sum in Court as security.

17. Consequently, the Applicant is deserving of a conditional stay of execution order and this Court now makes the following final orders:

[a] There be a stay of execution of the judgment in *Nairobi SCCOMM No. E15321 of 2024* on condition that the Applicant deposits the sum of Kshs. 200,000/= [Read: Kenya Shillings Two Hundred Thousand Only] in Court within 30 days of this order. For clarity, the order made on 13th May 2025 requiring the Applicant to deposit the sum of Kshs. 586,101/06 in Court is hereby set-aside.

[b] The costs of the application shall be in the appeal.

[c] The trial Court file be availed for further orders regarding the hearing of the main appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 19th day of November, 2025.

A.C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Peter, Learned Counsel for the Applicant.

Mr. Wachira, Learned Counsel for the Respondent.

Michael/Amina - Court Assistants.