



**Ponya Surgical and Nursing Home Limited & 2 others v Wambua t/a Viola Pharmacy
(Commercial Appeal E138 of 2024) [2025] KEHC 17276 (KLR) (24 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17276 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
COMMERCIAL APPEAL E138 OF 2024**

**TM MATHEKA, J
NOVEMBER 24, 2025**

BETWEEN

**PONYA SURGICAL AND NURSING HOME LIMITED 1ST APPELLANT
JUSTUS NDAMBUKI KIKOLYA 2ND APPELLANT
CATHERINIE MUKENYI MBOKA 3RD APPELLANT**

AND

JACINTA NDANU WAMBUA T/A VIOLA PHARMACY RESPONDENT

(An Appeal against the judgment in Makindu Small Claims Court case no. E075 2024)

RULING

1. On 30 10 2024 the learned trial magistrate delivered judgment in Makindu Small Claims Court case no. E075 2024 in favour of the Plaintiff Respondent.
2. The judgment provoked this appeal accompanied by an application brought by way of Notice of Motion dated 14 2 25 seeking orders.
 1. That pending the inter-partes bearing and determination of this application this Honourable Court be pleased to issue orders of stay the execution of the judgment decree rendered and issued in Makindu SCCOMM No. E075 OF 2024 Jacinta Ndanu Wambua T A Viola Pharmacy -Vs- Ponya Surgical & Nursing Home Limited & 2 Others delivered on 30th October 2024 by Hon. Nyandusi (Adjudicator).
 2. That pending the hearing and determination of the Appeal this Honourable Court be pleased to stay the execution of the judgment or decree rendered and issued in Makindu SCCOMM No. E075 OF 2024 Jacinta Ndanu Wambua T A Viola Pharmacy -Vs-Ponya Surgical & Nursing Home Limited & 2 Others delivered on 30 October 2024 by Hon. Nyandusi (Adjudicator).



3. That the costs of this application be provided for.
3. The grounds for the application are on its face and in the affidavit of Justus Ndambuki Kikolya inter alia;
 1. That the Respondent has obtained warrants for attachment of the Appellants' properties which have already been proclaimed.
 2. That the Applicants seek for orders of stay of execution as the Applicants may suffer a lot of prejudice if a judgement is enforced before their appeal is heard and determined and the appeal will be rendered nugatory
 3. That the Appellants are willing to abide by any conditions set by this Honourable court for the grant of orders sought herein including depositing monetary security in an interest earning account if the court makes such an order pending the hearing and determination of the Appeal.
4. The application was opposed vide the replying affidavit of Jacinta Ndanu Wambua – Sworn on 17 3 2025 where she states ;
 1. That I instituted and prosecuted the instant case, subsequently, judgment was delivered in my favor on 30.10.2024 for a sum of Kshs 374,565 plus costs of Ksh 30,000 - and interest and the Respondents were granted 30 days stay of execution.
 2. That my advocates on record extracted and served a draft decree and a certificate of costs upon the Applicants' advocates and a decree was issued by the Small Claims Court in Makindu on 4th December 2024. My Advocates thereafter instructed Kimu Auctioneers to recover the sum.
 3. That it is against this backdrop that the Applicants' have now come to court seeking an order for stay of execution in this matter.
 4. That the Application herein does not meet the legal threshold for granting stay of execution orders as no substantial loss has been demonstrated by the Respondents to be visited on them and that the contention there is impending execution is based on assumptions
 5. That I am informed by my advocates on record which information I verily believe to be true that appeal filed by the Applicants' is defective, unmeritorious and bad in law as it contravenes the provisions of Section 38 of the *akn ke act 2016 2 Small Claims Court Act* and as such my Advocates on record have filed a notice of Preliminary Objection to that effect. (Annexed and marked JNW-2 is a copy of the Preliminary Objection)
5. That the applicants had been granted stay by the Small Claims Court on 30 10 24 and no further stay was available to them.
6. The respondent filed notice of preliminary objection dated 11 12 2024 which was served with the memorandum of appeal, where the applicant contends ; That;
 1. The Learned Adjudicator erred in law and in fact in deciding case against the weight of the evidence adduced during trial.
 2. The Learned Adjudicator erred in law and in fact by disregarding the provisions of the law of contract and the *akn ke act 1930 33 sale of goods act* in a matter involving a contract between the parties.
 3. The Learned Adjudicator erred in law and in fact by deciding a case in favour of the claimant who did not adduce sufficient evidence to prove her case.



4. The Learned Adjudicator erred in law and in fact by finding the respondent liable when in actual fact they were not liable.
7. Parties argued the preliminary objection via written submission.
8. The position of the respondent is that the appeal contravenes the provisions of section 38 of the *akn ke act 2016 2 Small Claims Court Act, 2016*.
9. It is submitted that as per Samuel Kamau Macharia and another Vs Kenya Commercial Bank Ltd & 2 others [2012] eKLR – jurisdiction of the court emanates from *akn ke act 2010 constitution the Constitution* or from legislation.
10. That an appeal from the Small Claim Court to the High Court must be on a point of law only. That this is the position in *Jambo Credit Limited vs Mwangi Civil Appeal E340 2023 [2025] KEHC 656(KLR) (CIV) (30 1 2025)* judgment where the judge held that section 38 of the *akn ke act 2016 2 Small Claims Court Act* provides that appeals to the High Court must be on points of law only. It is argued that the appeal herein is based on points of fact only. That the applicant is inviting this court to re-evaluate the evidence of the trial court contrary to the law. The respondent relies on *Momentum Credit ltd Vs Keiwua (Appeal E014 2024) [2025] KEHC 388 (KLR) Commercial and Admiralty (23 1 2025)* that where the appeal is on factual issues it has no leg to stand on.
11. The applicant submits that the law provides for the right of appeal from the Small Claims Court to the High Court. That what constitutes points of law was determined in *Peter Gichuki King'ara vs IEBC & 2 others Nyeri Civil Appeal 31 2013* – that whether a court evaluated the evidence and arrived at a correct determination – was a point of law and further in *Otieno Ragot & Co. Advocates vs National Bank of Kenya Ltd [2020]eKLR-* where the court was of the view that other than the points of law – the court could consider whether the courts below had considered matters they should not have considered failed to consider matters they should have considered, or that the decision was perverse in its entirety, that a decision would be erroneous in law if it is one that no court could reasonably come to.
12. Further that in *Black's Law Dictionary 8th Edn* the term matter of law is generally understood as “a legal question on question that requires judicial interpretation application of legal principles that there are numerous precedents affirming the jurisdiction of the High Court in hearing appeals form small claim court.
13. That in *Kenya Airways Ltd vs Malei Nyamwea [2020] eKLR* it was held that the High Court in exercising its appellate jurisdiction has the power to address errors of law, procedural errors and factual inaccuracies in the decisions of lower courts”
14. The only issue for determination is whether Section 38 of the Small Claims Court limits the jurisdiction of the High Court - and if so – whether this matter falls within that limitation
15. Section 38(1) of the SCC states that;

“A person aggrieved by the decision of the court may appeal against the decision or order to the High Court on matters of Law.”
16. I have perused the memorandum of appeal. There are ground s stating that the adjudicator disregarded the law of contract and *akn ke act 1930 33 Sale of Goods Act* in a matter involving a contract between the parties. This is prima facie a point of law where this court will be required to look at the Statute and the law on contracts.



17. From the arguments made before me by both the respondent and the applicant and the law, the High Court's jurisdiction is limited to matters of law. On this one there are issues of law raised in the memorandum of appeal, whose merits I cannot go into at this stage.
18. Evidently the preliminary objection cannot stand as there is a point of law clearly raised by the respondent, and I so hold.
19. Having found the preliminary objection unsustainable, I have considered the application for stay pending appeal. The applicant has indicated that they are willing to abide by conditions laid down by court.
20. I allow the application for stay on condition that the applicant deposits in court in a joint interest earning account in the names of both counsel the sum of Kshs. 400,000 within 45 days hereof. In default the stay order to lapse automatically.
21. The record of appeal be filed and served within 45 days hereof. Mention for compliance and directions before the Deputy Registrar in 45 days hereof.
22. The costs herein to abide the appeal

DATED, SIGNED AND DELIVERED VIA CTS ON 24TH NOVEMBER 2025

MUMBUA T. MATHEKA

JUDGE

CA Chrispol

