

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**HCCA NO. E033 OF 2024**

**EQUATOR BOTTLERS LIMITED ..... APPELLANT**

**-VERSUS-**

**EUNICE RAHEL ACHIENG .....RESPONDENT**

**R U L I N G**

1. Before me is a Motion on Notice dated **18/9/2025** by the appellant. The same was brought under **Articles 159 (2) of the Constitution, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act & Order 9 rules 9 & 10 of the Civil Procedure Rules 2010.**
2. The appellant sought leave to effect change of advocate as well as stay of execution of the decree in **Kisumu CMCC No. 425 of 2017** pending the hearing and determination of **Kisumu Court of Appeal Civil Application No. E098 of 2025.** On the **29/9/2025**, the firm of Nyamurongi & Co. Advocates was granted leave to act on behalf of the appellant
3. The grounds upon which the application was brought were set out in the body thereof and in the Supporting affidavit of **Julius Gicheha** sworn on **18/9/2025.** These were that with the dismissal of his appeal before this court, if the stay was not granted, the respondent would execute the decree

of the Chief Magistrates Court thereby occasioning the applicant loss to his prejudice as the appeal before the Court of Appeal will be rendered nugatory.

4. It was further contended that the applicant offers to deposit a bank guarantee as security to secure its right of appeal. That the applicant has filed an application before the Court of Appeal seeking leave to file its Notice of Appeal out of time which application is pending.
5. The respondent filed a replying affidavit sworn on the **25/92025** in response thereto. It was contended that following the dismissal of the applicant's appeal before this Court, the applicant's obligation to the respondent had crystallized as the bank guarantee provided as a condition of stay had lapsed.
6. That the applicant had failed to file a Notice of Appeal and having filed an application at the Court of Appeal, this court lacked jurisdiction to grant the orders of stay sought. That in any case the applicant has not met the conditions precedent for the grant of orders of stay of execution.
7. That she is a person of means being a business lady and as she was initially able to raise the decretal amount in the transactions with the applicant and also being the current Member of County Assembly for South Sakwa Ward.
8. The application was disposed by way of written submissions. It was submitted for the applicant that it had a right of appeal to the Court of Appeal wherein it had lodged an application to file the Notice of Appeal out

of time and that the instant application was not an application under **Order 42 Rule 6** of the **Civil Procedure Rules 2010** but rather the principles therein were only good for guidance.

9. That the respondent's means were unknown and that failure to grant the orders sought will render the intended appeal an academic exercise thus there was need for maintenance of status quo.
10. The respondent on her part submitted that it was not disputed that there was no Notice of Appeal filed, that the Court had already rendered its decision and become functus officio and thus it could only exercise its discretion under **section 1A, 1B & 3A** of the **Civil Procedure Act** once it confirms that the application has been brought under **Order 42 Rule 6** of the **Civil Procedure Rules 2010**.
11. That there being no appeal pending, the orders sought were a preserve of the Court of Appeal as the prayers being sought are the ones under **Rule 5 (2) (b) of the Court of Appeal**.
12. That the mere fact that the sums sought in execution is much is not reason enough to grant the orders sought. That the respondent is capable of refunding the said monies as they emanated from her in the commercial transactions between the parties herein.

13. I have considered the pleadings herein, the response and the submissions filed by the parties which were highlighted before this court on the **14/10/2025**.
14. The Court had already allowed the prayer for change of advocate. All that is pending is the prayer for stay of execution pending the hearing of an application that is pending before the Court of Appeal. It was contended that the applicant having not filed any Notice of Appeal and having filed an application at the Court of Appeal, this Court lacked jurisdiction to grant the orders of stay sought.
15. There is no dispute that there is no appeal pending before the Court of Appeal against this Court's decision of **16/6/2025**. It is also not in dispute that the applicant has filed an application dated **4/7/2025** before the Court of Appeal in which it seeks extension of time to file its Notice of Appeal.
16. What the applicant has done is to invoke the inherent jurisdiction of this Court to allow it an opportunity of being heard by the Court of Appeal. The application before me is not one of stay of execution pending appeal *strictu sensu*.
17. I have considered the checkered history of this matter. The period the case has taken in our Courts. I have also considered that this Court struck out an earlier application by the applicant for reasons on record. The question that arises is, is there any other jurisdiction left with this Court to deal with this

matter any further? I entertain doubts. Had the application for leave to extend time for filing of the Notice of Appeal been made before this Court under **section 7 of the Appellate Jurisdiction Act**, this Court would still have retained jurisdiction to act on this matter.

18. It must be recalled that the appeal before this Court was dismissed in June, 2025. That judgment was never appealed for reason that the applicant's previous advocates failed to act with expedition. Equity aids the diligent and not the indolent. There is no satisfactory reason that has been advanced to warrant transferring such indolence to the diligent respondent who has been waiting to enjoy the fruits of her judgment.
19. What has to be considered is the undoubted right of the applicant to appeal to a higher Court for consideration and the respondent's right to enjoy the fruits of her judgment.
20. Balancing these rights may not be easy but a court of law must decide one way or the other. In **Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR)** where the Court of Appeal held: -

***“A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings. It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is***

*whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory...”*

21. I have already found that with the striking out of the application for stay in July, 2025 and there being no pending appeal, this Court is bereft of any further jurisdiction to entertain the matter before it. If the appeal finally succeeds, the respondent has indicated that she will be able to refund the money as the same had initially emanated from her.
22. Accordingly, I find the application dated **18/9/2025** to be without merit and hereby dismiss the same with costs to the respondent.

It is so ordered.

**DATED** and **DELIVERED** at Kisumu this **28<sup>th</sup>** day of **November, 2025**.

**A. MABEYA, FCI Arb**  
**JUDGE**