



Mbaka v Micheni & 2 others; Micheni (Applicant) (Civil Appeal E023 of 2024) [2025] KEHC 17787 (KLR) (25 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E023 OF 2024
RL KORIR, J
NOVEMBER 25, 2025**

BETWEEN

FRANKLINE MUGENDI MBAKA APPELLANT

AND

LUCY MUTHONI MICHENI 1ST RESPONDENT

MORRIS MWENDA MICHENI (BEING THE ADMINISTRATIX AND ADMINISTRATOR RESPECTIVELY OF THE ESTATE OF COLLINS MICHENI MWENDA- DECEASED) 2ND RESPONDENT

SIDRA MOTORS SALES & SPARES 3RD RESPONDENT

AND

CHARITY MAKENA MICHENI APPLICANT

RULING

1. This Ruling is in respect of the Applicant’s Notice of Motion dated 17th October 2024. It is brought under Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 79B of the [Civil Procedure Act](#) and Article 50 (1) of [the Constitution](#). The Application seeks the following orders:-
 - i. The 1st and 2nd Respondents herein Lucy Muthoni Mucheni (deceased) and Morris Mwenda Micheni (deceased) be substituted with Charity Makena Micheni.
 - ii. The Memorandum of Appeal dated 5th July 2024 and all consequential orders thereto be struck out summarily under Section 79B of the [Civil Procedure Act](#).
 - iii. That this court be pleased to lift the stay of execution of the judgment granted to the Appellant/Respondent on 2rd July 2024 in Chuka Civil Case No. E004 of 2021 Lucy Muthoni Micheni & Another v Frankline Mugendi Mbaka & Another.



- iv. That costs of this application be borne by the Appellant/Respondent.
2. The Motion is premised on the grounds set out on its face and on the face of the Application and on the Supporting Affidavit of Charity Makena Micheni sworn on 17th October 2024.
3. The Applicant stated that Collins Mwenda Micheni died on 10th October 2016 and the 1st and 2nd Respondents who were the administratrix and administrator of his estate respectively are now also deceased. That she obtained letters of administration ad litem on 7th October 2024 in order to pursue this case and it is only fair and just that she be substituted in place of the deceased's estate.
4. The Applicant further stated that the Application subject of the Appeal is not one a party can appeal from as of right under Order 43 Rule 1 of the Civil Procedure Rules 2010 as it was primarily premised on Order 5 of the Civil Procedure Rules, 2010. Further, that the Appellant's main issue in the Application is whether there was proper service of summons and pleadings and whether he is entitled to orders to set aside the final judgment and decree of the court in the suit. That no leave was sought in the trial court before the current appeal was lodged and therefore the present appeal was abuse of the court process and whose aim was to curtail their enjoyment of the award by seeking to set aside a non-existent interlocutory judgment.
5. The Applicant further stated that the Appellant and the 3rd Respondent failed to file a defence in the matter leading to an interlocutory judgement which the Appellant's advocates moved the court to set aside. That the interlocutory judgment was set aside subject to throw away costs of Kshs. 20,000/- and the matter proceeded for hearing to completion with all parties present and judgment entered in favour of the 1st and 2nd Respondents against the Appellant.
6. The Applicant further stated that the Appellant proceeded to file a declaratory suit, Chuka CMCC E125 of 2023 Frankline Mwenda Micheni v Trident Insurance & 2 Others seeking enforcement of the decree issued by the court thereby implicitly accepting the judgment and decree he now challenges through the application.
7. In addition, the declaratory suit was determined in favour of the Appellant and the insurance company ordered to pay a statutory limitation of Kshs. 3,000,000 which they have already provided cheques for. That the Appellant was ordered to settle the remainder of the decretal sum which at the time was Kshs. 1,752,720.84 and therefore the application has been overtaken by events by virtue of determination of the declaratory suit. Moreover, the decree has already crystallized and is being partly satisfied or perfected by the insurance company as part of the decretal sum the insurance company was ordered to pay in 15 monthly instalments of Kshs. 200,000 post dated cheques commenced on 21st May 2024 and any disturbance would occasion confusion and miscarriage of justice.
8. The Applicant further stated that the Appellant did not deposit any security for the decretal sum of Kshs. 1,752,720.084 he was ordered to pay in order to be granted stay of execution pending appeal.
9. The Appellant/Respondent filed a Notice of Preliminary Objection in response to the Application raised on the following grounds:-
 - i. That the Application is fatally defective and should be struck out with costs as it is made by a stranger with no locus standi to address this honourable court in this appeal.
 - ii. That the Application by one Charity Makena Micheni is baseless, fatally defective and discloses no reasonable cause of action and/or remedy in law for its failure to disclose the rules of procedure or law under which it is made and accordingly it should be dismissed.



- iii. That the application by one Charity Makena Micheni is fatally defective and has no feet to stand on as the said Applicant has failed to support the Application with any Grant Ad litem or any other authority authorizing her to act or sue on behalf of the 1st and 2nd Respondents, and accordingly it should be dismissed with costs to the Appellant/Respondent.
10. The Appellant further filed a replying affidavit sworn on 12th November 2024. He stated that the Applicant Charity Makena Micheni is not a party in this appeal and therefore has no locus standi to address this court. That the said applicant has not disclosed the rules of procedure or law upon which she is making the Application thus prejudicing his response if at all such an Application is conceivable under law for the Application discloses no reasonable action and/or remedy in law.
11. He also stated that if it was true that the 1st and 2nd Respondents in the Appeal were deceased, then the Applicant ought to have obtained and supported her Application with a Grant ad litem or any other authority authorizing her act or sue on behalf of the 1st and 2nd Respondent. The Respondent further stated that the Applicant was misleading the court that he was ordered to deposit the sum of Kshs. 1,752,720.84 and also misleading the court that the Appeal was lodged without leave of the trial court as his appeal lies of right without requirement of the leave of court as per Order 43 Rule 1.
12. Lastly, the Respondent deponed that the issue of representation by counsel appointed by the insurance, the declaratory suit and interlocutory judgment are the subject of the Appeal and cannot be canvassed in this interlocutory application.
13. The Applicant filed a supplementary affidavit dated 11th November 2024 stating that she obtained grant ad litem on 7th October 2024 but despite her timely follow up and request there was unexpected delay by the court and the same was issued on 11th November 2024. A copy of the grant ad litem was annexed and marked as “CMM-8”.
14. Both the Application and the Preliminary objection were canvassed by way of written submissions. The Applicant filed written submissions dated 14th November 2024 in respect of the Application. She raised the following issues for determination:-
 - (i) Whether the 1st and 2nd Respondents herein, Lucy Muthoni Micheni (deceased) and Morris Mwenda Micheni (deceased) should be substituted with Charity Makena Micheni.
 - (ii) Whether the Memorandum of Appeal dated 5th July 2024 and all consequential orders thereto should be struck out.
 - (iii) Whether this honourable court should lift the stay of execution granted to the Appellant/ Respondent on 23rd July 2024 in Chuka Civil Case No. E004 of 2021 Lucy Muthoni Micheni & Another v. Frankline Mugendi Mbaka & Another.
15. In respect to the Preliminary Objection, the Applicant filed written submissions dated 14th November 2024 raising one issue for determination being whether the Preliminary objection is meritorious.
16. The Appellant/Respondent filed written submissions dated 5th December 2024 addressing both the Application and the Preliminary Objection. He raised the following issues for determination:-
 - i. Whether the Applicant/Intended Substitute’s Supplementary Affidavit dated 11th November 2024 is properly before this court and whether the same can be considered as part of the Application.
 - ii. Whether the Applicant/Intended Substitute has any locus standi to bring this Application and whether she may be allowed to substitute both 1st and 2nd Respondents herein.



- iii. Whether the memorandum of appeal dated 5th July 2024 should be struck out summarily under Section 79B of the Civil Procedure Act.
 - iv. Whether stay of execution pending appeal granted on 23rd July 2024 in Chuka CMCC No. E004 of 2021 should be lifted.
17. I have considered the rival affidavits and submissions by the parties. The issues arising for my determination are: -
- i. Whether the Supplementary Affidavit dated 11th November 2024 is properly before the Court and whether it should be admitted as part of the Application.
 - ii. Whether the Applicant, Charity Makena Micheni, has locus standi to bring the Application and whether she should be substituted in place of the deceased 1st and 2nd Respondents.
 - iii. Whether the Application is competent in light of the alleged failure to cite the specific rules of procedure or legal provisions under which it is brought, and the effect of such non-disclosure on the Appellant's right of reply.
 - iv. Whether the Memorandum of Appeal dated 5th July 2024 and the consequential orders should be summarily rejected or struck out under Section 79B of the Civil Procedure Act.
 - v. Whether the stay of execution granted on 23rd July 2024 in Chuka CMCC No. E004 of 2021 should be lifted.
 - vi. Whether the Preliminary Objection raised by the Appellant is meritorious.
 - vii. Who should bear the costs of the Application.

(i) Whether the Supplementary Affidavit dated 11th November 2024 is properly before the Court and whether it should be admitted as part of the Application.

18. The Supplementary Affidavit was filed to introduce the Grant ad litem which, according to the Applicant, was issued late due to administrative delays.
19. Counsel for the Appellant/Respondent submitted that a supplementary affidavit can only be admitted with the leave of the court which the Applicant did not seek. That there is no legal basis for responding to a Notice of Preliminary objection through a supplementary affidavit. Further, that the supplementary affidavit has introduced new facts that were not part of the Application and allowing it will be trial by ambush as the Respondent will not have an opportunity to respond. In addition, that the supplementary affidavit is scandalous and ought to be struck out.
20. The Applicant explained that the Supplementary Affidavit was necessitated by the late issuance of the Grant ad litem, which delay was said to be purely administrative. That affidavit was filed to place before the Court evidence that the Applicant now holds the requisite legal capacity. That it was therefore not an afterthought but an essential document for the proper ventilation of the Applicant's case.
21. Order 51 Rule 14(3) CPR permits filing of a supplementary affidavit with leave. Although leave was not expressly sought, the Court retains discretion to admit the affidavit where no prejudice is shown. Courts have consistently emphasized that procedural rules are designed to aid not hinder the delivery of substantive justice.



22. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others* (2014) eKLR held that: -

“The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases

Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

I reiterate what the court said in *Githere V Kimungu* (1976-1985) E.A 101, that: -

“... the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case”.

...It ought to be clearly understood that

the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why *the constitution* and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities”.

23. Applying these principles, I am not persuaded that the Appellant/Respondent will suffer any prejudice that cannot be cured by an opportunity to respond, should that be necessary. No substantive rights are shown to have been compromised. The Supplementary Affidavit merely places before the Court evidence relating to the Applicant’s legal capacity an issue central to the Application. Its admission ensures that the Court has the material necessary to fairly determine the issues in controversy.

24. I am also not satisfied that the contents of the affidavit meet the threshold for being termed scandalous. The affidavit is relevant to the question of locus standi, and relevance is the primary test for admissibility.

25. In the circumstances, and guided by Article 159(2)(d) that justice shall be administered without undue regard to technicalities, I find that the omission to seek leave is a curable defect. The interests of justice would not be served by striking out the Supplementary Affidavit.

26. Accordingly, the Supplementary Affidavit dated 11th November 2024 is hereby admitted into the record, the procedural lapse notwithstanding.



(ii).Whether the Applicant/Intended Substitute has any locus standi to bring this Application and whether she may be allowed to substitute both 1st and 2nd Respondents herein.

27. It is the law that only a person with sufficient interest in the matter may invoke the jurisdiction of the Court. Locus standi is derived from the nature of the interest in the subject matter of the dispute and the legal capacity to act on behalf of a party or estate. In civil matters, the guiding principle is that the Court will only entertain an application by a person who is directly affected by the proceedings or has legal authority to act for a party in the proceedings.
28. The Appellant argued that the Applicant is a stranger to the appeal as she had not exhibited Letters of Administration ad litem at the time of filing the Application. In support of his position, he cited the case of Hasham V Nathoo [2022] KEHC 17050 (KLR) where the court determined that a party suing on behalf of a deceased must first obtain grant ad litem. He urged the court to find the Application incurably defective while citing Wango'ndu (Administrator ad litem to the Estate of Leah Watetu Wangangi-deceased) v Mwangi & 13 Others [2023] KEELC 474 (KLR) where the court buttressed that one must first apply to the court for a limited grant ad litem to be issued in his favour before he can address the court on any issue concerning the estate of the deceased.
29. He further argued that the Applicant has only grant ad litem for the 1st Respondent and for there to be valid substitution the Applicant must produce grants ad litem for both 1st and 2nd Respondents.
30. On her part, the Applicant contended that the issue of locus standi can be proved by the grant ad litem introduced by the supplementary affidavit. She submitted that the 1st Respondent was the spouse of the late Collins Mwenda Micheni while the 2nd Respondent was his son. That she (the Applicant is the daughter of Collins Mwenda Micheni and Lucy Muthoni Micheni both deceased and the brother Morris Mwenda Micheni (deceased) thus the basis for grant of letters ad litem and the basis for her locus standi.
31. Substitution upon death of a party is governed by Order 24 Rules 3 and 4 Civil procedure Rules and Sections 1A, 1B, 3A CPA. The law requires that a person seeking substitution demonstrate the legal authority to act on behalf of the deceased party, typically through grant ad litem. In the instant case, the Applicant has annexed a valid grant ad litem, demonstrating that she has the authority to act on behalf of the estate of the late Collins Mwenda Micheni.
32. The argument that separate grants are required for the 1st and 2nd Respondents does not assist the Appellant. The 1st and 2nd Respondents were, respectively, the spouse and son of the deceased. The Applicant is a daughter of the deceased and, under the law, her grant ad litem permits her to represent the estate in legal proceedings where the administrators of the estate are deceased. No prejudice to the Appellant is demonstrated by permitting substitution in this manner.
33. Having regard to the law and the facts before me, I find that the Applicant has locus standi to bring this Application and holds the legal authority to be substituted in place of the deceased 1st and 2nd Respondents. Substitution is therefore appropriate, and the Applicant is recognized as the proper party to prosecute this appeal on behalf of the estate of Collins Mwenda Micheni.
34. Therefore, Charity Makena Micheni is hereby substituted for the deceased 1st and 2nd Respondents in this appeal.



(iii).Whether the memorandum of appeal dated 5th July 2024 should be struck out summarily under Section 79B of the Civil Procedure Act.

35. Section 79B CPA empowers the Court to summarily reject an appeal where the appeal is frivolous, vexatious, or has no reasonable cause or prospect of success. The Court is enjoined to exercise this power sparingly, given the constitutional right of a party to access justice under Article 50(1) of the Constitution. The overriding objective is to ensure that appeals are determined on their merits rather than being dismissed on technical or procedural grounds, unless it is clear that the appeal cannot succeed.
36. The Applicant submitted that the Appeal does not disclose any sufficient ground for interfering with the orders of the trial court. That the subject of the Appellant's Application is not one that a party can appeal against as a matter of right as the same is primarily based on Order 5 of the Civil Procedure Rules. Further, that Appellant did not seek leave in the trial court as provided for under Order 43 Rule 2 of the Civil Procedure Rules.
37. The Applicant cited the following authorities: - Directline Insurance Co. Ltd v Onyango [2022] eKLR; which emphasizes that leave must be sought for appeals not appealable as of right. The Case of Simon Kalachu v Yuasa International Limited [2021] eKLR that emphasizes on leave to Appeal in accordance to Order 5 and 17 Rule 2. Peter Nyaga Murake v Joseph Mutunga where the court of appeal affirmed that without leave of the high court the Applicant was not entitled to give notice of appeal and that leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules.
38. The Appellant/Respondent submitted that he was entitled to an automatic right of appeal under Order 10 Rule 11 of the Civil Procedure Rules and Order 43 Rule 1 (g). That the Appeal relates to his right to a fair trial and in the circumstances, he was never notified of civil proceedings giving rise to the execution proceedings against him. He argued that the civil suit was served upon and defended by his insurer pursuant to Section 10 of the Insurance (Motor Vehicle Third Party Risks) without his knowledge. That the failure to notify him was in breach of his constitutional right to fair trial. He relied on the case of Judicial Service Commission & Another V Rawal [2016] KECA 831 (KLR).
39. I am of the considered view that Section 79B was not intended to be a tool to bypass substantive adjudication. The principles established in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others (supra) caution against summary dismissal except in the clearest of cases, particularly where no prejudice or injustice is caused by allowing the appeal to proceed.
40. No evidence has been adduced that demonstrates that the appeal is entirely unsustainable or that allowing it to proceed would be an abuse of process justifying summary striking under Section 79B.
41. Consequently, it is my finding that the interests of justice would be served allowing the appeal be heard and determined on its merits.

(iv).Whether stay of execution pending appeal granted on 23rd July 2024 in Chuka CMCC No. E004 of 2021 should be lifted.

42. Stay of execution is governed by Order 42 Rule 6 which states as follows: -

- “ 1. 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.

- (2) No order for stay of execution shall be made under sub rule (1) unless—
 - (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

43. In *Antoine Ndiaye Versus. African Virtual University* (2015), eKLR, the court stated as follows:-

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that: -

- a) The application is brought without undue delay;
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

44. The Applicant submitted that The Appellant was granted stay of execution in the lower court yet he did not deposit any security for the decretal sum of Kshs. 1,752, 720. ⁸⁴ he was ordered to pay in order to be granted stay of execution pending appeal. She submitted that where stay is granted the same should be conditional as settled in the case of *James Wangalwa & Another V Agnes Naliaka Chesoto* [2012] eKLR and *Alois Ochieng’ Ndege v Explico Insurance Company Limited; Jane Wachuka Munene (Interested Party)* [2022] eKLR.

45. On his part, the Appellant argues that the Applicant has not produced any evidence showing that he was required to deposit the said sum. That when the Plaintiffs in the lower court were served with the application for stay they had an opportunity to respond and if dissatisfied with the ruling of the lower court they ought to either appeal or apply for review.

46. In *RWW Versus EKW* (2019) eKLR, the court stated that: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.



However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of cost. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

47. Stay of execution is a discretionary remedy intended to balance the interests of the Appellant and the decree holder. It is not automatic and is conditional upon compliance with prerequisites, including providing security for the decree to prevent prejudice to the judgment creditor.
48. It is undisputed that no security for the decretal sum has been deposited by the Appellant/Respondent. The absence of such security prejudices the Applicant, as it exposes her to risk of frustration of the decree in the event of appeal.
49. While the Appellant argues that the lower court properly granted the stay, the statutory conditions under Order 42 Rule 6 must be satisfied. Failure to provide security undermines the basis for maintaining the stay.
50. Having allowed the Appeal to proceed, I order that the Appellant shall provide security for the decree. I grant stay of execution conditional on the Appellant depositing into court half the decretal sum of Kshs.1,752,720.84 within 30 days of today. The record of appeal shall also be filed and served within the same period.
51. Costs shall abide the outcome of the Appeal.

RULING DELIVERED, DATED AND SIGNED AT CHUKA THIS 25TH DAY OF NOVEMBER, 2025.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Ms Kerubo holding brief for Mr. Mwiti for the Applicant/Respondent; Mr. Mbaka for Respondent/Appellant; Muriuki (Court Assistant.)

