Royal Hisham Kenya Ltd v Kembo (Civil Appeal E344 of 2025)
[2025] KEHC 17517 (KLR) (27 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17517 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E344 OF 2025

G MUTAI, J

NOVEMBER 27, 2025

BETWEEN

ROYAL HISHAM KENYA LTD ..... APPELLANT

AND

JULIANA LIMA KEMBO ..... RESPONDENT

RULING

1. The learned adjudicator delivered a ruling on 3rd November 2025 in SCCC No E356 of 2025. Vide the said decision, the court refused to grant a stay of execution of the judgment it had previously delivered. Being aggrieved by the said decision, the appellant/applicant filed an appeal to this court through a memorandum of appeal dated 4th October 2025, in which six grounds of appeal were raised.

2. Concomitantly, the appellant/applicant filed an application dated 4th November 2025, vide which it sought, inter alia, an order staying execution of the judgment and decree issued on 1st October 2025, by the Small Claims Court at Mombasa, in Claim No E356 of 2025, all consequential orders, and for the costs to be provided for. Upon considering the matter exparte, this court granted a stay of execution in terms of prayer No. 2 of the said notice of motion.

3. The application was opposed. The respondent filed her deposition, sworn on 14th November 2025, in which she averred that the application was an abuse of the court process as the appellant/applicant was served with the pleadings in the court below but chose not to prosecute its defence, as a result of which a default judgment was entered into. It was denied that the draft defence raised triable issues. The respondent also denied that the applicant would suffer substantial loss. The respondent contended that the applicant had not offered any security as required by Order 42, Rule 6(2) of the Civil Procedure Rules, 2010. In her view, the application was an afterthought and a device to delay and prevent the respondent from enjoying the fruits of a judgment in her favour. She contended that the issuance of the order sought would prejudice her.

4. The application was canvassed by way of oral submissions on 19th November 2025.

5. Mr Kiwinga learned counsel for the applicant urged that they seek to challenge the lower court's exercise of discretion, in declining to grant a stay of execution. It was averred that the court below entered an exparte judgment on 1st October 2025. When execution commenced, they sought to have it stayed and to have the ex exparte judgment set aside. The prayer for a stay, however, was denied. Mr Kiwinga contended that execution would grind its business to a halt, as what was attached were the applicant's tools of trade. He urged that if a stay is not granted, the appeal would be rendered nugatory.

6. Mr Ondeng, the learned counsel for the respondent, opposed the application. He submitted that the challenge concerned the exercise of discretion by the subordinate court. He denied that the judgment was entered exparte, stating that the applicant appointed the firm of Ambwere & Advocates, as evidenced by annexure "JKL2". He urged that the grant of stay is not a matter of right. counsel stated that the applicant wasn't denied orders in the court below, but rather the court fixed the matter for hearing on 12th November 2025. Mr. Ondeng urged that the applicant had not satisfied the requirements of Order 42, Rule 6(2) of the Civil Procedure Rules, and he prayed that the application be dismissed.

7. In response, Mr Kiwinga urged that the High Court has power under Article 165 of *the Constitution* to supervise the subordinate courts, which it should exercise in this case.

8. I have considered the application and the responses thereto, as well as the submissions of the parties. In my view, the issue to be determined is whether the court should grant a stay of execution. Was the court below wrong to deny the applicant an ex exparte stay?

9. In my view, a decision as to whether or not to grant a stay of execution is an exercise of discretion. The learned magistrate had unfettered discretion to grant or deny a stay. Like all discretions, she was required to consider the application and exercise her discretion judiciously and not whimsically or capriciously. Did she fail to do so?

10. The Court of Appeal for Eastern Africa in Mbogo v Shah (1968) EA 93 stated that an appellate court could only interfere with the exercise of discretion by an inferior court or tribunal where the court had misdirected itself or considered extraneous facts.

11. In the Hajar Services Limited v Peter Nyangi Mwita [2020] KEHC 4652 (KLR), the court stated that: -

> "This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633, there is no difference between the words "sufficient cause" and "good cause"."

12. I am not persuaded that the court below acted whimsically or capriciously. It would appear to me that the learned magistrate considered the evidence of service presented to her, to wit, the affidavit of Michael Thoya Mbwana sworn on 29th August 2025, the evidence of service shown by the stamp impression on the mention notice and the pleadings, the notice of appointment filed by the firm of

Ambwere & Co. Advocates and concluded that there was no reason to disturb the judgment without hearing all the parties.

13. In my view, the court correctly exercised its discretion. Since the applicant acted deliberately, not to prosecute its defence, there was no need for the court to come to the aid of an indolent litigant. In my view, the applicant did not have a right to a favourable finding at the ex exparte stage.

14. In my view, the application is wholly without merit. The application is clearly an abuse of the court's process, which this Court should not condone.

15. In the circumstances, the application dated 4th November 2025 is dismissed. I award the respondent costs of Kes. 30,000/-

16. Orders accordingly.

DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

Gregory Mutai

JUDGE

In the presence of:-

Mr Kiwinga for the Appellant/Applicant;

Mr Ondeng, for the Respondent;

Arthur - Court Assistant.