

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
HCOMMA CASE NO. E028 OF 2025

BETWEEN

MOHAMMED YASIN JAMAL.....
APPELLANT

AND

SAID FARAH ABDI.....
RESPONDENT

RULING

Introduction and Background

1. By an application dated 3rd February 2025 filed under a Certificate of Urgency pursuant to Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and it seeks the following reliefs:-

a. Spent

b. THAT this Honourable Court be pleased to issue an order for a stay of proceedings in the Chief Magistrates Court at Milimani, Case **No. E676 of 2024**, pending the

hearing and determination of the Application and Appeal.

- c. The Honourable Court do issue an order directing the Respondent to deposit the sum of USD 55,000 in this Honourable Court pending the hearing of the instant Application and Appeal.
- d. THAT costs of this application be provided for.

2. The Application is supported by the grounds set out therein and the supporting affidavit of MOHAMED YASIN JAMAL, the Appellant herein sworn on 3rd February 2025. The application is opposed and the Respondent, SAID FARAH ABDI has sworn a replying affidavit on 21st February 2025. The matter was canvassed through written submissions which were filed pursuant to the directions of this court and which I have carefully considered.

Analysis and Determination

3. From the record, I note that the Appellant has filed a Memorandum of Appeal raising six grounds of appeal. It is on that basis that the Appellant has filed the present Notice of Motion application in which he seeks to stay the proceedings in the Chief Magistrates Court in **CMCC No. E676 of 2024**. The Applicant argues that he is dissatisfied with the ruling of the lower court in the said suit where the court found there was no

evidence of the payment of the USD 55,000 by the Applicant and wishes to appeal against the said ruling.

- 4.** The present application seeks two prayers; first, a stay of the proceedings in the said Magistrate's court pending the hearing and determination of his appeal to this court; and, secondly, an order directing the Respondent to deposit with this court the sum of USD 55,000 pending the hearing of the appeal.
- 5.** In opposing this application, the Respondent in the replying affidavit urges to dismiss the application and hold that it is without merit. The Respondent avers that the Applicant, having filed an application in the lower court on 16th January 2025, was invited by the court to file submissions but failed to do so and when the court considered the application, the court dismissed the application and awarded costs to the Respondent. That the matter is pending for trial and parties have already submitted themselves to pretrial motions. In any event, the Respondent opines that the appeal as filed is without merit and has very little chances of succeeding.
- 6.** On the second limb on the of depositing the USD 55,000 in court by the Respondent, the Respondent argues that the said prayer is misplaced as such an order can only be issued where there is a decree that is being stayed for execution. The Respondent

further opines as the suit is yet to be fully heard, there is no order of the court holding him culpable for payment of the said sum of money. He further argues that the said order to deposit funds in court are made at the discretion of the court and on extraordinary circumstances where the court is satisfied that there is a need to protect a party from incurring costs that may not be recovered at the conclusion of the trial.

7. I have considered the application and the supporting affidavit. I note that the court under Order 42 Rule 6 has power to grant a stay of proceedings pending appeal. The said order 42 Rule 6 provides as follows:-

“6. Stay in case of appeal [Order 42, rule 6] (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 subrule (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.** (3) **Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.** (4) **For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.** (5) **An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.** (6) **Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”**

8. As argued above, stay of proceedings is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. The Court of Appeal in the case of David Morton Silverstein v Atsango Chesoni (2002)eKLR stated thus:-

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of Rule 5 (2) (b) of the Court’s own rules. But as the Court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay.”

9. I have considered the Memorandum of Appeal filed herein and the grounds set out therein, I find that the appeal challenges an interlocutory relief as the main suit between the parties is yet to be determined. I find therefore granting an order of stay of proceedings at this stage in the hearing will unnecessary interfere with the courts mandate which is tasked with hearing and determining the suit as filed. In any event, I find that the appeal as filed will not be rendered nugatory if the matter

proceeds to full trial in the lower court. I therefore decline to stay the proceedings in the lower court.

10. On the second limb of deposit of USD 55,000 in court by the Respondent pending the hearing and determination of the Appeal. I am alive to the fact that such an order is ordinarily granted where a party is apprehensive that it may not be able to recover costs if it succeeds in the matter proceeding before the court and where a decree of the court has been issued, the same may not be executable for one reason or another. In the present case, I note that the said sum of USD 55,000 is the issue in dispute in the trial court and the matter is yet to heard and determined on merit. The court is also called upon to consider if the party seeking such an order is likely to suffer substantial loss if the said order is not granted. Substantial loss was defined by the court in the case of *West Kenya Sugar Co. Ltd v Matayo Ingoshe* (2022) eKLR as:-

....” Substantial loss to include prove of loss of money if the payment was made since the Respondent would not be able to repay the money. That is a potential loss that the Applicant has demonstrated and the Respondent has demonstrated he is capable of refunding the money held in security if the appeal succeeds.”

11. The facts in this case are different. There is no decree issued by a court for USD 55,000. What there is a claim before court for the said repayment of USD 55,000 by the Appellant against the Respondent. There has not been demonstrated before this court that the Appellant if he succeeds in the lower court will not be able to recover the same once a decree is issued. It has also not been demonstrated to the court that the Respondent is likely to remove himself from the jurisdiction of this court after the matter is concluded to evade paying any sums issued against him in judgment. I find therefore the prayer sought for deposit of USD 55,000 has no basis. The matter is yet to be heard and there is no guarantee that it will be determined in favour of the Appellant. I decline therefore to grant the orders sought in this application.

12. In sum I find and hold that the application is without merit. The same is dismissed with costs to the Respondent. Let the matter in the lower court proceed for trial to its logical conclusion and the appeal herein be heard and determined on merit. It is so ordered.

DATED SIGNED and DELIVERED virtually at NAIROBI this

1ST DAY of DECEMBER 2025

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF:-

1. Mr. Nyaribo for the Plaintiff/Applicant.
2. Mr. Gitau for the Defendant/Respondent.
3. Ivan - Court Assistant

ORIGINAL