

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL No. E103 OF 2025**

**EMMA MATINA MUSILU.....APPELLANT**  
**VERSUS**  
**TRAKANA MOMBASA LIMITED.....RESPONDENT**

**RULING**

1. By way of Notice of Motion dated 27<sup>th</sup> May 2025 seeking the following orders;

**1) Spent**

**2) Spent**

**3) Spent**

**4) There be an order of stay of execution of the decree in Eldoret CMCC number E277 of 2024 pending the hearing and determination of this appeal.**

**5) The costs of this application be in the cause.**

2. The application is expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules and Section 1A of the Civil Procedure Act.

3. The application is premised on the grounds on the face of it and the averments in the affidavit sworn in support of the application by the applicant. In her affidavit, she deponed that on 6<sup>th</sup> of May 2025, the lower

court entered judgment in favour of the Respondent. Being aggrieved by the Judgment, she preferred an appeal against the whole judgment before this court. She annexed the copy of the judgment marked as annexure EMM1 and a copy of the Memorandum of appeal marked as annexure EMM 2. She urged that the appeal filed has merits, raises triable issues and has high chances of success.

4. The deponent averred that the orders of stay of execution granted by the lower court are about to lapse and she is apprehensive that the Respondent may resort to execution of the decree. Further, that in the event that execution is levied against her, the appeal will be rendered nugatory and she will thereby suffer irreparable loss. She additionally stated that the Respondent's financial means are unknown and in the event that any money is paid out to it, it will not be possible to recover the same if the appeal is successful. She deponed that she is ready and willing to give a bank guarantee from a reputable bank as a condition for the grant of the orders of stay of execution. That no party will be prejudiced.
5. The respondent filed a Grounds of Opposition dated 9<sup>th</sup> June 2025 premised on the following grounds;
  - 1) **It is well established that stay of execution is an extraordinary remedy granted only when the Applicant satisfies the conditions laid down under Rule 42 of the Civil Procedure Rules and the Applicant herein has not met those conditions and hence the said application is bad in form and lacks merit.**
  - 2) **That there are no serious question to be tried: -the appeal filed by the Applicant raises no serious or arguable issues likely to succeed. The**

**trial court's decision was thorough, based on evidence, and the Applicant's grounds are mere disagreements.**

- 3) That the Appeal is frivolous and vexatious: -the Applicant's appeal and the stay application constitute an abuse of process intended to delay enforcement of a valid judgment. The application also lacks genuine urgency since the Respondent herein has not moved to execute yet.**
- 4) That the Respondent has the requisite financial capacity: -as deposed in the Affidavit sworn by Rachel Auma Juma, Assistant Administrator of the Plaintiff, the respondent company has the means to satisfy the judgement and has demonstrated that it can repay the decretal sum and hence, this negates the risk of irreparable harm to the appellant herein and subsequently, there is no cause to warrant grant of stay of execution herein.**
- 5) Balance of convenience: granting the stay would cause substantial prejudice to the Respondent by frustrating enforcement. Conversely, refusal of the stay will not cause irreparable harm to the Applicant given the merits and financial capacity of the Respondent.**
- 6) Irreparable Loss Not Established: The applicant has failed to establish any irreparable loss beyond mere financial inconvenience, which is insufficient to justify the stay. In any event, the Appellant's negligence has caused the Respondent immense loss since the date of the accident and no further delay is warranted in the circumstances.**
- 7) Applicant to furnish Security: -the Applicant has failed to satisfy the mandatory requirement under Order 42 Rule 6(2) (b) of the Civil**

**Procedure Rules, which obligates an applicant seeking stay of execution to furnish security for the due performance of the decree. The provision is a substantive condition for the grant of stay and not a matter of mere procedural formality. In the absence of any offer or proposal for security, the present application is fatally deficient and does not warrant the exercise of the Court's discretion in the Applicant's favour.**

**8) Prejudice to the Respondent: - the Respondent stands to suffer greater prejudice if the stay is granted, as the judgment debt remains unpaid and justice delayed.**

6. The Respondent prayed that the court dismisses the application with costs to the respondent.

#### **Applicants' Submissions**

7. Learned counsel for the applicant filed submissions dated \*\*\*\*\*.

8. Counsel urged that the memorandum of appeal raises triable issues as it challenges the ratio of liability apportioned and quantum of damages awarded as being inordinate and excessive. Counsel placed reliance on the case of Chris Munga N. Bichage Vs Richard Nyagaka Tongi and 2 others (2013) in this regard. Additionally, counsel placed reliance on the case of Socfinaf Ltd (Ruera Estate) v Abisagi Igoki [2018] eKLR and urged that it is evident that the issues raised therein in the Memorandum of Appeal are arguable with a high likelihood of success. Counsel prayed that this application be allowed and the orders of stay of execution pending appeal be granted.

- 9.** Further, Counsel cited Order 42 Rule 6 of the Civil Procedure Rules where the principles guiding the grant of stay of execution are settled and further stated that these principles were similarly echoed by the judges of the Court of Appeal in Rhoda Mukuma v John Abuoga and the case of RWW v EKW [2019] eKLR.
- 10.** On substantial loss, Counsel submitted that the decretal sum is a colossal amount and payment of the sum and may cripple the activities of the Applicant and discourage her from pursuing the appeal. Further, that substantial loss is the corner stone for granting a stay of execution pending appeal as was emphasized in the case of Kenya Shell Limited vs Kibiru & another 1986, KLR and also by the Court of Appeal when dealing with a similar situation in National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another (UR) CA 238/2005.
- 11.** Counsel submitted that the above position is verified by the supporting affidavit of the Appellant/ Applicant and that the Respondent has not demonstrated in any manner whatsoever that it has the requisite financial capability to satisfy the decree in the event that the stay sought is not granted and that in the event the said decretal amount is released to the Respondent herein, and the appeal succeeds, the same is unlikely to be refunded thereby resulting in substantial loss to the Appellant/ Applicant. Additionally, that in the absence of an order of stay of execution, the Respondent may levy execution at any time leaving the Applicant unprotected and exposed to severe consequences. Counsel urged that the status quo should be maintained so as to preserve the decretal sum awaiting the outcome of the appeal.
- 12.** On whether the application has been filed without delay, counsel urged that the judgment of this case in the lower court was delivered on 6th May 2025, the Memorandum of Appeal was filed on 22nd May 2025 and the application

for stay of execution was filed on 29th May 2025. As such, the application was made timeously without any delay within the statutory 30 days' timeline and even before the lapse of the initial 30 days and so both done within the one-month timeline.

**13.** On the third limb, counsel urged that the provision of security is a condition precedent for granting stay of execution. The Applicant is ready and willing to furnish security for the due performance of the decree as may be ordered by court and should the need eventually arise and further that she is willing to deposit a bank guarantee as a condition for stay of execution pending appeal. Counsel placed reliance on the case of *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR and *Focin Motorcycle C. Ltd vs Ann Wambui Wangui* [2018] eKLR in this regard. Counsel urged that the applicant is opposed to the prayer by the Respondent in its Replying Affidavit that they pay the salvage amount directly to the Respondent as the said amount forms part of the judgement amount that is being appealed and the basis of the Applicant's appeal. It would therefore be in the interest of justice that the Respondent is directed to secure the decretal amount by way of a bank guarantee. Counsel lastly submitted that the Applicant has met the threshold for granting of stay of execution pending appeal.

### **Respondents' submissions**

**14.** Learned counsel for the respondent filed submissions dated 15<sup>th</sup> September 2025 through the firm of Messrs. Nzamsa Sankale & Company Advocates.

**15.** Counsel urged that the guiding law on stay pending appeal is encapsulated in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, which provisions he reproduced. Counsel urged that execution is a lawful process and it is

therefore not a ground for granting stay of execution. Guided by the above applicable law, the burden thus lies squarely with the Applicant to establish to the satisfaction of the Court how execution shall irreparably affect him or alter the status quo to his detriment.

**16.**Counsel urged that the cornerstone of the jurisdiction of this Court under Order 42 of the Civil Procedure rules is that substantial loss would result to the Applicant unless stay of execution is granted. Further, that substantial loss was clearly explained in the case of James Wangalwa vs Agnes Naliaka Cheseto [2012] eKLR. He urged that it is trite that an Applicant seeking stay of execution orders must satisfy the Court that substantial loss would result rendering the intended appeal nugatory if no stay is granted. It is not enough to simply put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention.

**17.**Counsel submitted that the Applicant/Appellant has not placed any credible evidence before the Court to demonstrate that she stands to suffer substantial loss if the orders sought are not granted. Counsel cited the case of Masisi Mwita v Damaris Wanjiku Njeri [2014] eKLR and urged that the Applicant's claim that the Respondent is incapable of refunding the decretal sum is false and the onus of proving the Respondent's inability goes beyond throwing an allegation without proof. In response to such allegations, counsel placed reliance on the case of National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR.

**18.**Counsel submitted that it is a well-established business with an active presence in the logistics and transport sector and has continued to meet its tax obligations. Further, that it has demonstrated a strong financial position and a stable operational history sufficient to refund the decretal sum in the unlikely event the judgment is overturned on appeal. In the replying affidavit

dated 10.6.2025, the Respondent exhibited recent audited financial statement and bank records and a register of its assets together with evidence of their ownership which clearly demonstrates liquidity and solvency. These documents affirm that the Respondent is financially capable of reimbursing the decretal sum should the appeal succeed. Counsel urged that the Appellant has failed to demonstrate with specific detail the substantial loss that they are bound to suffer if stay orders are not granted.

**19.**Counsel submitted that the Respondent is entitled to enjoy the fruits of a judgment lawfully obtained after full hearing. The trial court’s findings on liability were grounded in cogent evidence and proper application of legal principles, and there is no demonstration of any misdirection or error to warrant appellate interference. The continued withholding of the judgment sum causes a clear prejudice to the Respondent's commercial operations. This tips the balance of convenience squarely in favour of execution. Counsel urged that it is not in dispute that the Appellant was the registered owner of the motor vehicle that caused the accident, which completely wrote off the Respondent’s commercial vehicle effectively rendering the Respondent’s business inoperative. The Respondent was deprived of a critical income-generating asset and has endured significant economic strain for the years due to the Appellant's negligence and stands to suffer further delay in accessing lawful compensation.

**20.**On whether the appeal is arguable, counsel submitted that the memorandum of appeal dated 22.5.2025 does not raise triable issues other than mere disagreement with the findings of the trial court which he submits is an insufficient basis to warrant the extraordinary relief of stay of execution. The trial court’s decision on liability involved factual evaluation, assessment of witnesses, and application of settled principles on negligence. Counsel cited

Selle v Associated Motor Boat Co. Ltd [1968] EA 123 and Kiruga v Kiruga [1988] KLR 348, and urged that the Applicant has not demonstrated any prima facie arguable appeal with a likelihood of success. The mere fact that a party is dissatisfied with a judgment does not in itself elevate their appeal to one with arguable merit.

21. On security, counsel urged that the appellant has not offered any reasonable acceptable security for the performance of the decree. Further, that the purpose of security was explained in the case of Arun C. Sharma v Asha Raikundalia T/A Rairundalia & Co. Advocates (2014) eKLR. Counsel urged that the Appellant's refusal or failure to furnish any security underscores a lack of bona fides and compounds the injustice already suffered by the Respondent. This is not a party seeking equitable relief with clean hands but is the act of a litigant trying to evade the consequences of a lawful judgment while exposing the Respondent to further economic prejudice. Counsel submitted that the Appellant has failed to satisfy the conditions set under Order 42 Rule 6 (2) and the Application must thus fall. Counsel urged the court to dismiss the application with costs.

### **Analysis & Determination**

22. In light of the foregoing depositions and submissions, it is my considered opinion that the following issue then arises for determination;

#### **i) Whether the Application for Stay of Execution is merited**

23. The conditions to be met by an Applicant seeking for an order for the grant of a stay of execution pending appeal are provided for under **Order 42 rule 6(2) of the Civil Procedure Rules** as hereunder:

**“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.**

24. In that regard, I have carefully considered the Application, the depositions made in support of the same as well as the grounds filed by the Respondent in opposition thereto. I have also addressed my mind at length to the submissions made and taken into account the period within which the Memorandum of Appeal together with this Application were filed after the delivery of the impugned judgement by the Trial Court and I find that there was no delay at all on the part of the Applicant in moving the court.

25. All in all therefore, I am well satisfied that the applicant has adequately met the conditions set out in Order 42 Rule 6(2) to warrant the stay orders sought.

26. In this regard, I find that the Application has merit and accordingly, an order of stay of execution of the judgement and decree issued in Eldoret CMCC No. E277 of 2024 pending the hearing and determination of the appeal filed be and is now hereby issued.

27. The Applicant is now hereby ordered to pay half of the decretal sum directly to the Respondent and is to further deposit with the Court a Bank Guarantee from a reputable bank for the balance thereof within 45 days from the date of

this Ruling failure to which the orders herein issued shall be deemed to have lapsed and the Respondent shall be at liberty to execute for the entire decretal sum. The Applicant is to bear the costs of the Application.

**Read dated and Signed at ELDORET on 19<sup>th</sup> December 2025**

**E. OMINDE**  
**JUDGE**