

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
COMMERCIAL APPEAL NO. E003 OF 2025

BETWEEN

AFRIFOODS

LIMITED.....APPELLANT

VERSUS

RICHARD KATILU MULI.....

....RESPONDENT

RULING

1. In its Notice of Motion dated 24th March 2025, the appellant invoked Articles 50 and 169 of the Constitution, sections 1A and 3A of the Civil Procedure Act and order 42, rule 6 together with order 51, rule 1 of the Civil Procedure Rules seeking the following reliefs:

1. ... Spent;

2. ... Spent;

3. THAT this Honourable Court be pleased to order a stay of execution of the judgment and/or decree made on 24th February 2025 in the Machakos Small Claims Court SCCCOM/E286/2024 which was delivered against the appellant/applicant herein in the

sums of Kshs. 350,000.00 plus costs and interest, pending the hearing and determination of this Appeal;

4. THAT the costs of this application be dispensed with.

2. The application is supported by the grounds set out in the body of the Motion and the supporting affidavit of the Jimmy Jackson Mutunga, the appellant's director, sworn on 24th March 2025. The appellant contends that the trial court delivered a judgment on 24th February 2025 awarding the respondent Kshs.350,000.00 as compensation for his resignation as a co-director of the appellant. The trial court granted a 30-day stay of execution.
3. The appellant states that upon expiry of the stay period, the respondent intimated that it was in the process of obtaining warrants of execution and attachment. It is further averred that the appellant has been operating at a loss and has remained inactive and dormant for the past three years. The appellant therefore urges this court to grant the orders sought, arguing that execution is imminent and it stands to suffer irreparable harm if the application is not allowed.
4. The appellant also submits that the respondent is well aware of its financial struggles and would not suffer prejudice if the orders sought are granted. A memorandum of appeal dated

21st March 2025 was annexed to demonstrate its intention to prosecute the appeal.

5. The respondent opposed the application through a replying affidavit sworn on 23rd April 2025. He contends that the appellant has failed to demonstrate substantial loss that would render the appeal nugatory if stay is not granted. He urges that execution is a lawful process and no sufficient reason have been advanced to justify its suspension. The respondent further states that he is a businessman with the financial capacity to refund the decretal sum should the appeal succeed.
6. The respondent also asserts that the appellant has not shown willingness to furnish security for the due performance of the decree. He describes the grounds of appeal as frivolous and lacking merit. In the alternative, he proposes that if stay is granted, the appellant should deposit the entire decretal sum plus costs in a joint interest-earning account pending determination of the appeal. He prays that the application be dismissed with costs.
7. In rejoinder, the appellant filed a further affidavit, sworn on 19th May 2025 reiterating that the trial court failed to consider its additional documents thereby occasioning a miscarriage of justice. It urged this court to allow the application, unconditionally, asserting that the appeal is meritorious.

8. The application was canvassed by way of written submissions. The appellant filed submissions dated 12th June 2025, urging the court to allow the application. The respondent filed submissions dated 11th June 2025, urging that the application be dismissed with costs.
9. I have considered the application, the affidavits in support and opposition, the parties' submissions, and the applicable law. The appellant seeks stay of execution pending hearing and determination of the appeal. Under Order 42 Rule 6, stay may be granted if the applicant demonstrates that substantial loss may result unless the order is made, that the application was filed without unreasonable delay, and that security for due performance of the decree is furnished.
10. In ***Butt vs. Rent Restriction Tribunal*** [1982] KLR 417, the Court of Appeal outlined guiding principles for the exercise of discretion in granting stay in the following terms:

"1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

11. On the issue whether the application was filed without unreasonable delay, this court notes that the application is dated 24th March 2025 and lodged on 27th March 2025. This was immediately after the lapse of the thirty day stay granted by the trial court on 24th February 2025. I therefore find there was no delay in filing of the application. On whether the appellant has demonstrated substantial loss, the Court of Appeal in ***Mukuma vs. Abuoga*** (1988) KLR 645 held that:

“the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

12. In this instance, the appellant has explained that execution is imminent as the respondent has already threatened to commence the process. This fact has not been denied by the respondent who instead justified that execution is a lawful process and argued that no sufficient grounds have advanced to halt it pending hearing of the appeal. The respondent further asserted that he is financially capable of refunding the appellant the decretal sum should the appeal succeed. On this issue, I am guided by the Court of Appeal decision in the case of **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another** [2006] KECA 333 (KLR) that held that:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back

the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

13. Applying the above principle, I note that although the respondent has claimed to be a man of resources, he has not disclosed any specific source of income or assets that would enable him to refund the decretal amount if the appeal succeeds. In the circumstances, I am satisfied that if execution is allowed to proceed, the appeal risks being rendered nugatory and reduced to a mere academic exercise on account of substantial loss.
14. On the issue of security, the appellant urged this court to exercise its discretion to grant an unconditional stay. While it is true that under Order 42 Rule 6(2) of the Civil Procedure Rules the court has discretion in this regard, I find that the circumstances of this case call for a conditional stay in the interests of justice.
15. Accordingly, the Notice of Motion dated 24th March 2025 is allowed on the following terms:
 - a. ***An order of stay of execution of the judgment and/or decree delivered on 24th February 2025 in the Machakos Small Claims Court SCCCCOM/E286/2024 in the sums of Kshs. 350,000.00 plus costs and***

interest, is hereby granted pending the hearing and determination of this appeal;

- b. The appellant shall deposit the decretal sum of Kshs. 350,000.00 in a joint interest account to be opened by the appellant and the respondent's counsel in a reputable bank within 45 days from the date of this order;*
- c. In default of compliance with order (2) above, the stay orders granted herein shall automatically lapse without any further reference to this court;*
- d. The costs of this application shall abide the outcome of the appeal.*

It is so ordered.

Dated, signed and delivered at Machakos this 29th day of January 2026.

RHODA RUTTO
JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

COPY