

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**CIVIL APPEAL NO. E012 OF 2024**

**JOAN WANJA MUTEGI.....APPELLANT/APPLICANT**

**VERSUS**

**FLORENCE KENDI MUCHENA.....RESPONDENT**

**RULING**

1. For determination is the Application dated 6<sup>th</sup> August 2024 which seeks the following orders: -

- i. Spent
- ii. That there be an interim stay of execution of the judgment of the trial court delivered on 14<sup>th</sup> May 2024 pending the hearing and determination of this application.
- iii. That there be stay of execution of the judgment of the trial court delivered on 14<sup>th</sup> May 2024 pending the hearing and determination of the Appellant's appeal.

- iv. Any other relief that this honourable court deems fit and appropriate to grant.
- v. Costs be in the cause.

2. The Application is premised on the grounds set out on the face of the motion and on the supporting affidavit of Joan Wanja Mutegi the Applicant. She deposed that she was the Respondent in Small Claims Case No. E 015 of 2024 where the trial court judgment was delivered on 14<sup>th</sup> May 2024. That the judgment was in favour of the Claimant where the trial court awarded general damages of Kshs. 200,000 an admitted amount of Kshs. 159,793 which included 20 percent interest plus costs of the suit.

3. She stated that she has calculated the amount awarded in the judgment which totals to Kshs.540,000 and the Respondent has threatened to execute if the full amount is not paid.

4. She also stated that being dissatisfied with the judgment of the trial court, she lodged an appeal and was apprehensive that the Respondent may execute any time. That the trial court did not grant stay of execution and the appeal raises serious issues with high chances of success. That it would be in the interest of justice that the court grant the orders sought.

5. The Application was opposed vide the grounds of opposition dated 12<sup>th</sup> August 2024 raised as follows:-

- i. That the Application is in bad faith meant to derail the Respondent from enjoying the fruits of her judgment.
- ii. The Applicant is not specific on what she has appealed. There are two judgments, one dated 30<sup>th</sup> April 2024 which was based on her own admission and judgment dated 14<sup>th</sup> May 2024.

- iii. That the Applicant cannot appeal judgment/order dated 30th April 2024 as the period of appeal had lapsed and no leave to appeal out of time was sought.
- iv. The Appellant is in disobedience of a court order issued on 30<sup>th</sup> April 2024 which states “a judgment of Kshs.156,793 is entered on admission in favour of the claimant against the Respondent. The same will be repaid in 3 months beginning May 2024.” The period lapsed 30<sup>th</sup> July 2024 without the Appellant paying the admitted amount.
- v. The Applicant’s hands are soiled and the Application defies all principles of equity. The court should not provide ant audience to the Appellant for until and unless the Kshs. 159, 793 is paid first.

- vi. The Appellant raises matters of fact and not of law and therefore rendering the application baseless.
  - vii. The Applicant has not met the mandatory pre-conditions for the grant of the orders sought.
  - viii. That the Applicant has not offered any security as required by law.
  - ix. The application is fatally defective as it is supported by an incurably defective affidavit hence an abuse of the court process.
  - x. The application is misconceived, incompetent and bad in law.
6. The Respondent also filed a replying affidavit dated 14<sup>th</sup> May 2025 whose averments are similar to the grounds of opposition.
7. The Application was canvassed by way of written submissions. The Applicant filed written submissions dated 10<sup>th</sup> March 2025 while the

Respondent filed written submissions dated 14<sup>th</sup> May 2025. They both raised the following issues for determination: -

- i. Whether there was unreasonable delay in filing the instant application.
- ii. Whether the Applicant will suffer substantial loss in the event the order for stay of execution is not granted.
- iii. Security

### **Analysis and determination.**

8. I have considered the application, the submissions by the parties as well as the authorities relied upon. The only issue for determination is whether the Applicant has met the threshold for grant of stay of execution.

**9. Order 42 Rule 6 of the Civil Procedure Rules** stipulates: -

**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 orders 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.**

10. The Applicant must therefore satisfy the court that substantial loss may result if the order is not granted; that the Application was made without unreasonable delay and that the Applicant had given security for due performance.

## Substantial loss

11. Substantial loss means much more than losing money in a money decree through execution. In **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR** where the Court observed that:

***“The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”***

12. The Applicant submitted that having been aggrieved with the trial court’s judgment she filed a Memorandum of appeal on time and if the status quo is not maintained, the Respondent poses the imminent threat of execution which will render her

appeal nugatory. She submitted that the Respondent's financial status is unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal sum in the event the Appeal is successful. She relied on the following authorities; **Tropical commodities Suppliers Limited & Others V International Credit Bank Ltd (in liquidation) [2004] 2 EA, Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** and **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR.**

13. The Respondent on her part submitted that the Applicant has not demonstrated that she will suffer substantial loss. She submitted that the court ought to balance the substantial loss. Further, that the Applicant has not demonstrated that she was capable of satisfying the decretal amount in the event the appeal fails. That the

Applicant has not demonstrated that the Respondent is incapable of compensating her in the event the appeal succeeds. She relied on the following cases; **Mutua Kilonzo v Kioko David Machakos [2008] eKLR** and **Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] eKLR.**

14. It is trite that the mere fact that execution has been threatened or that the decretal sum is large does not, of itself, amount to substantial loss as execution is a lawful process and the natural consequence of a judgment. However, where an applicant demonstrates that recovery of the decretal sum from the Respondent would be doubtful or impossible, and that the appeal would be rendered nugatory, the court is entitled to find that substantial loss has been established.

15. While the Applicant alleges that the Respondent's financial status is unknown, she has not laid any factual foundation for that apprehension. No material has been placed before the Court to show that the Respondent is a person of straw or lacks the means to repay the decretal sum. A general statement that the Respondent's financial standing is unknown cannot suffice. The burden remains on the Applicant to demonstrate, on a balance of probabilities, that the appeal would be rendered nugatory if stay is not granted.

16. Moreover, the Respondent has deposed, without contradiction, that part of the decretal sum arose from the Applicant's own admission and that the admitted amount has not been settled despite clear timelines having been given by the trial court. A party who is in default of complying with an admitted judgment cannot lightly invoke the

discretionary jurisdiction of this Court without demonstrating good faith.

17. Balancing the competing rights of the parties, I am cautious not to deprive a successful litigant of the fruits of her judgment in the absence of clear evidence of substantial loss. The Applicant has failed to demonstrate that execution would occasion her irreparable harm or render the appeal nugatory. What is at stake is a monetary decree, and no special circumstances have been shown.

18. Accordingly, I find that the Applicant has not satisfied the requirement of demonstrating substantial loss.

### **Delay**

19. The Applicant submitted that the judgment was delivered on 14<sup>th</sup> May 2024 and she filed her Memorandum of appeal on 24<sup>th</sup> May 2024 and the instant application on 4<sup>th</sup> June 2024 thus there was

no unreasonable delay in filing the application. The Respondent did not submit on this limb.

20. On the question of delay, the Court is required under Order 42 Rule 6(2)(a) of the Civil Procedure Rules to be satisfied that the application has been made without unreasonable delay. In this case, the interval between the delivery of judgment and the filing of the application is neither excessive nor unexplained. On the contrary, the Applicant acted promptly by first lodging the appeal within ten days and shortly thereafter moving the Court for stay.

21. The Respondent did not controvert these timelines nor contend that the delay was inordinate or prejudicial. There is therefore no material upon which this Court can find that the application was not brought timeously.

22. Accordingly, I find that the present application was filed without unreasonable delay

## **Security**

23. The Applicant expressed her willingness to provide security in the form of a bank guarantee of Kshs. 50,000. She relied on the case of **Focin Motorcycle Co. Ltd V Ann Wambui Wangui & Another [2018] eKLR.**

24. The Respondent on her part urged the court to balance the applicant's right to appeal against her rights to enjoy the fruits of her judgment. She relied on the case **Luxus Woods (K) Ltd v Patrick Amugure Kamadi [2016] eKLR.**

25. The decretal sum herein, by the Applicant's own computation, stands at approximately Kshs.

540,000 inclusive of general damages, the admitted sum, interest and costs. A proposed bank guarantee of Kshs. 50,000 in my view represents only a small fraction of the decretal amount. Such security would not sufficiently secure the due performance of the decree should the appeal fail. Security is intended to cushion the decree holder against the risk of further delay and to ensure that the appeal is not used merely as a vehicle to obstruct enjoyment of a lawful judgment.

26. Balancing all factors, and bearing in mind that the Applicant has admitted part of the claim, I find it is just to require security sufficient to safeguard the Respondent's interests without stifling the appeal.

27. Consequently, I make the following orders: -

- i. The application is allowed and stay of execution is granted on condition that the

Applicant pay to the Respondent Kshs.159,793 being the undisputed amount within 30 days.

- ii. The Applicant/Appellant to file the Record of Appeal within 30 days.
- iii. Though successful, the Applicant is not granted costs, for to do so would amount to punishing the successful party.

Orders accordingly.

**Ruling delivered, dated and signed at Chuka this 19<sup>th</sup> day of February, 2026.**

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**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of Mr. Mbugua holding brief for the Respondent and in the absence of the Applicant. Muriuki (Court Assistant).**

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