

**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E024 OF 2025**

**MARINE PARK RESORT (CHUKA)  
LIMITED.....APPELLANT**

**VERSUS**

**MARGARET NEKESA  
WANDERA.....RESPONDEN  
T**

**RULING**

1. The Applicant filed the instant Application dated 7<sup>th</sup> July 2025 seeking orders that:-

- (i) Spent.
- (ii) That pending hearing and determination of the application stay of execution of judgment in Chuka MCCC No. E195 of 2023; **Margaret Nekesa Wandera vs Marine Park Resort (Chuka) Limited** do issue.

(iii) That pending hearing and determination of the appeal stay of execution of judgment in Chuka MCCC No.195 of 2023; **Margaret Nekesa Wandera vs. Marine Park Resort (Chuka) Limited** do issue.

(iv) That the costs of the application be provided for.

2. The Application was brought on grounds reproduced verbatim:-

(i) That on 1<sup>st</sup> July 2025, Hon. Wachira Tracy Wanjiku delivered a judgement for the Plaintiff on 1<sup>st</sup> July, 2025 in Chuka MCCC No. E195 of 2023; Margaret Nekesa Wandera vs Marine Park Resort (Chuka) Limited. In her judgement, the learned magistrate awarded the plaintiff a total of **KSHS.1,280,000/- plus costs of the suit.**

- (ii) The Appellant is dissatisfied by the learned magistrate's judgement and has preferred an appeal before the honourable court. The appeal has high chances of success.
- (iii) Pendency of appeal notwithstanding, the execution of the impugned judgement is likely to commence and by reason whereof prejudice the Appellant's appeal.
- (iv) Absent intervention of the court in issuing stay of execution pending appeal, execution will commence thereby exposing the Appellant to substantial loss and rendering its appeal before the court nugatory.
- (v) The Appellant is willing to comply with the conditions that the court deems fit on stay of execution. The Respondent has no known assets to refund the judgment amount if the same is paid to her.

(vi) The Application has been made without undue delay and should be allowed in the interest of justice.

3. Alexious Njue, the Appellant's director swore the Supporting Affidavit dated 7<sup>th</sup> July 2025. His averments mirror the grounds already listed above.

4. The Respondent opposed the Application through the Replying Affidavit of Margaret Nekesa Wandera. She stated that the Application does not meet the threshold for granting orders of stay of execution; that the Applicant had not shown what loss it would suffer and how such loss, if any; and; if such loss was irreparable and incapable of being compensated by way of damages.

5. The Respondent further stated that the Applicant had not offered security and that the appeal stood no chance of succeeding.

6. The Applicant filed submissions dated 10<sup>th</sup> September, 2025. They submitted that the applicable principles were contained in Order 42 of the Civil Procedure Rules, 2010 and that the Application had satisfied all the principles.

7. The Applicant submitted that the Application was filed without unreasonable delay. That the court should balance the rights of the Respondent to the fruits of her judgement *vis-a-vis* the Appellant's right of appeal. The Applicant further urged that the appeal had high chances of success and that failure to offer security did not bar the court from imposing any condition in exercise of its discretion.

8. The Respondent's submissions were dated 26<sup>th</sup> September, 2025. The Respondent urged that the Applicant had not demonstrated substantial loss it will suffer, if any, and which cannot be compensated by damages if they were to succeed on appeal.

Further, that the Applicant had not offered any security.

9. The only issue for any determination is whether the Application is merited.

10. **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.**

11. A reading of **Order 42 Rule 6(2) of the Civil Procedure Rules**, shows that an Applicant should satisfy the court that substantial loss may result to him unless the order is made; that the application has been made without unreasonable delay; and the Applicant must give such security as the court orders for the due performance of such decree.

12. On timeliness of the Application, the Applicant stated that the impugned judgement was delivered on 1<sup>st</sup> July 2025 and the Application was filed 6 days later. I have looked at the proceedings. The judgement of Hon. Wachira was delivered on 1<sup>st</sup> July, 2025, which as the Applicant states, was six days later. I find that it was filed without unreasonable delay.

13. On substantial loss, the Applicants have urged that the damages awarded were too high such that if the

judgement was executed, they would suffer loss. The Respondent on the other hand has urged that there was no demonstration that the loss if any cannot be compensated by way of damages.

14. Substantial loss must mean 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...”***

15. As earlier stated, the Applicant argues that they would suffer loss if the award was paid out. I am not

persuaded that the Applicant would suffer substantial loss.

17. The Applicant submitted that there was no evidence that the Respondent would be able to refund the decretal sum if the Applicant was successful on appeal. They urge that such a scenario would render the appeal nugatory.

18. This court takes the position that a successful party should not be denied the fruit of their judgement merely because they may not be in a position to repay if the opposing party was successful on appeal.

19. With respect to the appeal, the Applicant stated that their Appeal had high chances of success and that the said appeal would be rendered nugatory if they would already have paid the decretal sum. I have looked at the Memorandum of appeal and the judgement of the trial court. Without going into the merits of the appeal, I observe that the appeal raises arguable grounds. To that

extent therefore it would be just and fair to give the Appellant a chance to argue that appeal.

20. The Court of Appeal aptly discussed the applicable principles in the case of **Butt vs Rent Restriction Tribunal [1979]** cited by Muchemi J in the case of **Jamii Bora Bank Limited & another vs Samuel Wambugu Ndirangu (2022) eKLR**, as follows: -

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

***b. Secondly, 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 the appeal court reverse the judge's discretion.***

***c. Thirdly, 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.***

***d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order to lapse.***

17. Guided by the above, I am persuaded to exercise discretion in favour of the Applicant. I grant the order of stay of execution pending appeal on the following conditions:-

(i) The Applicant shall pay half the decretal sum to the Respondent within 30 days.

(ii) The Appellant shall file the Record of Appeal within 30 days of today.

(iii) The Appellant shall expeditiously prosecute the appeal.

(iv) Though successful, the Applicant is denied costs as to grant costs would amount to punishing the successful party in the suit.

Orders accordingly.

**Ruling delivered, dated and signed at Chuka this 13<sup>th</sup> day of February, 2026.**

.....

**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of Mr. Ondago for the Appellant and Mr. Okwaro for the Respondent. Muriuki (Court Assistant).**

ORIGINAL