

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**[MILIMANI LAW COURTS]**  
**THE CIVIL APPELLATE DIVISION**  
*(Coram: A.C. Mrima, J.)*  
**SMALL CLAIMS APPEAL. NO. E159 OF 2025**

**-between-**

**WILBERFORCE NYAGA**

**& 8 OTHERS.....**  
**APPLICANTS**

**-versus-**

**KASH MOBILE LIMITED.....**  
**RESPONDENT**

**RULING**

1. Through a Notice of Motion dated 25<sup>th</sup> October 2024, the Applicants sought for orders of stay of execution of the decree arising from the judgment of *Hon. C.A. Okumu* in Milimani *SCCOMM No. E1041* of 2023 pending the hearing and determination of the appeal.
  
2. The application was anchored on the grounds on the face of it and a Supporting Affidavit sworn on even date. The Applicants averred that by a ruling of the Court dated 4<sup>th</sup> October 2024, the Adjudicator dismissed their application by way of a Notice of Motion dated 31<sup>st</sup> July 2024 where they had sought for stay of the *ex-parte* judgment entered by the Learned Adjudicator on 11<sup>th</sup> April 2023. They argued that the Adjudicator dismissed their application despite no proof of service of the claim upon themselves. They contended that they were condemned unheard as the Adjudicator failed to examine their evidence to establish that they had paid already repaid some money yet the same was included in

the decree. Additionally, it was their case that the appeal raised arguable points of law with prospects of success. They claimed that the Respondent lacked the capacity to sue as it was neither registered nor their physical address known. In the end, they emphasized that the application was filed without unreasonable delay and that the balance of convenience weighed in their favour. The Applicants further averred that they were apprehensive that should execution issue, they would suffer prejudice, the appeal would be rendered nugatory and they would suffer substantial loss as they will be condemned to pay a decretal sum twice as they had paid the claimed sum prior.

3. The Respondent strenuously opposed the application. It filed a Replying Affidavit sworn on 4<sup>th</sup> March 2025 by *Henry Ozianyi*, the Respondent's Operations Manager. It emphasized that it had effected service upon the Applicants and further that the payments made by the Applicants were taken into account and all the amounts paid by themselves deducted from their outstanding loan balances. It contended that the statements provided by the Applicants include payments made to accounts unknown by the Respondent. It insisted that it was a duly registered company with capacity to sue in order to recover the monies owed to it. It urged this Court to dismiss the application with costs for being an abuse of the Court process.
4. The application was heard by way of written submissions. Parties duly complied and filed their written submissions whose contents have been considered and will be ingrained in the later part of this decision.
5. As the application seeks to stay execution of a decree, the law thereto is provided under *Order 42 Rule 6* of the Civil Procedure Rules. The conditions are well settled and are that

the application be filed timeously, a demonstration of substantial loss likely to occur should stay not be granted and the aspect of security for costs for due performance.

6. I will now apply the above conditions to the matter at hand. On delay, the judgment of the trial Court was delivered on 11<sup>th</sup> April 2023, and the instant application was filed on 26<sup>th</sup> October 2024, a period of over one year. The delay was, however, not explained by the Applicants. Next is the issue of substantial loss. The Applicants submitted that they were retirees and would be subjected to substantial loss if they are committed to civil jail for non-payment whereas they were never served with the Court process and indeed have paid a substantial amount of the decretal amount. In a claim of non-payment of money, a defence of having already satisfied the decree is so cardinal and cannot be overlooked. If it is true that the Applicants paid the sums and are now likely to face jail for non-payment, then such a scenario amounts to substantial loss since their incarceration will be irreversible. To this Court, the Applicants stand to suffer substantial loss if the order is not granted.
7. On the aspect of security, the Applicants posited that it would be unfair to require them to deposit any further security as the money was already paid. To the contrary, the Respondent argued that the sums were yet to be paid and that if any payment was made as alleged, then it was to a third party and not itself. In such a scenario, on one hand, it will be unfair to call upon the Applicants to render any deposit if it is true that they indeed made payments. On the other hand, the Respondent has an unsettled judgment if the Respondent position is true. In such a case, therefore, since the Applicants stand to lose their liberty if they will be unable to settle the deposits, it is prudent to instead focus

on an early determination of the main appeal without the necessity of making any deposit.

8. Drawing from the foregoing, the Notice of Motion dated 25<sup>th</sup> October 2024 is merited and the following final orders hereby issue: -

**[a] That pending the hearing and determination of the appeal herein, there be stay of execution of judgment in *Nairobi [Milimani] Small Claims Court Case number E31041 of 2023* delivered on 11<sup>th</sup> April 2023.**

**[b] Costs of the application to be in the appeal.**

**[c] As the appeal is against a ruling, the requirement to file and serve a Record of Appeal is hereby dispensed with and the trial Court file be availed.**

**[c] The Appellants will file and serve written submissions within 14 days of this Order and upon service, the Respondent shall file and serve written submissions within 14 days of service.**

**[d] The matter shall be fixed for highlighting of submissions on a date to issue.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 13<sup>th</sup> day of February, 2026.**

**A. C. MRIMA  
JUDGE**

**Ruling virtually delivered in the presence of:**

**Mr. Ogeri**, Learned Counsel for the Appellants.

**Ms. Wambui**, Learned Counsel for the Respondent.

**Michael/Amina** - Court Assistants.