



**Proto Energy Limited v Muli (Civil Appeal E225 of 2025)
[2026] KEHC 1378 (KLR) (Civ) (13 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1378 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E225 OF 2025**

AC MRIMA, J

FEBRUARY 13, 2026

BETWEEN

PROTO ENERGY LIMITED APPELLANT

AND

FRANCIS MUINDE MULI RESPONDENT

RULING

Background

1. Francis Muinde Muli, the Respondent herein, instituted Milimani Small Claims Court Case No. E4632 of 2023, (hereinafter referred to as 'the suit') against Proto Energy Limited, Appellant herein. He sought damages arising from a gas cylinder explosion. The suit proceeded ex-parte, resulting in a judgment delivered on 15th December 2023 in favour of the Respondent.
2. Upon becoming aware of the judgment via proclamation by Auctioneers, the Appellant filed an application dated 16th January 2025. It sought to set aside the ex-parte judgment. It also filed a subsequent application dated 18th January 2025 seeking stay of execution pending the hearing of the set-aside application.
3. On 27th February 2025, the trial Court dismissed the application for stay of execution, finding that the Appellant had failed to demonstrate substantial loss. Subsequently, the Respondent's agents, Hazara Auctioneers, proceeded to attach the Appellant's motor vehicle, registration KCS 087R. Aggrieved by the ruling of 27th February 2025, the Appellant approached this Court.



The Applicant's case:

4. By a Notice of Motion dated 28th February 2025 brought under Order 42 Rule 6 Order 22 of the Civil Procedure Rules, the *Auctioneers Act* and Section 3A of the *Civil Procedure Act*, the Applicant sought the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to issue an order staying the execution of the ruling delivered on the 27/02/2025 pending the inter parties hearing of this application.
 3. That pending the hearing and determination of the application, the Court be pleased to order the immediate and unconditional release of the Appellant/Applicant motor vehicle KCS 087R in the custody of Hazara Auctioneers, which motor vehicle was not in the schedule of the proclaimed assets.
 4. That the Honourable Court be pleased to recall and nullify the warrants issued to M/s Hazara Auctioneers and consequently nullify the execution proceedings undertaken by the said auctioneer who was not licensed as at the time of proclaiming the applicants' assets.
 5. That this Honourable Court be pleased to issue an order staying the execution ex-parte judgment delivered in Nairobi Milimani SCCC No. E 4632 of 2023 which was resuscitated following the ruling delivered on 27th February 2025 pending the hearing and determination of this appeal.
 6. That the costs of this application be provided for.
5. The application was supported by the Affidavit of Wambui Maina, the Appellant's Legal officer. She deposed that the execution process was marred by illegality because the Auctioneer, Hazara Auctioneers, was not duly licensed at the time of the proclamation on 15th January 2025. Further, it was her case that the attached motor vehicle namely registration number KCS 087R was not listed in the schedule of proclaimed assets, rendering the attachment irregular. She argued that unless a stay is granted, the appeal will be rendered nugatory as the subject vehicle is scheduled for auction. She proposed to deposit the decretal sum in a joint interest-earning account as security.

The Submissions:

6. The Appellant filed submissions dated 28th April 2025. It was its case that the trial Court erred by dismissing the protective application dated 18th January 2025 without determining the substantive application for setting aside the ex-parte judgment dated 16th January 2025. It urged that the ex-parte judgment was irregular due to lack of proper service, as service was purportedly effected via an unverified email address. Drawing support from the case of *James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another* [2016] eKLR it submitted that an irregular judgment must be set aside ex debito justitiae irrespective of the defence's merits.
7. Regarding the stay of execution, the Appellant argued that the imminent sale of tools of trade constituted irreparable harm.

The Respondent's case:

8. The Respondent opposed the application through his Replying Affidavit deposed to on 14th March 2025. He contended that the application is incompetent because the appeal challenged a ruling on stay of execution which required leave to appeal, yet no such leave was obtained from the lower Court.



9. The Respondent averred that execution is a lawful process pursuant to a valid decree and that the Applicant had failed to demonstrate how execution would cause irreparable damage. He further argued that the order dismissed by the lower court is a negative order incapable of being stayed.

The Submissions:

10. In his written submissions dated 14th May 2025, the Respondent argued that an appeal against an order dismissing a stay of execution does not lie as of right and requires leave. The case of *Nyutu Agrovat Ltd -vs- Airtel Networks Ltd (2015) eKLR* and *Stephen Omondi Juma -vs- Sprocer Awuor Rabote (2022) eKLR* were relied upon to bolster the legal position.
11. Regarding the substantive issues, the Respondent argued that the judgment was regular as service was effected via the email address info@protoenergy.com, which appeared on the Appellant's sales receipt.
12. He challenged the competency of the affidavit filed in the lower Court, arguing that it was sworn by a representative of GA Insurance, a stranger to the suit, before subrogation rights had crystallized. To that end, it referred to the case of *Kenya Power & Lighting Company Ltd -vs- Julius Wambale & Anor (2019) eKLR*.
13. Finally, it was his case that the Applicant failed to prove substantial loss or furnish security in the lower court.

Analysis:

14. Having carefully appreciated the parties' positions, the rival submissions and the decisions referred to, the following issues arise for determination: -
- i. The competence of the appeal.
 - ii. Depending on (i) above, the merits of the application
 - iii. Whether the execution proceedings by Hazara Auctioneers warrant nullification.
15. The Court will now deal with the above issues in seriatim.

The competence of the appeal:

16. The jurisdiction of the High Court on appeals arising from the Small Claims Court is circumscribed by Section 38 of the [Small Claims Court Act](#) in the following terms: -
38. Appeals
- (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
 - (2) An appeal from any decision or order referred to in subsection (1) shall be final.
17. In *M'riungu and Others -vs- R [1982-88] 1 KAR 360* His Lordship, Chesoni AJA, discussed matters of law in the following manner: -

.... We would agree with the views expressed in the English case of *Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) [1983] 1 CR 511* that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of



first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law.

18. The Respondent raised the objection that the appeal is incompetent for want of leave. It is common ground that the application which was dismissed by the trial Court was based on Order 42 Rule 6 of the Civil Procedure Rules. Likewise, the instant application seeks similar prayer of stay of execution. Sub-rule 6[1] of the Civil Procedure Rules states as follows: -

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 the appeal is preferred may apply to the appellate court to have such order set aside.

19. The above provision speaks for itself. Since the application that was dismissed and eventually prompted the appeal sought a stay of execution, then the Applicant had a right to make a similar application before this Court. However, the application could not be made in isolation, hence, the appeal. Suffice to say that the appeal raised other grounds including the fact that the trial Court erred in determining the stay application before the main application seeking the setting aside of the ex-parte judgment was disposed of. As the appeal is essentially revolving around the setting aside of the ex-parte judgment, then under Order 43 of the Civil Procedure Rules such appeals do not require leave to appeal. Therefore, this Court finds that the appeal is competent and the objection fails.

Whether the application seeking stay of execution is merited:

20. The power to grant a stay is discretionary and governed by Order 42 Rule 6 of the Civil Procedure Rules. The Court is to be satisfied on the three principles being whether substantial loss may result to the Applicant unless the order is made; whether the application has been made without unreasonable delay and the issue of security.
21. In Civil Application Nai 6 of 1979, Butt -vs- Rent Restriction Tribunal [1979] eKLR, the Court of Appeal, while referring to the decision of Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459 remarked as follows: -

.... It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.

22. The Learned Judges then crystallized the conditions as hereunder:
- 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 for stay of execution to lapse.

23. This Court will now consider the above requirements sequentially.

Substantial Loss:

24. The Applicant argued that the attached vehicle, KCS 087R, is a tool of trade and its sale would render the appeal nugatory. More critically, the Applicant raised a serious issue regarding the legality of the execution. It was deposed that Hazara Auctioneers was not licensed at the time of the proclamation on 15th January 2025 and that the vehicle attached was not on the proclamation schedule. If the execution is allowed to proceed based on a process that may be statutorily void, due to an unlicensed auctioneer, the Applicant will suffer substantial loss in the form of an illegal deprivation of property.
25. Such a loss is not merely financial, but also allegedly based on impugned legal processes. The integrity of the processes and the whole judicial system is at stake. If the vehicle is sold illegitimately, the substratum of the appeal, and the main suit, vanishes. The Court finds that substantial loss has been demonstrated.

Delay:

26. The ruling was delivered on 27th February 2025 and this application was filed on 28th February 2025. There was no delay.

Security:

27. The Applicant expressly offered to deposit the entire decretal sum in an interest-earning account in the joint names of Counsel. This satisfies the requirement for security and safeguards the Respondent's interests.

Whether the execution proceedings by Hazara Auctioneers be nullified:

28. The Applicant deposed that the subject motor vehicle KCS 087R was not in the schedule of proclaimed assets. A review of the Proclamation Notice annexed as 'WM 1' confirms that the schedule list has "Assorted Office Chairs and tables," "assorted Computers," "assorted empty and filled Gas Cylinders," and motor vehicles KCZ 062Y, KCU 822S and KCS 071T. The subject vehicle was, hence, not among the proclaimed items. That raises the aspect of the legal propriety of the attachment.
29. Further, there is the allegation that the Auctioneer was unlicensed at the material time. Section 9(1)(2) of the [Auctioneers Act](#) provides as follows:
 9. Prohibition against unlicensed auctioneers



1. No person shall, in Kenya, carry on the business of an auctioneer unless he holds a valid licence issued by the Board under this Act.
 2. A person who contravenes the provisions of subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding two years, or to both.
30. Whereas execution of Court orders must be carried out in strict compliance with the law, this Court cannot determine the status of the Auctioneer given the above legal provisions.

Disposition:

31. Deriving from the foregoing, the application is merited and the following orders hereby issue: -
- (a) The Notice of Motion dated 28th February 2025 is allowed to the extent that a stay of execution of the judgment and decree in Milimani SCCC No. E4632 of 2023 is hereby issued pending the hearing and determination of the appeal herein.
 - (b) The stay of execution is conditional upon the Appellant/Applicant depositing the entire decretal sum being Kshs 549,958.92/= in Court within 21 days from the date of this Order and in default the stay orders will automatically lapse and execution shall issue.
 - (c) The attachment of Motor Vehicle registration number KCS 087R by M/s Hazara Auctioneers be and is hereby suspended and the said vehicle shall be released to the Appellant immediately upon the deposit of the security.
 - (d) Costs of this application shall abide the outcome of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2026.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Ng'ang'a, Learned Counsel for the Appellant/Applicant.

Mr. Omwenga, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

