

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. 29 OF 2016

BETWEEN

MAXAM LIMITED.....

.....PLAINTIFF

AND

HEINEKEN EAST AFRICA IMPORT

COMPANY LIMITED.....1ST

DEFENDANT

HEINEKEN INTERNATIONAL BV.....2ND

DEFENDANT

RULING

Introduction and Background

1. On 7th November 2025, this court delivered a Ruling where it dismissed the 1st Defendant's Reference and upheld the Deputy Registrar's assessment of instruction fees of Kshs.86,000,000.00/= and allowed the Plaintiff's application awarding it interest on the principal decretal sum of Kshs.1,799,978,868.00/= at the rate of 14% per annum from the date of Judgment, that is, 29th July 2019 until the date of full payment. The Court accordingly directed the

Deputy Registrar to compute the interest payable and to issue fresh warrants of attachment and sale for the consolidated sum of the principal decretal amount and accrued interest.

2. The Defendants, being dissatisfied with the said Ruling, have evinced their intention to appeal against the Ruling and resultant order. However, the 2nd Defendant is apprehensive that the Plaintiff may proceed and execute the Ruling and it has thus filed the Notice of Motion dated 24th November 2025 seeking a stay of execution pending the filing, hearing, and determination of the intended appeal.
3. The application is supported by grounds on its face and the affidavit of the 2nd Defendant's authorized representative, KEVIN SANTRY, sworn on 24th November 2025 and opposed by the Plaintiff through the replying affidavit of its Managing Director sworn on 15th December 2025. The parties have argued the application by way of written and oral submissions by their respective counsel and together with the pleadings I have considered the same and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

4. The parties agree that the legal framework for granting a stay of execution pending appeal is well settled under **Order 42 Rule 6** of the **Civil Procedure Rules**. The applicant must demonstrate that they will suffer substantial loss if the order is not granted, that the application has been made without unreasonable delay; and that they are willing to provide such security as the court may order for the due performance of the decree. It is not contested that the 2nd Defendant has filed the application in a timely manner. The 2nd Defendant has also intimated that they are ready and willing to abide by any reasonable conditions for security that this Court may order as a condition for the grant of stay and the 2nd Defendant proposes issuing a bank Bank Guarantee as security. The Plaintiff submits that it is agreeable to the stay if the 2nd Defendant deposits the entire decretal sum in a joint interest-earning account in the name of the parties' advocates.
5. At the oral hearing of the Application, the Applicant/2nd Defendant proposed to avail a security in form of a Bank Bank Guarantee but wished to have the said Bank Guarantee capped at the sum of Kenya Shillings 100,000,000 instead of the full decretal amount. The Applicant also sought to have the said Bank Guarantee given I

favour of the Court instead of the Plaintiff. This offer was opposed by the Plaintiff/Respondent who argued that the Plaintiff, having been paid the proceeds of the decretal amount secured by the earlier Bank Guarantee by the court was fully operational and is a going concern and would have no difficulties in reimbursing any funds received by it. The Plaintiff further argued that a Bank Guarantee issued in favour of the Court in place of the Plaintiff would create difficulties, should the Appeal fail, in its realization as was the case in enforcing the previous Bank Guarantee which required the Plaintiff to move the Court for its realization. The Plaintiff indicated to the court that it was not opposed to the Application for stay pending appeal provided security for costs was given in a form of Bank Guarantee that was acceptable to it and was issued for the full decretal amount and made to the benefit of the Plaintiff.

6. Having gone through the parties' arguments and heard the oral arguments made by the parties, I note ostensibly that this application has been conceded to by the Plaintiff and the only sticky issue remaining for the court to determine is whether to allow a Bank Guarantee for a limited amount for the sum of

Kshs.100,000,000/= as per the prayers of the Applicant or the Bank Guarantee for the full decretal amount as sought by the Plaintiff.

7. I have considered both arguments and note that there are no compelling reasons as to why this court should consider a Bank Guarantee for a reduced amount of Kshs.100,000,000/= when there is a clearly drawn up decree and a certificate of costs that has been prepared by the court and in accordance with the law. I am also alive to the fact that a Bank Guarantee is only a promise to pay the debt in future and does not place these funds so Bank Guaranteed to the use and benefit of the beneficiary. In the event that the Appeal is successful, these funds shall be made available to the Appellant. I note however, if this court allows a Bank Guarantee for a sum less than the decretal amount, in the event that the appeal is dismissed, then the Plaintiff/Respondent shall be forced to start execution proceedings to recover the balance of the decretal amount less the amount in the Bank Guarantee. In my view, this kind of scenario would greatly prejudice the Respondent.

Conclusion and Disposition

8. Having weighed the above factors in considering the present application, I am inclined to grant the application for stay pending

appeal on condition that the 2nd Defendant furnishes security for the balance of decretal sum of Kshs.1,474,608,336.22/= as per the decree drawn by the Court on 26th November 2025 forthwith but not later than 21 days from the date of the ruling. For the avoidance of doubts and to avoid a back and forth between the parties, the form of the Bank Guarantee, which shall be for the sum of Kshs.1,474,608,336.22/=, shall be issued in the same format, terms and conditions as those found in the original form of Bank Guarantee dated 19th December 2019. The Bank Guarantee shall be made payable to and in favour of the Plaintiff and from it shall be from a reputable local bank and a copy thereof be served to the court through the Deputy Registrar of the Division. Failure to provide the said Bank guarantee within 21 days will amount to a default of compliance, the orders of stay pending appeal granted herein shall stand discharged forthwith and the Plaintiff/Respondent shall be at liberty to commence execution proceedings.

9. On costs, in light of the fact that costs have already been assessed as part of the execution process, I decline to award any costs for this application and direct that

each party shall bear their own costs. It is so ordered.

**DATED SIGNED and DELIVERED virtually at NAIROBI this 2nd
DAY OF MARCH 2026**

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**J.W.W. MONGARE
JUDGE**

IN THE PRESENCE OF

- 1. Mr. Nyachoti for the Plaintiff/Respondent.
- 2. N/A for the 2nd Defendant/Applicant.
- 3. Amos - Court Assistant

ORIGINAL