



**Aziz v FEP Sacco & 2 others (Commercial Appeal E136 of 2025)
[2026] KEHC 2520 (KLR) (Commercial and Tax) (19 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E136 OF 2025
JWW MONG'ARE, J
FEBRUARY 19, 2026**

BETWEEN

SAMERA MERAJDIN AZIZ APPELLANT

AND

FEP SACCO 1ST RESPONDENT

JAMES MAKENA 2ND RESPONDENT

KENNETH CHARLES KIMATHI 3RD RESPONDENT

RULING

Introduction & Background

1. By the Notice of Motion dated 26th April 2025, the Appellant seeks to set aside the ruling delivered on 28th March 2025 in favour of the 2nd Respondent by the subordinate court in CMCC No. E529 of 2022 and further stay all proceedings before the said court pending the hearing and determination of this appeal. The application is supported by the grounds on its face and the supporting affidavit of the Appellant sworn on 26th April 2025 and it is opposed by the 1st and 3rd Respondents through the Grounds of Opposition dated 25th June 2025 and by the 2nd Respondent through his replying affidavit sworn on 6th May 2025.
2. The background leading rise to the appeal is in respect of a lease dispute between the Appellant and the Respondents on the former's premises on property LR No. 209/7755/15 on Kabarnet Road, Nairobi. The Appellant obtained a default judgment on 20th June 2023 after the Respondents failed to enter appearance and the ruling of 28th March 2025 set aside the default judgment, which the Appellant now claims is erroneous and unjust.



3. The application has been canvassed by way of written submissions that are on record and I have considered the same together with the pleadings in my analysis and determination below.

Analysis and Determination

4. As stated, the Appellant seeks to set aside the ruling of the subordinate court and stay proceedings therein. The Appellant avers that the learned magistrate ignored the Appellant's preliminary objection on sub judice and that the ruling contains apparent errors like wrongly attributing pleadings to the wrong party. She states that she has partially recovered the judgment debt by way of auction and a consent agreement, but that the ruling could allow the 2nd Respondent to unfairly restart litigation. That there is a risk of substantial loss and irreparable damage if the ruling is not stayed, that the appeal has a high chance of success and the application was filed without unreasonable delay.
5. In response, the 2nd Respondent asserts that the subordinate court correctly set aside the ex-parte judgment entered against him and granted him leave to file a defence and counterclaim, which he has done. He argues that he was wrongly included in the suit before the subordinate court and clarifies that he was formerly the chairman of the 1st Respondent but vacated office on 29th April 2024. That he was not a personal party to the lease agreement between the Appellant and the 1st Respondent as he only interacted with the Appellant in his official capacity as chairman and he informed the Appellant of his departure and provided contact details for his successor. The 2nd Respondent contends that the contractual dispute is exclusively between the Appellant and the 1st Respondent, and he bears no personal liability for any alleged breach. He accuses the Appellant of acting with malice by wrongfully suing him, selectively executing the ex-parte judgment against him, leading to the attachment and proclamation of his property.
6. The 2nd Respondent depones that he changed advocates due to the seriousness of the execution against his property, that his new advocates filed an application to set aside the ex-parte judgment, which was opposed by the Appellant by way of a preliminary objection. That the subordinate court dismissed the Appellant's objection on 3rd December 2024 and later granted his application, the subject of this appeal. He denies any knowledge or involvement in any negotiations or commitments between the Appellant and the 1st Respondent and urges the court to uphold the subordinate court's ruling dated 28th March 2025, as it serves the ends of justice and correctly allows him to defend himself.
7. On their part, the 1st and 3rd Respondents argue that the application is frivolous, vexatious, and an abuse of court process because it attempts to set aside a ruling of the subordinate court at an interlocutory stage, which they claim is untenable and contrary to the right to a fair hearing. That it seeks to stay proceedings in an unrelated case being Milimani CMCC No. E529 of 2022, Dennis Murimi Mwaura v. Directline Assurance Company Limited, which has no connection to the current appeal and that the Appellant has failed to disclose sufficient reasons to justify an order for stay of proceedings. They further see the application as aimed at delaying the hearing of the main suit thereby offending the Overriding Objective of the court as set out under Sections 1A and 3A of the *Civil Procedure Act*.
8. The principles governing the grant of stay of proceedings are well settled. Order 42 Rule 6 (1) of the Civil Procedure Rules provides that an appeal shall not operate as stay unless the Court so orders and provides as follows:

No Appeal or second Appeal shall operate as a stay of execution or proceeding 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 order set aside.

- (2) No order for stay of execution shall be made under subrule (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.”

9. I am in agreement with the 2nd Respondent’s submission that unlike stay of execution under Rule 6 (2) above, stay of proceedings is governed by broader judicial discretion and is to be exercised sparingly. This court has laid out various principles that guide its determination of an application to stay proceedings and I am persuaded by a 3-judge bench ruling of this court in *William Odhiambo Ramogi v Attorney General and three others* 2019 eKLR where five guiding principles were set out as follows:

1. There must be a pending Appeal.
2. The application must be made expeditiously.
3. The Appeal must risk being rendered nugatory.
4. Exceptional circumstances must exist.
5. The prejudice must be irreparable or incapable of being compensated by damages.

10. All these factors must be considered for an order of stay of proceedings to be granted. Halsbury’s Laws of England, 4th Ed. Vol. 37 (Practice and Procedure) at p.330 states that “The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The Applicant for a stay on this ground must show not merely that the Plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.” (see *Sigat v Sigat* [2025] KEELC 5808 (KLR))

11. Whereas I agree that an appeal has been filed and that the present application has been filed without unreasonable delay, I find that the Appellant has not demonstrated that continuing the trial before the subordinate court would cause exceptional or irreparable harm that cannot be compensated by way of damages. The appeal challenges a procedural ruling, that of setting aside ex-parte judgment and if the trial proceeds and the Appellant loses, they can still appeal the final judgment. This appeal is not automatically rendered nugatory by the trial continuing as the setting aside order remains a distinct legal issue for the appellate court to decide.



12. Further, the core dispute is contractual and involves a monetary claim for special damages. The Appellant's main grievance, being subjected to trial after an ex-parte judgment was set aside, is a normal part of litigation procedure, not an exceptional situation warranting a halt to all proceedings. In my view, any prejudice suffered from defending the suit will be generally assuaged by an award of costs if the Appellant ultimately succeeds. The harm of having to face trial does not constitute irreparable prejudice.
13. On setting aside the ruling of the subordinate court, I am in agreement with the 1st and 2nd Respondents and I find that it would be inappropriate to grant such substantive relief through an interlocutory application when an appeal against the same Ruling has already been filed and is pending (see Sigat(supra))

Conclusion & Disposition

14. As I have found that the proceedings before the subordinate court cannot be stayed and its ruling cannot be set aside at this stage, the Appellant's application dated 26th April 2025 fails. The same is dismissed forthwith and costs will be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF FEBRUARY 2026

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J.W.W. MONGARE

JUDGE

IN THE PRESENCE OF

Ms. Wanjiru for the Applicant.

Ms. Muthoni holding brief for Mr. Michuki for the 1st Respondent.

Mr. Njoroge Baiya for the 3rd Defendant.

Amos - Court Assistant

