



REPUBLIC OF KENYA



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**Safaricom Plc v Wangari & another (Civil Appeal E027 of 2025)
[2026] KEHC 1112 (KLR) (29 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 1112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E027 OF 2025
JN NJAGI, J
JANUARY 29, 2026**

BETWEEN

SAFARICOM PLC APPELLANT

AND

LUKAS MUGO WANGARI 1ST RESPONDENT

TRIDENT INSURANCE CO LTD 2ND RESPONDENT

RULING

1. The applicant herein has filed a Notice of Motion application dated 13th October 2025 seeking for orders that:
 1. Spent
 2. Spent
 3. Spent
 4. That the court be pleased to review/vary/alter the Ruling/Orders/Directions issued on 7th October 2025 and 13th October 2025 and the in Hola MCC COMM. E052 of 2024 Garnishee order absolute issued in Hola MCC COMM. E052 of 2024 in the terms it may deem fit.
 5. That the Honourable court be pleased to stay execution of Garnishee order absolute issued in Hola MCC COMM. E052 of 2024 pending the hearing and determination of the Memorandum of Appeal.
 6. That this Honourable Court do issue a temporary injunction restraining the 1st Respondent by himself, his agents Mutrix Auctioneers, employees and/or assigns from in any way whatsoever dealing with, attaching, disposing of, auctioning or otherwise interfering with the Appellant/Applicant's movable property and any other attachable assets, in its shops, headquarters



following the proclamation of attachment dated 13th October 2025 in satisfaction of the Garnishee Order Absolute issued on 7th October 2025 in Hola MCC COMM. E052 of 2024 pending herring and determination of the Appeal.

7. That the further Affidavit contained in the Appellant/Applicant's application dated 8th October 2025 be admitted and leave sought be granted and the proceedings at the lower court be re-opened for purposes of a fair hearing before another trial magistrate.
 8. That any proclamation of attachment issued be lifted as it is illegal.
 9. That the 1st Respondent be directed to pay the Auctioneers fees following its proclamation of attachment.
 10. That such further and other relief be granted to the Appellant/Applicant's as this court deems fit and expedient in the circumstances.
 11. That the costs of the application be provided for.
2. The application is based on grounds stated on the face of the application and supported by the affidavit of the legal manager of the Applicant, Daniel Ndaba. The application was opposed by the 1st Respondent vide the Replying affidavit of his counsel, Geoffrey Kilonzo.
 3. The case for the Applicant is that the SPM's court at Hola had on the 17th December issued a garnishee order on the Applicant attaching money held in the 2nd Respondent's pay bill No. 98xxx. On the 8th January 2025, The High Court at Garsen issued an order lifting the Order Nisi.
 4. It is the averment of the legal manager of the Applicant that upon being served with the High Court order lifting the Order Nisi, the Applicant proceeded to release to the 2nd Respondent a sum of Ksh.19,600,000/= that was in the 2nd Respondent's pay bill number. That thereafter the Applicant learnt that the High Court on 6th March 2025 issued an order setting aside its order of 8th January 2025 and substituted it with an order staying the lower court's order pending the hearing and determination of the application dated 30th December 2024. That it later learnt that the pending application was withdrawn and the High Court ordered execution to proceed.
 5. That upon the withdrawal of the pending application at the High Court, the 1st Respondent moved back to the lower and sought to make the decree absolute. The Applicant sought leave of the court to file a further affidavit to explain the change of circumstances that led to the money being released to the 2nd Respondent but the lower court on 7th October 2025 proceeded to deliver a ruling on the garnishee application dated 17th December 2024 making the order absolute. The Applicant says that this was done without considering the change of circumstances regarding the Applicant's indebtedness to the Judgment Debtor as the pay bill number garnished was unsuspending in compliance with the High Court order dated 8th January 2025. That this prompted them to move the lower court vide an application dated 8th October 2025 seeking stay of execution and review of the garnishee Order absolute but the magistrate declined to deal with the application on the ground that it was filed in the wrong court and the court rendered itself functus official.
 6. The legal manager of the Applicant depones in his supporting affidavit that garnishee proceedings are based on the Appellant's indebtedness to the Judgment debtor and given the change of circumstances occasioned by the lifting of the order by the High Court, it was only fair for the Applicant to confirm its indebtedness to the Judgment Debtor.
 7. He avers that the 1st Respondent is under mistaken belief that the Applicant continues to hold funds to its credit in the 2nd Respondent's pay bill. That the 1st Respondent has filed an application dated 7th



October 2025 for execution by way of warrants of attachment of the Applicant's movable property. That the appeal filed herein will be rendered nugatory in the absence of interim orders staying execution of the decree. That the Applicant stands to suffer substantial loss, injury and inconvenience should this court decline to grant staying of execution of the orders sought herein.

8. Mr. Kilonzo on his part deposed that the Applicant was aware of the High Court order of 6th March 2025 and in the premises disobeyed the order and as such must be held personally liable. That it is clear from the affidavit sworn on 14th March 2025 by the agent of the Applicant (annexed as GK-3) that as at 13th March 2025 the account had a sum of Ksh.27,485,410.76/=. That the Applicant is precluded by the principle of estoppel from asserting something that is contrary to their previous statement. That the Applicant admitted there was money in the account and cannot thereby go back on their conduct and say that they are unable to pay the decree.
9. It was deposed that it is evident from the prayers sought in the application that the Applicant is on a fishing expedition. That the prayer for review cannot issue because this court has no jurisdiction to review an order by the trial court and only the trial court can do so. That the prayer for temporary injunction cannot be granted as there is no prayer for a permanent injunction in the memorandum of appeal. More so that the application does not meet the principles for granting injunctions as held in the case of Giella v Cassman Brown & Co. Ltd (1973 EA 358. Further that the prayer for stay cannot issue as the application does not satisfy conditions for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules.
10. The application was canvassed by way of written submissions of the respective counsels for the three parties.

Applicant's submissions

11. The Applicant submits that the conduct of counsel for the 1st Respondent of deposing an affidavit in the matter offends Rule 9 of the Advocates Practice Rules. The applicant cited the cases of Magnolia Pvt Limited v Synermed Pharmaceuticals (K) Ltd (2018) KEHC 1866 (KLR and Republic v Nairobi County Government & 6 other Exparte Mike Sonko Mbuvi (2015) eKLR.
12. It was submitted that the Applicant was not a party in HCCA E006 of 2024 and was not served with the order of 6th March 2025 reinstating the Garnishee Order Nisi. That the posting of a ruling onto the CTS is no substitute for effective service as contemplated under Order 5 of the Civil Procedure Rules. That the Applicant had complied with the orders of the lower court issued in December 2024 by freezing the pay bill and similarly complied with the orders of the High Court issued in January by releasing the money to the pay bill. That in that case fraudulent conduct or negligence cannot be imputed on the Applicant.
13. The Applicant submitted that the act of the trial court of denying the Applicant a chance to present a further affidavit showing the change of circumstances was akin to allowing the Garnishee Order unopposed. The Applicant stressed the importance of an affidavit by citing the case of Katiba Institute v Attorney General & 9 others (2021) KESC 25 (KLR) where the court cited its decision in Gedion Konchellah v Julius Lekakeny Ole Sunkuli & 2 others (2018) eKLR that:

A replying affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or list of authorities that may be subsequently filed. Absence this foundational pleading, the replying affidavit, it follows that even the written submissions purportedly filed by the 1st respondent on 17th August, 2018 are of no effect...



14. It was submitted that the denial to put in further affidavit and the refusal to be heard on the application dated 13th October 2025 amounted to the Applicant being condemned unheard. Therefore, that the directions of the trial court issued on 7th and 13th October 2025 should be set aside so as to avert a miscarriage of justice.
15. On the question of granting stay of execution orders pending the hearing of the appeal, it is submitted that the Applicant's memorandum of appeal raises weighty issues that can only be ventilated at the trial. Further that in view of the fact that the 1st Respondent has commenced execution proceedings by issuing proclamation notices on the Applicant's property, the appeal will be rendered an academic exercise if stay of execution is not granted. The Applicant cited the case of *Macharia v Wachira* (2024) KEHC 4223 (KLR) where the court stressed that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case, see *RWW v EKW* (2019) KEHC 6523 (KLR). That considering that garnishee proceedings are based on the Applicant's indebtedness to the Judgment Debtor, levying execution before the same is done will occasion the Applicant substantial loss. In the premises the court should use its discretion to grant stay of execution.
16. The Applicant submits that a garnishee cannot be condemned to offer security in a bid to secure an appeal as the monies such a party holds (if any) are the property of the Judgment Debtor and thus it cannot be said that the applicant has failed to meet the threshold for stay of execution pending appeal on the grounds of security.

1st Respondent's submissions

17. Counsel for the 1st Respondent submitted that the Applicant was aware of the ruling delivered on 6th March 2025 as their counsel Mr. Ojonga had participated in the proceedings. More so that the ruling reinstating the garnishee order nisi was uploaded on the judiciary's e-filing portal where the Applicant's advocates had access to. Therefore, that failure to comply with the order was intentional.
18. It was submitted that the 1st Respondent has demonstrated vide annexure marked GK-3 that as at 13/3/2025 there was Ksh.27,485,410.76/= in the 2nd Respondent's account which was enough to re-attach and as such the Applicant is assisting the Judgment Debtor to evade and avoid the attachment. That they cannot now cry foul or use their own non-compliance as ground of appeal. Counsel cited the case of *Gulabcourt chand Popatlal Shah & another, Civil Application No.39 of 1990 (Unreported)* and which stressed the importance of obeying court orders. It is submitted that the Applicant is precluded by the principle of estoppel from asserting that there was no money in the account.
19. On whether the prayers sought can be issued, counsel for the 1st Respondent submits that the Applicant filed an application for review at the lower court dated 8th October 2024 which application is still pending at the lower court. That the actions of the Applicant of instituting a similar application in the High Court when the lower court has jurisdiction to review its own orders is outright abuse of the court process and sub-judice. That such conduct amounts to forum-shopping as this court has no jurisdiction to review the orders of the trial when there is a similar application pending at the trial court.
20. It is submitted that the prayers for temporary injunction being sought cannot issue in the absence of a prayer in the Memorandum of Appeal for a permanent injunction.
21. Further that the application has not met the principles of granting an injunction as was set out in the case of *Giella v Cassman Brown case (supra)*. That they have not proved that they will suffer substantial loss unless the prayers sought are granted and they have not provided security.



22. Counsel for the 1st Applicant submits that the prayer seeking admission of further affidavit fails as the same can only await the final judgment of the appeal.
23. That an application for trial before another magistrate can only await judgment and clear proof of bias. Additionally, that an application seeking disqualification of a magistrate is only made before that magistrate.
24. Counsel submits that the prayer to consolidate the application with other application that have not been filed is undeserved.
25. It is submitted that the Applicant initially sought to pursue a review against the garnishee order absolute and when the trial court declined to grant ex parte orders the applicant filed the appeal against the garnishee order absolute. That under Section 80 of the *Civil Procedure Act* provides that where a party opts to apply for review such a party cannot after the review exercise the option to appeal against the same order he sought he sought review of. That Order 45 of the Civil Procedure Rules equally makes it clear that a party cannot seek review of an order and appeal the same order. Reliance was placed in the case of *Fahim Yasin Twaha v Timamy Issa Abdalla 7 2 others* (2015) eKLR where the Supreme Court held that: where a litigant has more than one option to pursue, he/she must settle on one of them. The decision on which course to pursue is taken in advance and once it is taken, the other option is no longer available or placed on abeyance to be reverted to at a later stage in the event the initial option does not succeed. This means that when choosing, the litigant is expected to chose the best available option since she may not have any further recourse.
26. It was submitted that the applicant had his day in court when they chose to seek a review of the order that he now wishes to appeal against. That litigation for the applicant came to an end when he applied for review. Reliance was made on the Supreme Court decision in *University of Eldoret & another v Hosea Sitienei & 3 others* (2020) eKLR where the court stated that:

“We therefore note that when the applicants preferred to pursue review of the decision, as they were entitled to, that was the best option in their assessment even if it turned out to be unsuccessful. Allowing them to take the second option at this stage, as if they never exercised the first option in the first place, would not only contribute to protracting litigation but also defeat the whole essence of finality of the litigation process. This would mean that precious judicial time and resources would have been unnecessarily expended in not settling the dispute but rather satisfying the litigants’ options to cherry pick and engage in trial and error at the alter of judicial process without the attendant consequences.

The delay which the applicants seek to be excused from is largely as a result of the applicants’ pursuit of the review process before the Court of Appeal and the resultant appeal before the Supreme Court. This delay, the 1st and 2nd respondents indicate is 560 days which the applicants do not contest. Whereas the applicants may have diligently been pursuing their options whose success may have had an implication on the need for these proceedings, we are not inclined to accept such explanation based on what we have already stated.

In conclusion, the parties have had their share of litigation and we would not want to extend it any further, more so on the limited issue of costs as a result of these applications. There must be an end to litigation however much the applicants are dissatisfied.”

27. Also cited on the same point are the cases of *Serephen Nyasasi Menge v Rispah Onsare* (2018) eKLR where the court in dismissing an application for review observed that the applicant could not apply for review and at the same time appeal against the same order.



28. In *Thuo v Gichina* (Civil Misc. Appl E007 (2022) KEHC 16501 (KLR) 15 December 2022) (Ruling), where the applicant was seeking leave to file an appeal out of time after the review application was dismissed, the court in dismissing the application said that the application was abuse of court process.
29. On whether counsel for the 1st Respondent, Geoffrey Kilonzo, has capacity to swear affidavit on behalf of the 1st Respondent, counsel submitted that he has capacity to swear the affidavit as he is well versed with the facts of the case and has provided sources of his information. He relied on the case of *Barrack Ofulo Otieno v Instarect Limited* (2015) eKLR which cited the authors of *Halsbury's Laws of England*, 3rd Edition, Paragraph 845 that:
- “Affidavits filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that, in interlocutory proceedings or with leave, statements as to a deponent’s information or belief are admitted, provided the sources and grounds thereof are stated...For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties but are made for the purpose of keeping things in status quo till the right can be decided, or for purpose of obtaining some direction of the court as to the conduct of the cause.”
30. Also cited is the case of *Jane Jaoko Owino v Blue Shield Insurance Co. Ltd* HCC359 of 2000 where Justice Tanui held that an affidavit sworn by an advocate on matters which are not in dispute and supported by the court record is not defective.
31. Further reliance was made on *Kamlesh M.A. Pattni v Nasir Ibrahim Ali & 2 others* CA 354/2004 adopted by Justice Aburili in *Factory Guards Limited v Abel Vundi* (2014) eKLR where in dismissing an application for striking out of an affidavit sworn by an advocate the court held that there is an express prohibition against an advocate who of his own knowledge can prove some facts to state them in an affidavit on behalf of his client.
32. Counsel for the 2nd Respondent on the other hand supported the Application by the Applicant. He submitted that the Application has met the threshold for grant of temporary injunction pending appeal as established in the case of *Giella v Casman Brown* case (supra). That the appeal raises triable issues on whether the Applicant was given an opportunity to respond to the application seeking garnishee absolute orders and whether the action of the 1st Respondent to proceed to proclaim the Applicant’s goods in execution of the decree was justified. That Applicant should have been allowed to respond on whether there were funds in the 2nd Respondent’s account before the decree nisi was issued.

Analysis and determination

33. I have considered the grounds in support of the application, the grounds in opposition thereto, the pleadings and the submissions by the respective counsels for the parties. The issues for determination as far as I can discern from the pleadings are whether the court should grant the Applicant stay of execution pending the hearing and determination of the appeal and whether the related appeals filed by the Applicant should be consolidated. The other issues are in my view for determination during the appeal.
34. However, before the court determines the issue at hand, there is a preliminary issue on whether the replying affidavit of Mr. Geoffrey Kilonzo, counsel for the 1st Respondent offends Rule 9 of the Advocates Practice Rules which provides as follows:

“No Advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or



by declaration or affidavit; and if, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear; provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

35. The Applicant in supporting the position that an advocate should not depose an affidavit in contentious matters cited the case of *Republic v Nairobi County Government & 6 other Exparte Mike Sonko Mbuvi* (supra) where the court stated that:

Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.

See also *Magnolia PVT Limited vs Synermed Pharmaceuticals (K) Ltd* (2018) eKLR where the Court dealt with similar issue.

36. It is settled rule that an advocate should not descend to the arena of litigation by swearing affidavits in contentious matters but he may do so in formal averments where the issues deposed of are not in dispute and are supported by the court record. In *Oriental Commercial Bank Ltd v Shreeji Contractors Ltd & 2 others* [2021] KEHC 3873 (KLR) Justice Joel Ngugi (as he then was) while considering a similar issue stated as follows:

28. This principle is grounded in the rules governing conflict of interest and the need for counsel as an officer of the Court to retain an appropriate level of professional objectivity. To protect the integrity of the legal process, the Court cannot countenance counsel for a party placing his or her own credibility in issue on an important point of evidence. However, countless cases have stated that there certain procedural motions which turn on evidence that counsel can provide, such as the chronology of the action or facts regarding how litigation has progressed. Indeed, in those types of cases, the factual evidence of the Counsel is preferable to that of the client and is largely considered non-contentious – merely a convenient way to organize and identify evidence already on Court record. Indeed, the affidavit itself might be unnecessary.

37. Mr. Kilonzo argued that his replying affidavit was proper as he was well versed with the facts of the case and provided sources and grounds thereof. I have gone through the replying affidavit of Mr. Kilonzo sworn on 17th October 2025 and noted that some of the averments are contentious and are disputed by the Applicant. For example, Mr Kilonzo says that the Applicant was aware of the ruling of the High Court issued on 6th March 2025 which is disputed by the Applicant. He says that there was money in the 2nd Respondent’s pay bill account when the order of 6th March 2025 was issued which is a contention disputed by the Applicant. He deposes that the Applicant is assisting the decree holder to avoid the attachment which is denied by the Applicant. These are matters that may require Mr. Kilonzo to substantiate through cross-examination. He was not the proper person to depose on such issues. I however do not think that it would serve the ends of justice to expunge the affidavit from the record as it is only argumentative and does not warrant being expunged.



38. Under Order 42 Rule 6 of the Civil Procedure Rules, an applicant for stay of execution pending appeal is required to satisfy the court that:
- (1) Substantial loss may result to the applicant unless the order is made;
 - (2) That the application has been made without unreasonable delay; and
 - (3) The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
39. This court is therefore obligated to determine whether the above stated conditions were met in the instant application.
40. There is no dispute that the instant application was filed without delay. It is the other two conditions that are in issue.
41. The Applicant submits that levying execution against it will occasion it substantial loss considering that garnishee proceedings are based on the Appellant's indebtedness to the Judgment Debtor. They argue that they are not indebted to the 1st Respondent. The 1st Respondent on the other hand argues that there was sufficient money in the 2nd Respondent's pay bill account when the order of 6th March 2025 was issued. Whether or not there was money in the 2nd Respondent's account when the order of 6th March 2025 was issued is not for determined here. Suffice is to say that the court notes that Applicant as a garnishee was not a judgment debtor but an entity holding money on behalf of the Judgment debtor.
42. The court further notes that the 1st Respondent is in this matter executing several decrees against the Applicant whose sum total is about Ksh.19 million. This is by any standards a lot of money. The Applicant may have difficulties in recovering that sort of money from the various decree holders in the event that the appeal is decided in their favour. That would, in my view, would occasion substantial loss. The limb of substantial loss has thereby been established.
43. On the question of security, the Applicant argues that a garnishee is not expected to provide security as he is not a judgment debtor. That a garnishee holds the money on behalf of the judgment debtor and the garnished money would act as the security.
44. Indeed security may not be necessary where a garnishee is holding money on behalf of the judgment debtor because the garnished money can act as security. However, the circumstances in this case are different as the garnishee, the Applicant, is saying that they are not holding any money belonging to the judgment debtor. The 1st Respondent argues that there was money in the judgment debtor's account when the order of 6th March was issued and they are thus executing against the Applicant.
45. The court in an application for stay of execution is required to balance the interests of both the judgment creditor and the judgment debtor. In view of the special circumstances of this case, I consider it prudent to order the Applicant to furnish security for due performance of the decree.
46. The Applicant is further seeking for an order of temporary injunction to stop the auctioneers from proceeding with the execution pending the hearing of the appeal.
47. The conditions for grant of orders of interlocutory injunctions were stated by the Court of Appeal for Eastern Africa in the case of *Giella v Cassman Brown & Co. Ltd* (1973) EA as follows:
- (a) The applicant must first establish a prima facie case with a probability of success.
 - (b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.



- (c) Where there is doubt on the above, then the balance of convenience should tilt in favor of the applicant.
48. The issue is whether the Applicant has established an arguable case with a probability of success. It is trite that an applicant needs only raise a bona fide point worthy of consideration during the hearing of the appeal. It need not be one that must necessarily succeed - see Cooperative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) [2015] eKLR. The Applicant herein argues that it is not indebted to the judgment debtor. I find that to be an arguable issue.
49. On the second condition for grant of orders of temporary injunction as substantial loss, the same has been addressed above. In the premises I am of the considered view that an order of temporary injunction is merited.
50. In view of the foregoing, the court makes the following orders:
- (1) Stay of execution of the Garnishee Order Absolute is granted in terms of prayer 5 of the Notice of Motion dated 13th October 2025 pending the hearing and determination of the appeal herein.
 - (2) A temporary order of injunction be and is hereby issued in terms of prayer 6 of the Notice of Motion pending the hearing and determination of the appeal herein.
 - (3) The Appellant/Applicant to deposit with this court a bank guarantee to the sum of Ksh.19 million within thirty-one days from the date of this ruling, failing which the 1st Respondent will be at liberty to move the court for any necessary orders.
 - (4) The ruling herein to apply to the various related appeals filed by Appellant/Applicant.
- The Costs of the application to abide by the outcome of the appeal.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 29TH DAY OF JANUARY, 2026.

J. N. NJAGI

JUDGE

In the presence of:

Miss Rweya for Appellant/Applicant

Mr. Kilonzo for 1st Respondent

Mr. Wamalwa for 2nd Respondent

Court Assistant - Rahma

