

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. E053 OF 2023**

**BETWEEN**

**MWANGAZA GENERAL SUPPLIES  
& CONTRACTORS LIMITE..... APPELLANT  
/APPLICANT**

**AND**

**PAUL KASEMA T/A  
ROYAL INSURANCE BROKERS..... 1<sup>ST</sup>  
RESPONDENT**

**FIDELITY INSURANCE CO. LTD..... 2<sup>ND</sup>  
RESPONDENT**

**JEFFERSON KIMONYI NDAMBUKI..... 3<sup>RD</sup>  
RESPONDENT**

**RULING**

1. The appellant has moved this court through a Notice of Motion application dated 24<sup>th</sup> June 2025, supported by an affidavit of even date. The application is brought under Order 51 Rule 1, Order 22 Rule 22 and 25, Order 40 Rule 1,2 and 8 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A and 63E of the Civil Procedure Act, Article 159(2) (d) of the Constitution of Kenya 2010 and all other enabling provisions of the law.

2. The application seeks the following orders:

**1..... spent**

**2.THAT there be a temporary stay of execution of the judgment and decree issued in Machakos CMCC No. 408 of 2019 and the proclamation issued by Falcon Recovery Auctioneers against the applicant's Motor Vehicle Registration No. KCA 100J, households and other tools of business pending the hearing and determination of the application filed herein.**

**3. THAT there be stay of execution of judgment and decree issued in Machakos CMCC No. 408 of 2019 and all consequential proceedings arising therefrom including attachment and sale of the applicant's Motor Vehicle Registration No. KCA 100J, households and other tools of business pending the hearing and determination of this appeal.**

**4. THAT pending the hearing and determination of this application, this Honorable Court be pleased to grant an injunction restraining the respondent by itself, agents, legal representatives or whosoever from offering for sale, selling and or transferring the appellant's Motor Vehicle Registration No. KCA 100J to any third parties and or throwing him to civil jail.**

**5. THAT the cost of this application be provided for.**

3. The applicant's case that it procured a comprehensive motor vehicle insurance cover from the 2<sup>nd</sup> respondent, through the 1<sup>st</sup> respondent. The insured vehicle was subsequently involved in an accident that caused injuries to the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent thereafter instituted proceedings through Machakos CMCC No. 408 of 2019 and obtained a judgment in his favor against. The applicant maintains that both the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's denied liability.
4. The applicant further contends that aggressive execution proceedings have since been commenced by Falcon Recovery Auctioneers. The auctioneers have proclaimed the applicant's essential assets, including household goods, tools of trade, and most critically, the very motor vehicle that forms the subject matter of both the insurance contract and the pending appeal. The applicant therefore seeks to stop these proceedings.
5. The applicant submits that it has an arguable appeal, raising weighty and substantial issues of contractual and insurance law. It argues that the learned trial magistrate fundamentally misdirected herself in law and fact by disregarding a valid and subsisting insurance policy under which the applicant's motor vehicle was comprehensively insured with Fidelity Insurance Company Limited.

6. The applicant urges that it has satisfied the statutory requirements for stay of execution pending appeal as provided for under Order 42 Rule 6(2) of the Civil Procedure Rules.

### **Respondent's case**

7. The 3<sup>rd</sup> respondent opposes the application through a replying affidavit sworn on 16<sup>th</sup> July 2025 by Jefferson Kimonyi Mdambuki. The gist of the 3<sup>rd</sup> respondent argument is that no appeal was preferred by the defendant against the judgment in CMCC No 408 of 2019, and therefore there is no pending appeal before this court. According to the 3<sup>rd</sup> respondent the present appeal only challenges the lower court's refusal to grant stay of execution; refusal to consolidate CMCC No 277 of 2022 with CMCC No 408 of 2019 which already has a judgment and refusal to declare payment of decretal sum in 408 of 2019 within the separate suit CMCC No 277 of 2022.

8. Further the 3<sup>rd</sup> respondent's submitted that this application for stay is vexatious, unmeritorious and an abuse of the Court process. Consequently, the respondent urges this court to invoke its inherent jurisdiction and dismiss it with costs to the respondent.

### **Analysis and Determination**

9. I have carefully considered the application, the parties' submissions and the record before this court. The sole issue arising for determination is whether there is a proper appeal before this court to warrant the grant of a stay of execution under Order 42 Rule 6 of the Civil Procedure Rules.
10. To resolve this issue, it is necessary to set out the background. The applicant seeks stay of execution of the judgment and decree issued in Machakos CMCC No. 408 of 2019. The judgment in that matter was delivered on 30th June 2022. Following delivery of the judgment, the appellant applied for stay of execution. The trial court, upon hearing the parties, found that no appeal had been lodged and that the applicant had not offered any proposal on settlement of the decretal sum. The court granted the applicant 30 days to follow up with payment to the respondent.
11. Subsequently, the applicant filed CMCC E277 of 2022, in which they sought consolidation with CMCC No. 408 of 2019 and an order compelling the 1<sup>st</sup> respondent to pay the decretal sum in CMCC No. 408 of 2019. In its ruling of 16th March 2023, the trial court declined to grant the prayers sought. The appellant then lodged this appeal and filed an application dated 17th March 2023, which was substantially similar to the present application. That application was dismissed with costs in a Ruling delivered on 25th May 2023. The effect of this Ruling was that this court declined to grant a stay of execution of the judgment and decree in Machakos

CMCC No. 408 of 2019 against the appellant pending and hearing of this appeal.

12. The applicant is now trying to have a second bite at the cherry by attempting to relitigate the same issues. This conduct is procedurally improper and undermines the orderly administration of justice. A court of concurrent jurisdiction has already made a determination on the question of stay of execution in respect of CMCC No. 408 of 2019. The appellant's persistence in filing repetitive applications is an abuse of the court process and cannot be condoned.
13. It is also evident that there is no appeal before this court against the judgment and decree in CMCC No 408 of 2019 upon which an order for stay can be anchored. Order 42 Rule 6 presupposes the existence of a valid appeal against the judgment or decree being stayed. Without such an appeal, the jurisdiction of this court to grant stay is not properly invoked.
14. Moreover, the record shows that this court has previously declined to grant stay in a similar application. The applicant has not demonstrated any change in circumstances or new material that would justify a departure from that earlier determination.
15. Before I pen off, this court notes that the appeal was filed on 23rd March 2023. To date, no Record of Appeal has been filed, nor has any attempt been made to prosecute the same. The record further shows that since the ruling delivered on

25th May 2023, the appellant has remained complacent and has not taken any steps to advance the appeal.

16. Had the appellant been diligent, this appeal would by now have been concluded. The inaction displayed demonstrates a clear intention to frustrate the respondent from enjoying the fruits of their judgment. This court will not condone such conduct.

17. Accordingly, the appellant is directed to take all necessary steps to prosecute the appeal within the next sixty (60) days. In default, the respondents shall be at liberty to move the court for dismissal of the appeal for want of prosecution.

18. Accordingly, the notice of motion dated 24<sup>th</sup> June 2025 is dismissed with costs to the 3<sup>rd</sup> Respondents assessed at kshs.30,000/-.

19. It is so ordered.

Dated, signed and delivered at Machakos this 19<sup>th</sup> day of March, 2026

**RHODA RUTTO**

**JUDGE**

**In the presence of;**

.....Appellant

.....Respondent

Selina Court Assistant

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