



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwakuwema v Matano (Civil Appeal E032 of 2025)  
[2026] KEHC 4520 (KLR) (5 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 4520 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KWALE  
CIVIL APPEAL E032 OF 2025**

**F ANDAYI, J**

**MARCH 5, 2026**

**BETWEEN**

**BAKARI MWAKUWEMA ..... APPELLANT**

**AND**

**OMARI MATANO ..... RESPONDENT**

**RULING**

1. Bakari Mwakuwewa the appellant/applicant herein has filed an appeal through a memorandum dated 30th September 2025 against the ruling of the magistrate's court in Kwale Magistrates' Court Civil Case No. E036 of 2024 Omari Matano Mrabu v. Bakari Mwakuwewa delivered on 26th September 2025. In that ruling the trial court dismissed the appellant's application dated 19th September 2025 by way of notice of motion where the appellant herein was seeking the following pertinent orders:
  - a. That the court review, vacate, vary and or set aside its orders issued on the 7th May 2025 and allow the defendant / applicant herein to ventilate his case on merit.
  - b. That a temporary injunction be issued restraining the plaintiff/ respondent by himself, his authorised agent, servants, workmen and or any other person from executing the orders of this court issued on 7th May 2025 pending the hearing of this application inter partes.
  - c. That a temporary injunction be issued restraining the plaintiff/ respondent by himself, his authorised agents, servants, workmen and any other person from executing the orders of this issued on 7th May 2025.
  - d. That the court be pleased to grant the Defendant/Applicant leave to file its statement of defence out of time.
  - e. That the costs of this application be provided for.



2. The trial court considered and dismissed that application for lack of merit. The trial court observed in its ruling that there was a valid consent on record between the parties leading to the judgment and decree in the matter. The trial court then allowed the respondent's/decree holder's notice to show cause to proceed for hearing on 1st October 2025.
3. Arising from those orders, the appellant/applicant herein filed the appeal and an application by way of Notice of Motion dated 30th September 2025 seeking the following orders:
  - a. the application to be certified urgent and service of the same be dispensed with in the first instance.
  - b. a temporary injunction be issued restraining the Respondent whether by himself, his agents, servants and/or any other person acting on his behalf from executing the decree of the trial court issued on 7th May 2025 and all consequential orders emanating therefrom pending the inter-parties hearing of this application.
  - c. a temporary injunction be issued restraining the Respondent whether by himself, his agents, servants and/or any other person acting on his behalf from executing the decree of the trial court issued on 7th May,2025 and all consequential orders emanating therefrom pending the hearing and final determination of the instant appeal.
  - d. this Court at its own discretion be pleased to grant any other relief (s) that it deems fit and just to grant for the interest of justice.
  - e. costs of this application be provided for.
    1. The application is brought under sections 1A, 1B, 3A, 3C and 63 of the [Civil Procedure Act](#) (Cap. 21) Laws of Kenya; Order 40 Rules 1-9; Order 51(1) of the Civil Procedure Rule and articles 22(1), 27(1) and (2), 48, 50(1) and 159(2)(d) of [the Constitution](#) of Kenya and all other enabling provisions of the law.
5. When the application came up for directions on hearing on 2nd October 2025 the court, upon listening to counsels for both parties observed that although the applicant had framed his prayers as temporary injunction, it was apparent that they were for stay of execution pending appeal. Noting that there was imminent execution of the lower court decree by way of arrest of the applicant and the applicant's advocate having informed this court that the applicant was willing to pay the decretal sum by installments, this court issued a temporary order of stay of execution with conditions as follows:
  - a. The applicant to pay to the respondent through the respondent's advocate the sum of KShs 150,000/= within seven days. This was an amount the applicant had conceded that he owed the respondent and was outstanding.
  - b. The applicant to present himself before the trial court on 15th October 2025 with a proposal on how to settle the decretal sum or as the case may be.
  - c. Failure to abide by the above conditions the warrants of arrest issued by the trial court to take effect.
  - d. The application herein to remain abeyance for one month after which parties to appear for directions on how to proceed.
6. When the parties appeared before this court on 12th November 2025, learned counsel for the respondent informed the court that the applicant only paid KShs 70,000/= and not KShs 150,000/= as ordered by this court. Even then, the amount was not paid within 7 days as ordered by this court.



- Learned counsel further informed the court that the applicant failed to appear before the trial court on 15th October 2025 as directed by this court and therefore nothing happened in terms of his proposal to settle the decretal amount by installments.
7. Learned counsel for the applicant informed the court that the applicant was seeking the indulgence of the court as he was not employed and was struggling. That he was requesting for thirty more days to clear the KShs 80,000/= ordered by the court as a condition for grant of the order of stay of execution.
  8. This court directed the order of stay and the conditions attached were clear and there was not shown cause to vary them since the applicant had not made any application to court for variation. The court directed that the respondent files a reply to the application and the same to proceed on written submissions. The court further directed that after service of the reply, the applicant to file and serve submissions with a supplementary affidavit if he wished and the respondent to file and serve theirs within seven days of service by the applicant. The application was fixed for mention on 17th December 2025 to confirm compliance and fix a date for ruling.
  9. On 17th December 2025, learned counsel for the applicant informed the court that the applicant was yet to comply with the court's directions due to heavy workload. She requested for seven more days to comply. The respondent had filed his submissions. The court fixed the matter for ruling and granted leave to the applicant to comply as earlier directed within seven days.
  10. The grounds in support of the application as laid out on the face thereof and expounded in the supporting affidavit of Bakari Mwakuwewa sworn on 30th September 2025 are that he has filed an appeal against the trial court's order issued on 26th September 2025 which dismissed his application to set aside the decree of the court issued on 7th May 2025 and the said appeal has a high chance of success.
  11. Further that on 1st February 2025 the applicant was coerced by the respondent's advocate into signing a consent in the guise of giving the applicant immunity from arrest and committal to civil jail. This done after the advocate for the respondent was aware that the applicant's advocate had ceased acting for him. For that reason, the suit before the trial court was not heard on merit and in the interest of justice the decree of the trial court issued on 7th May 2025 should be set aside and the applicant accorded an opportunity to defend the case for a determination to be made on the basis of evidence tendered by both parties. He has annexed to his supporting affidavit herein a draft copy of defence he intends to file before the trial court if granted the opportunity. In the draft statement of defence he disputes that he owes the respondent KShs 1,268,550/= and avers that the respondent had confirmed through a WhatsApp communication that the applicant only owed him KShs 203,100/=
  12. The applicant deposes further that he stands to suffer substantial loss that cannot be cured by an award of damages due to the torture, anguish and agony he is likely to suffer while serving a jail term which is irreversible.
  13. Further that the execution by way of arrest and committal to civil jail contravenes provisions of the United Nations Covenant on Civil and Political Rights that is part of the Kenyan constitution.
  14. Further that the respondent will not be prejudiced if the application is allowed and that he can be compensated by way of costs.
  15. Finally, he deposes that the application is filed without undue delay
  16. The application is opposed by the respondent through the replying affidavit of Omar Matano Mrabu sworn on 28th November. He deposes that the and deserves no consideration. He deposes further that there is no evidence to justify the orders sought and therefore the application falls short of the threshold required for grant of the reliefs sought. Further that the applicant does not deserve the equitable reliefs



sought due to his past mischief of disobeying court orders, for instance when this court issued an order that he pays to the respondent KShs 150,000/= he failed to do so and also failed to attend the trial court with a proposal for settlement of the decretal sum. This, according to the respondent is deliberate defiance of the court's orders

17. The respondent deposes further that the applicant's appeal is not capable of impeaching the consent judgment as the same was made consciously.
18. The rest of the depositions describe the applicant's conduct before the trial court which the respondent decries as disdainful.
19. The court gave directions that the application be heard by way of written submissions to be filed by both parties.
20. When I embarked on writing this ruling, I checked the court case tracking system and the physical court file I only found submissions filed by the respondent. There are no submissions filed by the applicant. This means that effectively the applicant has failed to prosecute his application besides failing to abide by the court's order to file submissions within the extended seven days.
21. I have considered the application, the grounds in support thereof and the replying affidavit as well as the submissions by counsel for the respondent. The issue for determination is whether the applicant has satisfied the requirements for grant of injunction pending appeal.
22. The applicant seeks for a temporary injunction pending hearing of the appeal filed herein. He has styled his application as brought under Order 40 which applies to temporary injunctions in a pending suit not appeal as is the case herein. Order 42 Rule 6(6) of the Civil Procedure Rules is the one that provides for injunction pending appeal as follows;

“Notwithstanding anything contained in sub-rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just, provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

23. The principles governing the grant of a temporary injunction pending appeal were set out in *Patricia Njeri & 3 Others v National Museum of Kenya* [2004] KEHC 1614 (KLR) where the High Court citing the Court of Appeal in the case of *Venture Capital & Credit Limited vs Consolidated Bank of Kenya Ltd* Civil Application No Nairobi 349 of 2003 (174 of 2003 UR) held that:

“... an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows:

- a. The discretion will be exercised against an Applicant whose appeal is frivolous (See *Madhupaper International Limited vs Kerr* (1985) KLR 840 (cited in *Venture Capital* ). The Applicant must state that a reasonable argument can be put forward in support of his appeal (*J. K. Industries vs KCB* (1982 – 88) KLR 1088 (also cited in *Venture Capital*)
- b. The discretion should be refused where it would inflict greater hardship than it would avoid (See *Madhupaper supra*).



- c. The Applicant must show that to refuse the injunction would render his appeal nugatory (See Butt vs Rent Restriction Tribunal (1982) KLR 417 (cited also in Venture Capital).
  - d. The Court should also be guided by the principles in Giella vs Cassman Brown & Company Ltd (1973) EA 358 as set out in the case of Shitukha Mwamodo & Others (1986) KLR 445 (also cited in Venture Capital).”
24. Following these principles and as was further held in the cited case, this court having directed that the application herein be heard on written submissions and the applicant having failed to file any, it follows that he has failed to satisfy this court on the conditions for grant of a temporary injunction pending appeal as laid out in the case cited above.
25. In the circumstances, in the absence of submissions to explain how each of the conditions above has been met by the applicant, I find that the conditions have not been met and therefore, dismiss the applicant/appellants’ application dated 30th September 2025 with costs to the respondent.
26. The record of appeal shall be filed within 45 days from today.
27. Mention on 29th April 2026 for directions on the appeal.
28. Orders accordingly.

**DELIVERED, DATED AND SIGNED ON THE VIRTUAL PLATFORM, TEAMS THIS 5TH DAY OF MARCH 2026.**

**ANDAYI W. F.**

**JUDGE**

In the presence of:

Kembe (Ms) for the Applicant/Appellant. N/A for the Respondent.

Ummu: Court Assistant.

