

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. CASE NO. E078 OF 2020

BETWEEN

AZALEA HOLDINGS LIMITED.....

PLAINTIFF

AND

ESSENTIAL BRANDS

LIMITED.....DEFENDANT

RULING

Introduction and Background

1. By the court's judgment dated 5th November 2024, the Plaintiff's suit was allowed and judgment was entered in its favour and against the Defendant for Kshs. 50,786,960.80 together with interest and costs of the suit. The Defendant evinced its intention to appeal against the judgment at the Court of Appeal and filed an application seeking to stay the execution of the judgment pending hearing and determination of the intended appeal. In the court's ruling dated 28th April 2025, the Defendant's application was allowed and the court *granted "a conditional stay of execution of*

the judgment of 5th November 2024 upon payment of the sum of Kshs.10,000,000/= in court within 60 days from today, as security for costs. The Defendant in the alternative may avail to the Plaintiff a bank guarantee for the full judgment sum of Kshs.50,788,960.80/= from a reputable local bank as security for costs pending the hearing and determination of the intended Appeal. In default, the Plaintiff may proceed to execute the judgment and the resultant decree thereof.

2. It appears the Defendant did not abide by the court's conditions of stay and as such, the Plaintiff, in a letter dated 3rd July 2025 started the execution process through its auctioneers and warrants of attachment were issued by the court. This action prompted the Defendant to file the present application dated 1st August 2025 seeking to set aside the warrants of attachment and restrain the auctioneers from selling its goods and that the court grants it an additional 60 days to comply with the court's earlier orders. Alternatively, the Defendant urges the court to review the earlier orders and reduce the amount of security it is required to pay, arguing that the current amount is too high.
3. This application is supported by the grounds set out on its face and the supporting affidavit of the Defendant's director, DILPUN

GOVINDJI SHAH sworn on 1st August 2025 and it is opposed by the Plaintiff through the replying affidavit of its Senior Development Manager, PHILIPPE CAUVIERE sworn on 24th October 2025 and the Notice of Preliminary Objection of the same date and the Grounds of Opposition dated 2nd October 2025. The application was disposed by way of written submissions and I will make relevant references to the same in my analysis and determination below.

Analysis and Determination

4. I am inclined to agree with the Plaintiff's objection that the Defendant's present application is largely *res judicata* as the issue of the Defendant's entitlement of stay of execution was decided on 28th April 2025. The court heard its application and rendered a final decision, granting the stay on specific terms. To that extent, the issue of a stay has been heard and finally determined and this court cannot be asked to grant another stay of execution pending the same appeal, as it has already done so. Further, a court cannot sit on appeal over its own decision or that of another judge of concurrent jurisdiction.
5. However, I note that the Defendant is seeking a review of this order under **Order 45 Rule 1** of the **Civil Procedure Rules** which allows an application for review on grounds that there is discovery

of new and important evidence which was not within the applicant's knowledge at the time the judgment was passed, that there is a mistake or error apparent on the face of the record and; for any other sufficient reason.

6. It is also not lost to me that in ***Butt v Rent Restriction Tribunal*** [1979] KECA 22 (KLR) the Court of Appeal held as follows:

'1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The

special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.'

7. In ***Simba Coach Limited v Kiriiyu Mercharnts Auctioneers [2019] eKLR*** this court held that there are no fast and hard rules on what and how much the security ought to be and that the court reserves its discretionary power to determine as per the circumstances of the case and the nature of the security.
8. The Defendant is arguing that its inability to raise the sum of Kshs. 10,000,000.00 or the Bank Guarantee is due to financial constraints and its current economic status which constitutes a sufficient reason to review the order for security. However, I am inclined to agree with the Plaintiff that the Defendant has not demonstrated that its alleged financial inability to raise the security is a new and important matter that it could not have brought to the court's attention during the hearing of its initial application. In that

application, the court had the opportunity to consider the Defendant's financial position at that time and the Defendant never raised an issue of financial inability. This is a lack of diligence and this court has always held that that a party is expected to bring their entire case at once and cannot litigate in instalments. Allowing a party to come back and seek a review simply because complying with a court order is difficult undermines the finality of judgments and the authority of the court.

9. On enlargement of time to comply with the court's order, I am in agreement with the Plaintiff's averment that a court has discretion under **section 95** of the **Civil Procedure Act** to extend time but that this discretion is not automatic. It is an equitable remedy available only to a deserving party. The Plaintiff correctly states that equity aids the vigilant and I see the Defendant waited until after the 60 days lapsed and execution commenced to seek more time. This delay, without a reasonable explanation for the period between 28th April 2025 and 1st August 2025 imputes an improper motive intended to delay the Plaintiff from enjoying the fruits of its judgment and this prayer is an afterthought.

Conclusion and Disposition

10. In any event, in the interest of justice and to hand the Defendant a lifeline, I will order him to deposit the security sum of Kshs. 5,000,000.00 in court within twenty-one (21) days and that there will be a conditional stay for the said 21 days. Failure to do so, then the plaintiff shall be at liberty to proceed with execution within the confines of the law. The court notes that this is a proper case where each party should bear their own costs. It is so ordered.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this
8th DAY of MAY 2026**

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

IN THE PRESENCE OF

- 1. N/A for the Plaintiff
- 2. N/A for the Defendant
- 3. Amos- Court Assistant