

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. E408 OF 2025

(Before D. K. N. Marete)

LANDMARK HOLDINGS LIMITED.....APPELLANT/APPLICANT

VERSUS

ROBERT MACHARIA KINYUA.....RESPONDENT

*(Suing as the Legal Representative of the Estate of GRACE MWARI KIMOTHO
(DECEASED))*

R U L I N G

This is a Notice of Motion dated 2nd December, 2025 filed by the Appellant/Applicant under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The application seeks a stay of execution of the judgment and resultant decree issued in Milimani CMCC No. 4055 of 2015, pending the hearing and determination of this Appeal. Parties filed their written submissions and the matter was disposed of by way of these submissions.

The background to these proceedings is long and has generated a substantial volume of litigation. Grace Mwari Kimotho (Deceased), an employee of the Appellant, suffered fatal injuries in the course of her employment on 29th February, 2012. The Respondent, as administrator of her estate lodged claims under the Work Injury Benefits Act, 2007 (WIBA), was successful and received payment of Kshs. 313,465/= and Kshs. 500,000/= on 9th October 2012 and 16th October 2013 respectively, totalling Kshs. 813,465/=. These payments were made and collected by the Respondent but were never disclosed to the court.

Notwithstanding those payments, the Respondent filed a civil suit at the Chief Magistrates' Court, Milimani in CMCC No. 4055 of 2015. On 22nd August 2017 the parties entered into a consent order apportioning liability at 70% to 30% in favour of the Plaintiff and Respondent respectively. On 1st November 2017, the trial court delivered judgment in favour of the Respondent for the sum of Kshs. 1,151,710.00 plus costs assessed at Kshs. 137,850.00 and interest at court rates. Being dissatisfied, the Appellant preferred Civil Appeal No. 656 of 2017 to the High Court. That appeal was heard and dismissed by Serگون J on 14th June, 2019 with costs to the Respondent.

Following the dismissal of the appeal, further interlocutory applications were filed in the High Court and dismissed in sequence. In the meantime, the Appellant's insurer, APA Insurance Company Limited made further payments to the Respondent. By the 5th July, 2019 the total sum paid to the Respondent stood at Kshs. 1,484,095.00 against a decretal debt of Kshs. 1,387,569.00 as at that date. A court deposit of Kshs. 948,999.00 was further made on 5th February 2020, pursuant to the Ruling of Lady Justice B. Thurania Jaden of 24th May, 2018 which ordered that the advance payment of Kshs. 813,465.00 be taken into account in settling the decree of the trial court. That deposit remains in the Milimani Deposit Account.

The Appellant then filed an application dated 23rd January, 2020 in the trial court seeking, among other reliefs, a declaration that the decretal debt had been satisfied and, in the alternative, an accounting to determine the outstanding balance. That application was dismissed on 29th May, 2020. The Appellant appealed to the High Court in Milimani HCCA No. E113 of 2021. On 30th November, 2023, the late Justice Majanja allowed the appeal and remanded the application to the trial court with specific directions to determine the exact amount due to the Respondent, taking into account the amounts already paid. The trial court, now constituted by Hon. Lucy Njora, SPM, declined to carry out that accounting exercise and

dismissed the remanded application in its entirety by a ruling dated 28th November, 2025. It is that ruling that is the subject of the present appeal.

The Appellant's case is that if execution proceeds without first carrying out the accounting exercise as directed by Majanja, J., it risks paying a sum that may already have been discharged in whole or in substantial part, thereby suffering substantial and irreparable loss. The Appellant further submits that the application was brought expeditiously and that it is ready to abide by such security conditions as this Court may impose.

The Respondent opposes the application. In addition to opposing the stay on the merits, the Respondent filed a preliminary objection on 2nd February, 2026 on grounds that the appeal is *res judicata* as the issues raised were directly and substantially in issue in former proceedings between the same parties before a court of competent jurisdiction. These were finally determined therein and so this Court lacks jurisdiction to hear and determine the application and the appeal as framed. This is besides their proposition and pleading and that the Application is fatally defective, incompetent, bad in law and an abuse of the court process. The Respondent relies on the celebrated authority of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 368** and contends that the doctrine of *res judicata* under Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya bars any further litigation and that this court cannot sit in appeal over the High Court's prior determination.

I have carefully considered the application, the preliminary objection, the rival affidavits, the submissions of both parties and the law. The principles that guide the court in determining an application for stay of execution pending appeal may be distilled as follows;

- 1) Whether the applicant will suffer substantial loss if the stay is not granted.
- 2) Whether the application was made timeously and without unreasonable delay.
- 3) Whether adequate security has been or can be provided.
- 4) Whether prejudice would be occasioned to the Respondent.

On the first issue as to whether the Appellant will suffer substantial loss, the Appellant deposes that if execution proceeds before the accounting as directed by Majanja, J. is carried out, it risks being levied for a sum that may already have been discharged in whole or in substantial part. Indeed, the sum involved is substantial and this court is satisfied that substantial loss will result to the Appellant if the stay is not granted. This limb is established and upheld.

On the second issue, timeliness, the Ruling appealed from was delivered on 28th November, 2025. The Memorandum of Appeal was filed on 1st December, 2025 and this Notice of Motion on 2nd December, 2025. The application was filed promptly and without unreasonable delay. Indeed, there is no delay whatsoever. This limb and threshold is also established.

On the third issue, security, the Appellant has declared its readiness to abide by such conditions as this Court may impose. The sum of Kshs. 948,999.00 deposited on 5th February, 2020 remains in the Milimani Deposit Account and provides a measure of existing security. Balancing the interests of both parties and having regard to the nature of the dispute, a conditional stay is appropriate. The Appellant/Applicant again scores on this ground.

On the fourth issue, prejudice, the balance of convenience favours granting the stay. Any prejudice to the Respondent from the stay is compensable in costs should the appeal fail. This limb is also established.

On the issue of the preliminary objection, this Court exercises appellate jurisdiction over decisions of subordinate courts in matters of employment and labour relations by virtue of Section 12(1)(a) of the Employment and Labour Relations Court Act. A Preliminary Objection must raise a pure point of law that is capable of disposing of the matter without recourse to evidence or the merits of the case. The grounds raised by the Respondent touch on matters that are intertwined with the merits of the Appeal and are not amenable to summary disposal at this interlocutory stage. The preliminary objection therefore fails and is overruled.

A consideration of the respective cases of the parties tilts the application in favour of the Applicant. The Applicant has on a balance of probabilities established a case for the grant of a stay of execution in the interest of justice.

I am therefore inclined to allow the application and order as follows;

- (i) The Preliminary Objection dated 2nd February 2026 is hereby overruled with costs in the cause.
- (ii) The Notice of Motion dated 2nd December, 2025 be and is hereby allowed.
- (iii) That stay of execution be and is hereby issued against the judgment and resultant decree issued in Milimani CMCC No. 4055 of 2015 pending the hearing and determination of this Appeal.

- (iv) As a condition of the stay, the Appellant shall, within thirty (30) days from the date hereof, deposit in court or in a joint interest-earning account in the names of the advocates on record for both parties the sum of Kshs. 400,000.00 (Kenya Shillings Four Hundred Thousand Only) as further security for the due performance of the decree in the event the appeal fails, it being noted that the sum of Kshs. 948,999.00 deposited on 5th February, 2020 remains in the Milimani Deposit Account.
- (v) The Appellant is awarded forty-five (45) days to make, file and serve a Record of Appeal in this cause.
- (vi) Mention on 6th July, 2026 for confirmation of compliance and directions of court.
- (vii) The costs of this Application shall be in cause.

Delivered, dated and signed this **14th** day of **May** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Miss Achieng instructed by Okongó, Wandago & Company Advocates for the Appellant/Applicant
2. Miss Mwangi instructed by Omasa Omosa & Company Advocates for the Respondent