REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMM. APPEAL NO. E209 OF 2025

BETWEEN

RENEE ROYAL COACHES LIMITED.....1ST APPELLANT

SHEIKHALFRED MWIWA MWANZA.....2ND APPELLANT

AND

MWANANCHI CREDIT LIMITED..... RESPONDENT

RULING

Introduction & Background

1. The Appellants, through the Notice of Motion dated 14th August 2025 seek to stay the execution of the subordinate court's ruling of 6th August 2025 where they were restrained from dealing with the motor vehicle registration number KCQ ***A bus/coach("the Bus") and that they were to avail the Bus to the Nairobi Central Police Station to facilitate the Respondent to conduct inspection and

valuation. The Respondent was also at liberty to exercise any of its rights under the Loan Agreement between the parties.

2. The application is supported by the grounds on its face and the supporting affidavit of 2nd Appellant sworn on 14th August 2025 and it is opposed by the Respondent through the replying affidavit of its Legal Administrator and Analyst, Saleh Jackline sworn on 22nd August 2025. The parties have also supplemented their arguments by filing written submissions which I have considered and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

3. The singular issue for determination is whether the Appellants have established a valid basis for this court to grant an order for stay of execution. As submitted by the parties, the legal framework for granting a stay of execution pending appeal is well settled under **Order 42 Rule 6** of the ***Civil Procedure Rules.*** The Appellants must demonstrate that they will suffer substantial loss if the order is not granted, that the application has been made without unreasonable delay; and that they are willing to provide such security as the court may order for the due performance of the decree.

4. These principles were enunciated in ***Butt v Rent Restriction Tribunal*** **[1979] KECA 22 (KLR)** where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

> *1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.*
>
> *2. Secondly, 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 the appeal court reverse the judge's discretion.*
>
> *3. Thirdly, 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. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.

5. The Appellants state that learned magistrate erred in granting the orders and failed to properly apply the law on injunctions and that unless the court stays the ruling, the appeal will be rendered nugatory because the Bus will be sold. That the Appellants face the risk of contempt proceedings if forced to comply with the impossible order to produce a broken-down vehicle. In response, the Respondent states that the Appellants have not offered any security and that if the court is inclined to grant the stay, the Respondent proposes that the Appellants be ordered to deposit the full outstanding loan amount as security, that is, Kshs. 5,270,278.59 as at 11th February 2025.
6. Having gone through the pleadings and submissions, I am of the view that the Appellants have failed to satisfy the mandatory prerequisites for grant of stay of execution pending appeal under **Order 42 Rule 6** of the ***Civil Procedure Rules***. While the application was filed without unreasonable delay, the Appellants

have not demonstrated substantial loss and more critically, they have failed to offer any meaningful or acceptable security for the due performance of the decree. The Appellants submitted that substantial loss will occur because the Bus is integral to their business and its sale would force them out of business, that it is mechanically unfit and cannot be availed to the police station as ordered, exposing them to contempt and that the Respondent has not demonstrated its financial capacity to refund the decretal sum if the appeal succeeds.

7. However, the Bus is collateral and not a core business asset in equity as stated by the Appellants. They voluntarily offered it as security for a loan they have admitted defaulting on. As the learned magistrate observed in his ruling , a collateral's purpose is to secure the lender's position upon default. The borrower's duty to repay is not pegged on the profitability or operational use of the collateral. By offering the Bus as security, the Appellants converted it into a commodity the Respondent may realize upon default (see **Maina & another v Equity Bank Limited & 2 others [2023] KEHC 23538 (KLR)]**
8. Further, the legal burden lies first on the Appellants to provide cogent evidence that the Respondent is impecunious or

would be unable to refund any amounts ordered by the court and mere assertion without evidence is insufficient (see **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] KECA 333 (KLR)**]. In this case, the Respondent is a licensed microfinance institution and there is no suggestion of insolvency. The Appellants have therefore failed to discharge this burden.

9. The Appellants have also admitted the Bus is in poor mechanical state. However, the Respondent's evidence shows the Appellants tampered with the tracking device and removed tyres to frustrate repossession. A party cannot create its own difficulties and then use them as grounds for equitable relief. In any event, the Bus has a determinable market value and if the appeal ultimately succeeds and the sale was improper, the Respondent, a licensed and regulated microfinance institution, can compensate the Appellants through damages (see **Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] KEHC 4811 (KLR)**]. In short, there is no substantial loss that will be suffered by the Appellants if the stay is not granted.
10. On security, the Appellants have proposed in their submissions that the Bus itself, registered in the joint names of the parties, should be

deemed sufficient security. However, the very asset being sold cannot constitute security as the purpose of security under **Order 42 Rule 6(2)(b)** is to guarantee that the Respondent can recover the decretal sum if the appeal fails. If the Bus is sold, which is precisely what the stay is meant to prevent pending appeal, there would be no security left. The Appellants are effectively asking to keep possession of the Bus without any alternative security, which would leave the Respondent unprotected.

11. The Respondent has deponed that the Appellants tampered with the vehicle's tracking device and removed tyres to prevent repossession. This has not been rebutted by the Appellants and thus, allowing them to keep the Bus without tangible security invites further dissipation or concealment. Unlike the Appellants' cited case **Focin Motorcycle Co. Limited v Ann Wambui Wangui & Stephen Kinyua Mugo [2018] KEHC 8358 (KLR)]** where the applicant therein indicated readiness to provide security, the Appellants here do not offer any cash deposit, bank guarantee, or third-party guarantee. The mere fact that the Bus is jointly registered does not prevent its physical concealment or further damage.

12. The ruling of the subordinate court restrained the Appellants from selling or disposing of the Bus and ordered them to produce it to the police station for inspection. The Respondent was only at liberty to exercise its rights under the Loan Agreement and the Appellants have not been ordered to pay money but are simply being required to produce the collateral they voluntarily pledged.

Conclusion and disposition

13. Nevertheless, and despite my findings above, I would be inclined to grant a stay if the Appellants shall within 30 (thirty) days from the date of this ruling deposit the entire outstanding sum of Kshs. 5,270,278.59 into an interest-earning joint account in the names of the advocates for both parties, or furnish a bank guarantee for the same amount from a reputable bank, failing which the stay shall lapse automatically and the Respondent shall be at liberty to execute. The Respondent is awarded costs of the application.

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

.....

J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. N/A for the Applicant
2. Mr. Isoe for the Respondent
3. Amos- Court Assistant