



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nzioka v Official Receiver; Kamara (Interested Party) (Insolvency Cause E036 of 2023)  
[2025] KEHC 1417 (KLR) (Commercial and Tax) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1417 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E036 OF 2023  
PM MULWA, J  
FEBRUARY 27, 2025**

**BETWEEN**

**DAVIS ENOS NZIOKA ..... APPLICANT**

**AND**

**OFFICIAL RECEIVER ..... RESPONDENT**

**AND**

**ROSE MUTHONI KAMARA ..... INTERESTED PARTY**

**RULING**

1. The application before this Court is the Notice of Motion dated 7<sup>th</sup> December 2023. The applicant seeks a stay of execution of the ruling delivered on 15<sup>th</sup> October 2023 in CMCC No. 897 of 2015, pending the intended appeal.
2. The application is premised on the grounds on the face of the record and supported by the affidavit of David Enos Nzioka sworn on 7<sup>th</sup> December 2023. He contends that the trial court in CMCC No. 897 of 2015 delivered the ruling in favour of the interested party and the applicant was committed to jail for 6 months. He further contends his constitutional rights have been jeopardised as he is in a bad medical condition.
3. The applicant avers the intended appeal will be rendered nugatory and that he has no income or resources to pay the decretal sum. He avers that he intends to sell his matrimonial property to enable him to clear the decretal sum.
4. Opposing the application, Rose Muthoni, the interested party filed the replying affidavit sworn on 18<sup>th</sup> January 2023 and avers that the applicant owes her money which he has refused to pay. She disputes the medical records attached by the applicant to prove that he is ailing, and further avers that



these documents are intended to seek sympathy from the Court. The interested party argues that the applicant is capable of paying the decretal sum but has refused to do so, including failing to honor his plea for partial payment.

5. I have carefully considered the application, the respective parties' affidavits in support and in opposition as well as the submissions. The only issue that arises for determination is whether this Court should grant a stay of execution of the ruling.
6. Stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules. In summary, three conditions must be met when the Court is deciding whether or not to grant a stay, and these are: (i) whether substantial loss may result to the applicant unless the order is made; (ii) whether the application has been made without unreasonable delay; and (iii) whether security has been provided as the Court may order for the due performance of the decree or order.
7. On the issue of unreasonable delay, the ruling was delivered on 15<sup>th</sup> October 2023, while the current application was filed on 7<sup>th</sup> December 2023, a period of 53 days. This delay is not reasonable, and the applicant has failed to justify why such a lengthy delay occurred.
8. On the issue of substantial loss, I have noted that the applicant has not demonstrated how he stands to suffer substantial loss if the orders sought are not granted. The applicant asserts that his medical condition is precarious and that if incarcerated, it could worsen, resulting in significant harm to his health. He further claims that in the absence of a stay, the intended appeal would be rendered nugatory.
9. In the case of *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd* (in liquidation) [2004] 2 EA 331 the court stated that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
10. Upon reviewing the record, it is clear that the memorandum of appeal, a formal document required to initiate an appeal, is not on record. Without a valid appeal in place, the Court cannot ascertain what issues are being challenged or the legal basis for the appeal. The claim that the appeal will be rendered nugatory is premature, as no appeal currently exists to be jeopardized. The absence of a formal appeal prevents the applicant from demonstrating substantial loss in relation to the appeal process.
11. While the applicant's medical condition may raise a legitimate concern, I am not persuaded that the documents presented provide a clear and up-to-date status of the applicant's current condition. The documents are outdated, with some dating back to 2016 and 2018, and the most recent document being dated 2nd June 2023. On 7<sup>th</sup> March 2019, a doctor confirmed that the applicant was doing well and walking after suffering a thoracic spine injury. I am of the view that the documents adduced do not demonstrate how the applicant's condition could be adversely affected by imprisonment. The claim appears vague and seems aimed at defeating execution.
12. In *Antoine Ndiaye v African Virtual University* [2015] eKLR the court stated that

“...stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules.”



13. It is trite law that execution is a lawful process that must be carried out to ensure that the rights of the successful party are realized. The law assumes that once a judgment/ruling has been rendered, it is binding and enforceable unless stayed by the Court for valid reasons. Execution, therefore, is not a ground for granting a stay of execution. The interested party is entitled to enjoy the fruits of the judgment.
14. Staying execution on vague claims would undermine the judicial system. It is, therefore, my considered view that the applicant has not demonstrated any substantial loss he stands to suffer.
15. Order 42 rule 6(2) of the Civil Procedure Rules mandates that an applicant seeking a stay of execution must provide security for the due performance of the decree or order unless the Court otherwise directs. The rationale behind this provision is to strike a balance between safeguarding the applicant's right to appeal and ensuring that the respondent is not deprived of the benefits of the judgment. In the instant case, the applicant has not provided any security, thus rendering the application incomplete and unable to meet the requirements for the orders sought.
16. Based on the foregoing, I find that the applicant has not satisfied the conditions for granting a stay of execution. Consequently, the Notice of Motion application dated 7<sup>th</sup> December 2023 is bereft of merit and is dismissed with costs to the interested party.

**RULING DELIVERED, DATED AND SIGNED AT NAIROBI**

**THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025.**

**PETER M. MULWA**

**JUDGE**

**In the presence of:**

Ms. Waweru for Applicant

Mr. Mshindi h/b for Ms. Wandaka for Interested Party

N/A for Respondent

Court Assistant: Carlos

