



REPUBLIC OF KENYA



**Britannia Sacco v Jambo Biscuits Limited & another (Commercial Case 310 of 2013)
[2025] KEHC 3743 (KLR) (Commercial and Tax) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3743 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 310 OF 2013
A MABEYA, J
MARCH 26, 2025**

BETWEEN

BRITANNIA SACCO PLAINTIFF

AND

JAMBO BISCUITS LIMITED 1ST DEFENDANT

HARIT SHETH T/A HARIT SHETH ADVOCATES 2ND DEFENDANT

RULING

1. The 2nd defendant moved this Court vide an application dated 19/9/2023 under Order 42 Rule 6 of the [Civil Procedure Rules 2010](#) seeking a stay of execution pending an appeal against the ruling of Majanja J delivered on the 5/9/2023.
2. The application was anchored on the grounds set out in the body of the Motion and the supporting affidavit of Harit Sheth sworn on 19/9/2023.
3. These were that; in that ruling, the 2nd defendant was ordered to honour his undertaking dated 9/9/2016 by paying the plaintiff the sum of Kshs. 38,737,349.46 within 30 days of service of the ruling. That being aggrieved by the said ruling, he filed a Notice of Appeal on 12/9/2023 together with a letter requesting for typed proceedings for the purposes of lodging the intended appeal to the Court of Appeal.
4. He averred that his law firm does not have the sum of Kshs. 38,737,349.46 to satisfy the ruling as the funds the subject of the undertaking are being held in an escrow account with M/S Coulson Harney Advocates and are subject of stay orders issued by the Court of Appeal on the 25/3/2022 in Civ. Appln No. E448 of 2021.



5. He pointed out that the amount subject of the undertaking are safely tucked in account no. 00xxxx79 at Diamond Trust Bank in the joint names of Harit Sheth and Coulson Harney Advocates wherein the credit amount is approximately Kshs. 375,000,000/- which is more than enough to satisfy the aforementioned undertaking.
6. He therefore contended that he stands to suffer grave and irreparable substantial loss unless the orders sought are granted to enable him pursue his intended appeal which has extremely high chances of success. That the plaintiff does not appear in the list of registered co-operative societies and will thus not be able to refund the substantial amount of Kshs. 38,737,349.46 to him if he paid it over and the appeal succeeded.
7. In opposition to the application, the relied on the replying affidavit sworn on 15/11/2023 by Daniel Kaliku, the Secretary of the plaintiff. He deposed that the application for stay pending appeal was a delay tactic; that the cited appeal does not exist and that the 2nd defendant had kept this information from it.
8. It was stated that the plaintiff's application had been based of an unconditional undertaking by the 2nd defendant. That had the 2nd defendant not given the undertaking, the plaintiff would have stopped the sale of the company to 3rd parties. He deposed that the Sacco was fully existent and was capable of reimbursing any funds released to it and that it was in the interest of justice that the funds be released to the plaintiff as the 2nd defendant was out to defraud it.
9. In rejoinder the 2nd defendant swore a further affidavit on the 29/11/2023 in which he reiterated that he had filed an appeal against the ruling of Majanja J, a fact that was well within the knowledge of the plaintiff who had received a copy of the Record of Appeal.
10. He reiterated that a search at the Sacco Societies Regulatory revealed that the plaintiff does not exist and thus had no ability to reimburse the substantial amount of Kshs. 38,737,349.46 in case the appeal was decided in his favour and further no evidence of the Sacco's existence had been adduced.
11. It was further deposed that the subject of the undertaking was issued on behalf of the defendant as the 2nd defendant's client and not in his personal capacity.
12. I have considered the rival contestations and the submissions on record.
13. The main issue for determination is whether a case for stay of execution pending appeal has been made. The applicable principles are well settled. They are set out in Order 42 rule 6(2) of the [Civil Procedure Rules](#). These are an applicant will suffer substantial loss, he should give security for the due performance of the order or decree that might ultimately binding on him. Finally, the application must be made timeously. See [Antoine Ndiaye v African Virtual University](#) [2015] eKLR. In addition, courts are enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#).
14. As to what substantial loss is, it was observed in [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR, that: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate



the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

15. In the present case, the 2nd defendant averred that he stands to suffer substantial loss of over KShs. 38,737,349.46 as well as costs and interest if stay of execution is not granted. He further averred that the plaintiff did not demonstrate that it would be able to refund the sum if the appeal succeeds on account of it not being a registered Sacco.
16. As regards complying with any order as to security of costs, the 2nd defendant contended and submitted that, he was not in a position to comply with such an order as the sum of KShs. 38,737,349.46 subject of the undertaking was being held in an escrow account with M/S Coulson Harney Advocates and was a subject of stay orders of 25/3/2022 by the Court of Appeal in Civil Application No. E448 of 2021.
17. On its part, the plaintiff termed the application a delay tactic; that the alleged appeal did not exist and that it was fully existent therefore capable of refunding the sums in case it lost the appeal.
18. In *RWW v EKW* [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal, in the following words: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

19. In this case, the plaintiff has not given any material as to its ability to repay the decretal sum in case the appeal succeeds and in light of the depositions by the 2nd respondent that the plaintiff is not registered as a Sacco thus he shall suffer substantial loss if stay is not granted.
20. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (2006) eKLR the Court of Appeal held thus;

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

21. It is not in dispute that a lawful order to make good the subject undertaking is in force. The plaintiff is entitled to enjoy the fruits of its judgment. However, the 2nd defendant has stated that it cannot pay the said sum because the same is being held in escrow by another Law Firm. That there is another lawful order by the Court of Appeal preserving the said monies made in 2022. That if he paid over the said amount, the plaintiff would not be able to refund the same as it was not registered. The question is, were the 2nd defendant to pay the ordered amount, would it suffer substantial loss?
22. The 2nd defendant having averred that the plaintiff does not exist as the Sacco Societies Regulatory authorities had no records of the plaintiff, the evidentiary burden of proof shifted to the plaintiff to show otherwise. The plaintiff failed to discharge that burden. In the absence of any proof from the



plaintiff that it is a registered Sacco and having means to refund the money, I find that the 2nd defendant has satisfied the condition that he will suffer substantial loss if the decretal sum is paid to the plaintiff before the appeal is heard and determined. I am persuaded that substantial loss has been proved.

23. On whether the application was made timeously, the impugned order was made on 5/9/2023 and the present application was made on 19/9/2023. That is a period of 14 days only. That was timeous and I am satisfied that there was no inordinate delay.
24. As to security of costs, the 2nd defendant stated that he is not in a position to comply with such an order as the sum of Kshs. 38,737,349.46 subject of the undertaking is being held in an escrow account with M/S Coulson Harney Advocates and are subject of stay order of 25/2/2022 by the Court of Appeal in Civ. Appln. No. E448 of 2021.
25. The issue of adequacy of security was dealt with by the Court of Appeal in *Ndubiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 wherein it expressed itself as follows: -

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...

The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

26. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find that it would be onerous to require the 2nd defendant to give an independent security from the one already held by an order of the Court of Appeal. The amount is said to be far in excess of the amount ordered to be paid.
27. Accordingly, I am satisfied that the 2nd defendant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the *Civil Procedure Rules*.
28. In view of the foregoing, the 2nd defendant’s application dated 19/09/2023 is found to be meritorious and is hereby allowed as prayed.

It is so ordered.

SIGNED AT KISUMU THIS 17TH DAY OF MARCH, 2025.



A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MARCH, 2025.

F. GIKONYO

JUDGE

