



**Nduta v Chania Feeds Manufacturers Limited (Civil Appeal
E079 of 2024) [2025] KEHC 5060 (KLR) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E079 OF 2024
FN MUCHEMI, J
APRIL 25, 2025**

BETWEEN

LUCY NDUATA APPLICANT

AND

CHANIA FEEDS MANUFACTURERS LIMITED RESPONDENT

RULING

Brief facts

1. The application dated 19th February 2025 seeks for orders of stay of execution against the judgment in Thika Small Claims Court SCCCOMM No. E870 of 2023 delivered on 21st March 2024 pending the hearing and determination of the appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 24th November 2025.

Applicant's Case

3. The applicants state that judgment in Thika SCCCOMM No. E870 of 2023 was delivered on 21st March 2024 whereas the trial court entered judgment in favour of the respondent for the sum of Kshs. 231,968/- and interest at court rates from the date of filing the claim. Being aggrieved, the applicant lodged this appeal which he says has high chances of success. The applicant argues that the trial magistrate erred in law by failing to find that the respondent's claim was statutorily time barred by the [Limitation of Actions Act](#) and that the respondent failed to prove its claim against her.
4. The applicant avers that the judgment of the trial court is unjustified as the applicant has fully paid the said amount to the respondent.
5. The applicant further states that the respondent has already issued warrants of attachment to Messrs Makuri Auctioneers to recover an amount of Kshs. 264,074.91/-. The applicant states that she is



willing and able to furnish security by preferably furnishing a security bond to pay the decretal sum should the intended appeal be unsuccessful.

The Respondent's Case

6. The respondent states that the application does not raise any triable issues on appeal and the applicant is merely attempting a second try at the cherry. Further, the appeal is an afterthought as it is filed about one year from the date of judgment contrary to the provisions of Section 79G of the *Civil Procedure Act*. The respondent argues that the applicant has not moved the court vide any application to file an appeal out of time and further no certificate of delay has been filed in court.
7. The respondent avers that the applicant's decision was only arrived at after she was served with warrants of attachment and decree from Messrs Makuri Auctioneers.
8. The respondent argues that the applicant only wants to hijack its success at the lower court by stopping the execution process and have the judgment and resultant decree stayed. The respondent states that the applicant has not presented any harm that would occasion her if the orders sought and prayers are not granted. The applicant only wants to use the court as an avenue to remedy her indolence and in the process deny it from gaining the fruits of its litigation which is a right preserved upon successful litigation.
9. The respondent states that the applicant is not ready and willing to deposit the decretal sum in an account during the pendency of the appeal. The respondent further states that if the prayers sought are granted, they will genuinely be prejudiced and will be denied the fruits of their judgment and as a consequence affect their business which encompasses several employees.
10. Parties put in written submissions.

The Applicant's Submissions.

11. The applicant relies on Order 42 Rule 6(2) of the Civil Procedure Rules and the cases of Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997 and Equity Bank Limited vs Taiga Adams Company Limited (2006) eKLR and submits that she will suffer great loss as the respondent is at liberty to commence realization of the judgment sum. The applicant further submits that the award of Kshs. 324,474/- to be paid out to the respondent is a large sum for the average individual and it would be difficult to recover the said sum in the event the appellant succeeds on appeal resulting to substantial loss on her part.
12. The applicant submits that although the respondent has averred that it is a company of means and is able to refund the decretal sum should the appeal succeed, no evidence has been tendered to demonstrate its ability to pay the decretal sum.
13. The applicant submits that she has lodged a memorandum of appeal dated 18th April 2024 and a record of appeal dated 20th February 2025. Thus, she submits that there has been no delay in filing the current application. Furthermore, the applicant submits that she is willing to abide by the conditions imposed on her by the court in relation to granting security.

The Respondent's Submissions

14. The respondent refers to Section 79G of the *Civil Procedure Act* and the case of Edith Gichungu Koine vs Stephen Njagi Thithi [2014] eKLR and submits that the applicant filed an appeal one year after the trial court issued the judgment in SCCCOMM E870 of 2023. The respondent further submits that the draft memorandum of appeal does not raise any triable issues and is only an afterthought after she was



served with warrants of attachment and proclamation notice. Furthermore, the respondent refers to the cases of Joseph Odira Ombok vs South Nyanza Sugar Company Ltd [2018] eKLR and Santowels Limited vs Stanbic Bank Kenya Limited [2018] eKLR and submits that the trial court dealt with the issue of the claim being time barred as the cause of action was to lapse after 6 years however since there were transactions that took place in the year 2019 when the applicant made her last payments the suit was not statute barred at the time of filing the claim.

15. The respondent argues that the applicant has not given sufficient reasons as to why her appeal has been filed out of time.
16. The respondent relies on Order 42 Rule 6 of the Civil Procedure Rules and the cases of James Wangalwa & another vs Agnes Naliaka Cheseto [2012] eKLR; Njenga vs Njeri & 2 Others (Civil Appeal E125 of 2023) [2023] KEHC 23991 (KLR) (24 October 2023) (Ruling); Butt vs Rent Restrictions Tribunal (1982) KLR and Macharia t/a Macharia & Co. Advocates vs East African Standard No. 2 (2002) KLR 63 and argues that the applicant has not demonstrated what substantial loss she stands to suffer as execution is a lawful process and is not a ground for granting stay of execution.
17. The respondent further relies on the cases of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR and Muriuki vs Munene Storage Limited & 2 Others (Civil Appeal 296 of 2023) [2024] KEHC 4706 (KLR) (18 April 2024) and submits that the right of appeal must be balanced against an equally weighty rigid right of the respondent to enjoy the fruits of the judgment delivered in its favour.
18. Relying on the cases of [*Edward Kamau & Another vs Hannah Mukui Gichuki Misc. No. 78 of 2015*](#); Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 Others [2015] eKLR and Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd [2019] eKLR, the respondent submits that the applicant has not offered to furnish security for the due performance of the decree. The respondent urges the court to direct that the full decretal sum be deposited in court.

The Law

19. Section 79G of the [*Civil Procedure Act*](#) states:-

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

20. It is noted that the judgment in Thika Small Claims Court SCCCOMM No. E870 of 2023 was delivered on 21st march 2024 and the applicant lodged her appeal on 20th April 2024 vide her Memorandum of Appeal. Thus, the appeal herein has been filed within the statutory time within which one can file an appeal.

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

21. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-



1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
2. No order for stay of execution shall be made under sub rule 1 unless:-
 - a. The Court is satisfied that substantial loss may result to the 1st Applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
22. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
23. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“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.
24. The applicant in her affidavit argues that she stands to suffer substantial loss as the respondent shall proceed to execute the decree and has already issued warrants of attachment to Messrs Makuri Auctioneers to recover the decretal amount.
25. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect her or will alter the status quo to its detriment therefore rendering the appeal nugatory. In the instant case, the applicant has not shown how she stands to suffer substantial loss. The applicant has just mentioned that should the respondent proceed with the execution, the instant proceedings and the appeal shall be rendered nugatory and an exercise in futility. It is only in her submissions that the applicant has states that the respondent will not be in a financial position to pay back the decretal sum if the appeal succeeds. Thus, it is my considered view that the applicant has not demonstrated she stands to suffer substantial loss.



Has the application has been made without unreasonable delay

26. Judgment was delivered on 21st March 2024 and the applicant filed the instant application on 19th February 2025. It has taken the applicant eleven months to file the current application. Furthermore, the applicant has not given any explanation why it took her 11 months to file the present application. The applicant is obligated to explain delay failure to which his application may fail.

Security of costs

27. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

28. The issue of security is discretionary and it is upon the court to determine security and its terms. The applicant stated that she is ready and willing to furnish the court with security for the due performance of the decree. The court on 20th February 2025 directed that the applicant deposits the decretal amount in court within 30 days in default, the interim orders of stay to be vacated. On 19/3/2025, the court extended the period of deposit of security for 14 days. On perusal of the record, there has been no evidence that the said decretal sum was deposited in court.
29. Additionally, grant of stay being discretionary the court is obligated to balance out the interests of the successful litigant and the applicant’s unfettered right to file an appeal to fully ventilate her grievances. This was well stated in the case of M/s Porteitiz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997 where the court held:-

That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.

30. From the facts of this case, the applicant seemed to have filed this application to defeat execution which was in the process. He may have filed this appeal on time but did not apply for orders of stay until he was served with warrant of execution. The respondent is entitled to enjoy the fruits of his judgment. His rights cannot be brushed aside herein.
31. Bearing the said balance in mind and considering the provisions of Order 42 Rule 6 of the Civil Procedure Rules, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.
32. Accordingly, the application dated 19th February 2025 lacks merit and is hereby dismissed with costs to the respondent.
33. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25TH DAY OF APRIL 2025.



F. MUCHEMI
JUDGE

