



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Invest and Grow Sacco Ltd v Endende (Civil Appeal  
E191 of 2023) [2025] KEHC 9048 (KLR) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9048 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E191 OF 2023**

**S MBUNGI, J  
JUNE 26, 2025**

**BETWEEN**

**INVEST AND GROW SACCO LTD ..... APPLICANT**

**AND**

**WYCLIFFE AFANDI ENDENDE ..... RESPONDENT**

**RULING**

1. Before this court are two notice of motions dated 20<sup>th</sup> November 2024 and 24<sup>th</sup> March 2025 filed by the appellant/applicant under Certificate of Urgency and anchored on Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 22 Rule 22, and Order 45 Rule 1 of the *Civil Procedure Rules 2010*, as well as Article 159 of the *Constitution*.
2. In the application dated 20.11.2024, the Appellant/Applicant seeks orders for stay of execution of the judgment and subsequent orders issued on 30<sup>th</sup> November 2023 in Kakamega Co-operative Tribunal Claim No. 126 of 2020, pending the hearing and determination of the appeal. The grounds upon which the application is based include that the Applicant was aggrieved by the judgment of the Tribunal and has since lodged an appeal. The Respondent has extracted a certificate of costs and commenced execution proceedings. The Applicant further pleaded that if stay is not granted, it stood to suffer irreparable loss as the Respondent is a man of straw and may not be able to refund the decretal sum should the appeal succeed. The Applicant has expressed willingness to deposit the decretal amount in a joint interest-earning account or as directed by the Court.
3. In support of the application, the Applicant relied on the affidavit sworn on 20.11.2024 by Joseph Churchill, a credit recovery officer of the Appellant. He deponed that the application had been brought without unreasonable delay, and that the application for stay made before the Tribunal was dismissed for want of prosecution under circumstances the Applicant attributes to lack of communication on the hearing date.



4. The second application dated 24.03.2025 seeks review and/or variation of the Court's earlier interlocutory orders declining to certify the application dated 20.11.2024 as urgent. The Applicant also seeks temporary orders of stay of execution pending the hearing and determination of both the earlier application and the main appeal. In that application, the Appellant claims that in the course of awaiting the hearing of the application dated 20th November 2024 (then slated for mention to confirm submissions on 14<sup>th</sup> May 2025), the Respondent proceeded to instruct auctioneers who have since proclaimed the Applicant's property.
5. The application dated 24.03.2025 is supported by an affidavit sworn by Bevalyn Nyakwama, the Applicant's legal officer. She reiterated that the appeal has a high likelihood of success, that the execution process is already underway, and that unless stopped, the Applicant will suffer irreparable harm. She annexed a copy of the proclamation dated 20<sup>th</sup> March 2025. She reiterated the willingness of the Applicant to furnish security and argues that no prejudice will be suffered by the Respondent if temporary stay is granted.
6. The respondent opposed the applications vide replying affidavits dated 21<sup>st</sup> November 2024 and 27<sup>th</sup> March 2025, whereas the applicant filed written submissions dated 8<sup>th</sup> April 2025 in support of the applications.

#### **Applicant's Case.**

7. The applicant submitted that both applications sought a stay of execution pending the hearing and determination of the main appeal. It was contended that the decree in question was a monetary decree arising from the attachment of the Respondent's shares, which the Appellant utilized to offset non-performing loans that the Respondent had guaranteed. The Applicant challenged the legality of the said attachment, which is a central issue on appeal.
8. On the applicable legal threshold, the Applicant invoked the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010*, which require the Applicant to demonstrate that substantial loss may result unless the stay is granted, that the application was made without unreasonable delay, and that security has been offered. The Applicant also cited the principles laid down in *Butt v Rent Restriction Tribunal* which guide the exercise of judicial discretion in granting stay orders, namely: that the discretion must be exercised in a manner that does not render the appeal nugatory, and that the unique circumstances of each case must be considered.
9. On delay, the Applicant submitted that judgment was delivered on 30<sup>th</sup> November 2023 and that the appeal was lodged on 29<sup>th</sup> December 2023. An application for stay was filed on 2<sup>nd</sup> January 2024 before the Tribunal, which was dismissed for want of prosecution. The Applicant contends that its advocates were not notified of the hearing date, and therefore the failure to prosecute was not deliberate. Consequently, the instant applications were promptly filed. This sequence, the Applicant argued, demonstrated diligence and a genuine desire to preserve the substratum of the appeal.
10. On substantial loss, the Applicant maintained that the Respondent, being a man of straw, may be unable to refund the decretal amount if the appeal succeeds, thereby rendering the appeal nugatory. It was further argued that the execution process had already commenced, and auctioneers had proclaimed the Applicant's property. The Applicant, a financial institution, would suffer liquidity challenges if compelled to satisfy the decree before the appeal is heard and determined.
11. On security, the Applicant submitted that it was ready and willing to deposit the decretal amount in a joint interest-earning account in the names of both counsels, or as otherwise directed by the Court. The



Applicant emphasized that this offer of security should suffice to safeguard the Respondent's interests during the pendency of the appeal.

12. The Applicant prayed for the Court to find that it had satisfied all the conditions required for the grant of stay of execution pending appeal and prayed that the applications be allowed in the interest of justice.

### **Respondent's Case**

13. The Respondent submitted that the applications were not only res judicata but also an abuse of the court process, having been filed in bad faith and with the intent of frustrating him from enjoying the fruits of the judgment delivered in Kakamega Cooperative Tribunal Claim No. 126 of 2020 on 30<sup>th</sup> November 2023.
14. It was the Respondent's case that the Appellant had previously filed an identical application dated 2<sup>nd</sup> January 2024 before the Cooperative Tribunal, seeking stay of execution and proceedings in respect of the same judgment. The Tribunal listed the matter for hearing on 13<sup>th</sup> March 2024 and subsequently on 27<sup>th</sup> March 2024, but the Appellant failed to prosecute the application. The Tribunal consequently dismissed the same for want of prosecution. The Respondent annexed to his affidavits a copy of the said application, the Tribunal's dismissal order, and an extract from the CTS confirming the dismissal.
15. The Respondent submitted that the present applications were essentially re-litigation of the very same issues previously determined by the Tribunal. As such, he argued that the applications offended Section 7 of the [Civil Procedure Act](#), and the court lacked jurisdiction to entertain them on account of res judicata.
16. It was further contended that the Appellant had actively participated in the taxation proceedings of the Respondent's Bill of Costs dated 11<sup>th</sup> December 2023, which culminated in a ruling delivered on 7<sup>th</sup> November 2024. The Respondent pointed out that the Appellant, through 'Ligare Advocate', appeared during the ruling but made no effort to seek stay of execution of the resultant decree. This, he argued, demonstrated inconsistency, lack of diligence, and bad faith on the part of the Appellant.
17. The Respondent also faulted the Appellant for failing to prosecute the appeal. He noted that on 7<sup>th</sup> March 2024, this Honorable Court directed the Appellant to file the Record of Appeal within 60 days and further ordered that failure to do so would result in the automatic dismissal of the appeal. The 60-day period lapsed on 8<sup>th</sup> May 2024, but the Appellant failed to file the Record of Appeal, failed to request typed proceedings, and did not follow up through CTS. Instead, the Appellant filed yet another application dated 8<sup>th</sup> May 2024 seeking leave to file the Record of Appeal out of time.
18. The Respondent maintained that these multiple applications were filed solely to delay and obstruct execution of a lawful judgment. The Respondent decried the filing of "application after application" as a fishing expedition, and an affront to the orderly administration of justice. He insisted that the Appellant's failure to diligently prosecute both the appeal and its own applications should not be rewarded.
19. The Respondent prayed for this Court to find that the appeal stood dismissed as at 8<sup>th</sup> May 2024 pursuant to the court's directions of 7<sup>th</sup> March 2024, that the Appellant's applications were res judicata, and that the continued filing of unmerited applications was a mockery of judicial process. He prayed that both the applications dated 20<sup>th</sup> November 2024 and 24<sup>th</sup> March 2025 be dismissed with costs awarded to the Respondent.



## Analysis and Determination.

20. I have looked at both applications, the responses thereto by the respondent, and the submissions by the applicant.
21. The main issue for determination is whether the Appellant has met the threshold for grant of stay of execution pending appeal, and whether the subsequent application for review and temporary stay is merited in light of the circumstances surrounding the prior dismissal of a similar application before the Tribunal.
22. Order 42 Rule 6(2) of the *Civil Procedure Rules* sets out three essential conditions that must be satisfied for an order of stay pending appeal to be granted:
  - i. The application must be made without unreasonable delay.
  - ii. The applicant must demonstrate that substantial loss may result if the stay is not granted.
  - iii. The applicant must provide such security as the court may order for the due performance of the decree.
23. On the issue of delay, it is not in dispute that judgment was delivered on 30<sup>th</sup> November 2023, and that the Appellant filed an appeal on 29<sup>th</sup> December 2023. An application for stay was filed before the Tribunal on 2<sup>nd</sup> January 2024, but the same was dismissed for want of prosecution. The Appellant claims its advocates were unaware of the hearing date, which if true, would mitigate the blameworthiness of the delay. However, the record shows that the present applications were filed several months later, with the current application for review filed only after the proclamation of the Applicant's property by auctioneers. This suggests a reactive rather than proactive approach by the Appellant in safeguarding its interests.
24. However, this court is alive to the fact that the mistake of an advocate ought not be visited on the client. I will therefore excuse the applicant on this, having been guided by the case of *Lee G Muthoga V Habib Zurich Finance (k) Ltd & Another*, Civil Application No. Nai 236 of 2009, where the Court held:

“It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight.” In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel.”
25. As to whether substantial loss may result unless the order is granted, the Appellant argues that the Respondent is a man of straw and may be unable to refund the decretal sum in the event of a successful appeal. While the Respondent has not expressly rebutted this claim through evidence of means, it is equally true that the decree herein is a monetary decree and that the Appellant, being a financial institution, is better placed to absorb the immediate financial impact of execution.
26. The Appellant has, however, expressed willingness to furnish security in the form of depositing the decretal amount in a joint interest-earning account. This offer of security, if genuine and promptly undertaken, would safeguard the Respondent's interest and tilt the balance in favor of granting stay.
27. On the issue of res judicata, the Court is alive to the fact that the Tribunal dismissed an earlier application for stay. While the doctrine of res judicata under Section 7 of the *Civil Procedure Act* may apply where the same issues between the same parties have been conclusively determined, it is arguable whether such dismissal for want of prosecution amounts to a determination on merit. Additionally,



the present application is before a different forum, the appellate court, and arises from a new set of circumstances, particularly the ongoing execution process and alleged procedural lapses.

28. Regarding the allegation that the appeal stood dismissed as of 8<sup>th</sup> May 2024 due to non-compliance with the Court's directions of 7<sup>th</sup> March 2024, the record does show that no Record of Appeal had been filed within the 60-day period. However, the Appellant filed an application dated 8<sup>th</sup> May 2024 seeking leave to file the Record of Appeal out of time. This court, vide a ruling on 25<sup>th</sup> July 2024 allowed the application. The applicant was still unable to file the record of appeal, owing to the difficulty in getting the proceedings. This court is alive to the manpower challenge in the judiciary, particularly when it comes to obtaining proceedings. I shall not fault the applicant for that as the matter was beyond its control.
29. In the interests of justice and in view of the Applicant's expressed willingness to deposit security, the Court is inclined to exercise its discretion in favor of granting conditional stay of execution.
30. Accordingly, the Court makes the following orders:
  - I. A stay of execution of the judgment and decree in Kakamega Cooperative Tribunal Claim No. 126 of 2020 is hereby granted pending the hearing and determination of the appeal, on condition that the Appellant shall deposit the entire decretal amount in a joint interest-earning account in the names of the parties' advocates within thirty (30) days from the date of this Ruling.
  - II. Failure to comply with the above condition shall render the stay automatically vacated.
  - III. The application dated 24<sup>th</sup> March 2025 for review is allowed only to the extent that it seeks stay of execution on the above terms.
  - IV. Costs of both applications shall abide the outcome of the appeal.
31. Orders accordingly.
32. Right of Appeal 30 days explained.
33. The appellant counsel to have 14 days to put in submissions and serve the respondent upon receipt the respondent shall file his submissions within 7 days.
34. Judgment 16.9.2025.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF JUNE, 2025**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Court Assistant – Elizabeth Angong'a

Mr. Iddi for the Appellant present online.

Mr. Alego for Mr. Odek for the Respondent present online.

