



Biwott t/a Biwott Korir & Co. Advocates v Maosa t/a Maosa & Co. Advocates (Miscellaneous Case E338 of 2022) [2025] KEHC 11838 (KLR) (Civ) (24 June 2025) (Ruling)

Neutral citation: [2025] KEHC 11838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CASE E338 OF 2022

SN MUTUKU, J

JUNE 24, 2025

BETWEEN

JOSEPH KORIR BIWOTT TRADING IN THE NAME AND STYLE OF BIWOTT KORIR & CO. ADVOCATES PLAINTIFF

AND

THOMAS MAOSA TRADING IN THE NAME AND STYLE OF MAOSA & CO. ADVOCATES DEFENDANT

RULING

The Notice of Motion

1. Before the court for analysis and determination is the Notice of Motion dated 2nd May 2025 (the first Application) brought by Thomas Maosa T/A Maosa & Co. Advocates (hereafter the Applicant) and supported by the grounds set out on its body and in the Applicant's Supporting Affidavit. The Application is anchored on various provisions of the law as shown on the face of it. The Applicant seeks stay of execution of the judgment delivered in the present suit on 24th May 2024 and the resultant decree, pending the hearing and determination of an intended appeal in the Court of Appeal, against the aforesaid judgment.
2. The Applicant has deposed that this court, (Hon. Ongeru, J) delivered the aforesaid judgment against the Applicant and in favour of Joseph Korir Biwott T/A Biwott Korir & Co. Advocates (hereafter the Respondent); that both he and the Respondent are aggrieved by the said judgment and wish to challenge it on appeal, separately; that the Respondent has filed a Notice of Appeal dated 5th June 2024 while he has filed a Notice of Appeal dated 24th May 2024; that notwithstanding the above, the Respondent has commenced execution proceedings against him and unless the stay order sought is granted, the Applicant stands to suffer substantial loss thereby rendering the intended appeal nugatory.



The Replying and Further Affidavits

3. The Application is opposed by the Respondent through a Replying Affidavit sworn on 14th May 2025 in which it is deposed that save for filing a Notice of Appeal, the Applicant has not taken any steps in pursuing an appeal; that previously, the Applicant was granted a stay of execution for 60 days and yet he did not take any steps towards satisfying the decree; that the Applicant has similarly not disclosed the grounds upon which the intended appeal lies in order to ascertain the seriousness or otherwise of the intended appeal and that no supporting material has been tendered to enable this court to exercise its discretion in favour of the Applicant.
4. The Respondent has stated that the Application is premature and is intended to prevent him from realizing the fruits of his judgment.
5. The Applicant filed a further affidavit sworn on 20th May 2025 in which he has deposed, inter alia, that none of the Notices of Appeal have been struck out or withdrawn; that upon filing the Notice of Appeal, he made a formal request for certified copies of the proceedings and judgment to be made available to him and that the Respondent recently commenced execution proceedings by serving him with a notification letter dated 17th March 2025 notwithstanding the pendency of the Notices of Appeal.

Oral Submissions

6. The Motion was canvassed by way of oral submissions. Mr. Otieno, for the Applicant submitted that the annexures supporting the Application denote the existence of an ongoing appeal and convey the Applicant's desire to pursue an appeal at the Court of Appeal; that since both parties intend to lodge an appeal against the aforesaid judgment, it is only fair that a stay of execution be granted and that the Notices of Appeal on record; having not been withdrawn; indicate that an appeal is live.
7. The Applicant's advocate upon citing the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR) on the question of prejudice to be suffered unless a stay is granted, has argued that unless a stay is granted here, the Applicant is likely to suffer grave substantial loss since the decree in question is monetary in nature and arises out of a professional undertaking. That consequently, execution will subject the Applicant to financial loss and disrepute.
8. The Applicant has further advanced the argument that the Respondent ought not to be allowed to proceed with execution, since he too has submitted himself to the jurisdiction of the Court of Appeal. He has submitted, further, that upon filing the Notice of Appeal and requesting for certified copies of the typed proceedings and judgment, the Applicant was not obligated to seek an extension of time. On those grounds, the court has been urged to allow the Application as prayed.
9. Mr. Olonde for the Respondent relied on the contents of the Replying Affidavit and submitted that upon filing a Notice of Appeal, a party is required to file an appeal within 60 days thereof; that in the absence of any substantive appeal filed in this matter, it is clear that the Applicant does not intend on pursuing an appeal against the aforesaid judgment and that the instant Application is purely an afterthought and an attempt at delaying the execution process.
10. Counsel, further, contended that by commencing execution proceedings, the Respondent on his part opted to abandon the pursuit of an appeal against the judgment; that no grounds of appeal have been disclosed to this court and no security has been provided for the due performance of the decree and that for all the above reasons, the Application ought to be dismissed with costs.



11. Mr. Otieno, in rejoinder, argued that the typed proceedings have since been obtained and that the Applicant is in the process of filing an appeal at the Court of Appeal.

Analysis and Determination

12. I have considered the Application and the grounds supporting it as well as the Replying Affidavit opposing the Application. I have considered oral submissions advanced by the parties. The Applicant seeks stay of execution of the judgment delivered on 24th May 2024 pending an intended appeal. The issue raised in this application is whether the Applicant has filed a substantive appeal or pursued the same, so as to warrant a consideration of the instant application.

13. Given that the intended appeal lies with the Court of Appeal, Rule 75(2) of the *Court of Appeal Rules* (the Rules) dictates that a notice of appeal should be filed within 14 days of the judgment or order being appealed against. Further, Rule 82(1) of the said Rules provides that:

“Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—

- (a) a memorandum of appeal, in quadruplicate;
- (b) the record of appeal, in quadruplicate;
- (c) the prescribed fee; and
- (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

14. Upon perusal of the record, I have observed that the Applicant lodged the Notice of Appeal sometime on or about 24th May 2024. Subsequently, the Applicant vide a letter dated 4th June 2024 and addressed to the Deputy Registrar, requested for certified copies of the typed proceedings and judgment.
15. The record shows that the Deputy Registrar issued a Certificate of Delay dated 19th May 2025 indicating the prolonged delay in availing the requisite documents to the Applicant, and adding that it was not until 9th May 2025 that the Applicant was notified to collect the duly certified documents. Consequently, the intervening period between 4th June 2024 and 9th May 2025 (totaling 340 days) should be excluded in the computation of time.
16. The above position supports the averments by the Applicant for the delay occasioned here. The court is thus satisfied that at the time of bringing the Motion, the Applicant was still within the statutory timelines for filing a substantive appeal with the Court of Appeal, pursuant to Rule 82(1) cited above, upon taking into account the excluded period. In the circumstances, the court will proceed to address the merits of the Application.
17. It is appropriate to make mention at this juncture that the question whether or not an arguable appeal exists here is a preserve of the Court of Appeal and cannot therefore be addressed before this court.



18. Courts have discretionary power to grant an order for a stay of execution of a decree or order pending appeal as provided under Order 42, Rule 6 CPR which stipulates that:

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order 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 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.

19. Concerning the issue whether this Application has been brought without unreasonable delay, the record shows that judgment which triggered the instant Application was delivered on 24th May 2024 whereas the instant Application was brought close to one (1) year later, on or about 2nd May 2025. While it is clear that there has been a prolonged delay, the court upon considering the factors earlier set out to explain the delay, is satisfied that such delay is not unreasonable.

20. On the second condition, the relevance of substantial loss in any application for a stay of execution was aptly addressed by the Court of Appeal in Kenya Shell Ltd v Kibiru & Another [1986] KLR 410 when it held that:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”

21. The Court went on to set out the following still on the subject of substantial loss:

- “1.
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”



22. The decision in the Shell case, in my humble view, set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. Platt Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages. It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts.”

23. The learned Judge continued to observe that:

“It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

24. The court has considered the averments by the Applicant on the manner in which he stands to suffer substantial loss, alongside the resisting arguments by the Respondent on the same subject. It is trite that a successful party should be allowed to enjoy the fruits of his or her judgment. The onus, therefore, is on an applicant to demonstrate the specific manner in which he or she stands to suffer substantial loss if an order of stay is denied.

25. After considering the arguments by the Applicant that the appeal will be rendered nugatory if the Respondent proceeds with the execution process, the court is not persuaded that this would constitute a reasonable demonstration of substantial loss, going by the principle that execution is a lawful process. The explanation given by the Applicant is untenable, since he has failed to demonstrate what substantial loss he is likely to suffer.

26. The Applicant having failed to demonstrate substantial loss, I do not deem it necessary to address the final condition pertaining to the provision of security for the due performance of the decree or order.

27. Consequently, it is my considered view that the Applicant has failed to demonstrate that he deserves the orders he is seeking as a result of which the Notice of Motion dated 2nd May 2025 lacks merit and is hereby dismissed with costs to the Plaintiff/Respondent.

28. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 24TH JUNE 2025.

S. N. MUTUKU

JUDGE

