



**Africert Limited v Nyaga (Commercial Case 509 of 2015)
[2025] KEHC 11684 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 509 OF 2015**

MN MWANGI, J

JULY 31, 2025

BETWEEN

AFRICERT LIMITED PLAINTIFF

AND

RUTH RUGURU NYAGA DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 24th September 2024 filed by the plaintiff/applicant pursuant to the provisions of Sections 1A, 3A & 65 of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rules 6 (1) & (2) & Order 51 Rules 1 & 3 of the Civil Procedure Rules, 2010 and all other enabling provisions. The plaintiff seeks an order for stay of execution of costs of Kshs.671,833.00 taxed on 25th July 2024, the Certificate of Costs dated 18th September 2024 & the Warrants dated 19th September 2024 pending the hearing and determination of its Appeal at the Court of Appeal being Civil Appeal No. E485 of 2024.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Zabby Kariuki Chege, the plaintiff's Chief Executive Officer. He averred that this suit was heard and determined by the High Court vide a judgment delivered on 23rd February 2024, whereby the suit was dismissed with costs to the defendant. He stated that dissatisfied by the said judgment, the plaintiff lodged an Appeal against it, being Civil Appeal No. E485 of 2024 then filed a Memorandum of Appeal dated 22nd April 2024. Mr. Chege stated that the defendant's Bill of Costs dated 9th April 2024 was taxed at Kshs.671,383.00, thus the plaintiff seeks stay of execution of the said costs pending the determination of its Appeal .
3. Mr. Chege asserted that the plaintiff has an arguable Appeal, hence it is apprehensive that if execution of the said costs proceeds, its Appeal will be rendered nugatory and it will suffer substantial loss.



Further, the defendant's ability to refund the said costs in the event that the plaintiff's Appeal is successful is uncertain. He stated that the plaintiff is willing to deposit the taxed costs in a joint interest-earning account as security. He averred that the instant application was filed without delay, and any potential prejudice to the defendant would be mitigated by the security offered and costs.

4. In opposition to the application, the defendant/respondent filed Grounds of Opposition dated 30th September 2024 raising the following issues –
 - i. That the only occasion the Court has jurisdiction to stay execution to recover taxed costs is upon objection to the decision of a Taxing Officer and or filing of the Reference respecting the taxation as per Rule 11 of the Advocates Remuneration Order. As none was done in this case, the Court does not have the requisite jurisdiction to hear and determine the application (sic);
 - ii. That since the Appeal that has been proffered does not relate to the decision on taxation the Court does not have jurisdiction to stay execution for costs pending Appeal when the Memorandum of Appeal does not impugn the award of costs upon the dismissal of the case;
 - iii. That there has been inordinate delay in making the application, which delay amounts to an abuse of the process of the Court;
 - iv. That having taken part in the taxation, the applicant is estopped from applying for stay of execution after the taxation;
 - v. That it is paradoxical for the applicant to sue the respondent for recovery of a sum in excess of Kshs.15 Million on one hand, but claim that the respondent may not be able to reconstitute the taxed costs in the sum of Kshs.671,383.00;
 - vi. That the applicant has not demonstrated the substantial loss it will suffer, in the event that stay of execution is denied; and
 - vii. That the application is otherwise an abuse of the process of the Court.
5. The application herein was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of Makori & Karimi Advocates on 9th October 2024, while the defendant's submissions were filed on 25th October 2024 by the law firm of Masore Nyang'au & Company Advocates.
6. Mr. Makori, learned Counsel for the plaintiff submitted that the instant application was filed without delay, as the costs in question were taxed on 25th July 2024. He cited the case of National Industrial Credit Bank Limited v Aquinas Francis Wasike & another [2006] eKLR, and emphasized that the defendant has neither alleged nor demonstrated her ability to refund the taxed costs if the plaintiff's Appeal is successful, and as such, the plaintiff stands to suffer substantial loss if the taxed costs are paid out and the Appeal later succeeds.
7. Counsel stated that the plaintiff has already deposited the taxed costs in Court pursuant to a Court order issued on 2nd October 2024, thus satisfying the requirement for security. He submitted that although no Reference was filed, the plaintiff has appealed against the High Court's entire decision hence it is fair for execution of costs to be stayed pending that Appeal. In submitting that Courts have the jurisdiction to stay execution of costs, Mr. Makori relied on the case of Deposit Protection Fund v Rosaline Njeri Macharia [2006] eKLR.
8. Mr. Nyang'au, learned Counsel for the defendant relied on the case of Ahmed v Chania Executive Cool Limited; Gulf African Bank Limited (Garnishee) [2023] KEHC 18222 (KLR), and submitted that since this suit was dismissed, the Court issued a negative order which cannot be stayed as there is



nothing to execute. He referred to the case of Donholm Rahisi Stores (suing as a firm) v East Africa Portland Cement Ltd. [2004] KEHC 2014 (KLR) and Rule 11 of the Advocates Remuneration Order and argued that this Court lacks jurisdiction to stay execution of taxed costs where no objection was raised to the taxation and no Reference was filed. He asserted that an Appeal against the dismissal of a suit cannot be used to stay execution of costs that have not specifically been appealed from.

9. Mr. Nyang'au stated that the plaintiff's Memorandum of Appeal contains no grounds challenging the Trial Judge's award of costs and under Section 76 of the *Civil Procedure Act*, a party cannot raise on Appeal issues not included in the Memorandum of Appeal. Counsel contended that there was an 8-month unexplained delay in filing the instant application and asserted that the plaintiff has not demonstrated what substantial loss would result if stay of execution is denied. In addition, he submitted that the defendant is still a Director and shareholder of the plaintiff company and that she runs a profitable company by the name Kencert (K) Ltd., which does international work.

Analysis and Determination.

10. I have considered the instant application, the grounds on the face of it, and the affidavit filed in support thereof, the Grounds of Opposition filed by the defendant and the written submissions by Counsel for the parties. The issue that arises for determination is whether stay of execution should be granted.
11. Stay of execution pending Appeal is provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which states as follows –
 - 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.
12. In determining an application for stay of execution pending Appeal, Courts are under a duty to balance the competing interests of the parties taking into account the fact that an appellant has an undoubted right of Appeal, whereas the respondent has a decree which he/she/it should not be obstructed from executing unless there is a good reason. In the case of Vishram Ravji Halai v Thornton & Turpin [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending Appeal is unfettered, the High Court's jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules, 2010, is fettered by three conditions namely –
 - i. establishment of a sufficient cause;
 - ii. satisfaction of substantial loss; and
 - iii. the furnishing of security.
13. The suit between the parties herein was dismissed with costs to the defendant in a judgment delivered on 23rd February 2024. Dissatisfied by the said judgment, the plaintiff lodged an Appeal against it being Civil Appeal No. E485 of 2024. The plaintiff then filed a Memorandum of Appeal dated 22nd April 2024. Upon taxation of the defendant's Bill of Costs dated 9th April 2024 on 25th July 2024, the plaintiff filed the instant application seeking stay of execution of the taxed costs pending the determination of its Appeal.



14. The defendant in opposition to the application herein filed Grounds of Opposition stating inter alia, that the judgment appealed from by the plaintiff dismissed the plaintiff's suit, thus it is a negative order and an order for stay of execution cannot issue against it. I however note that the order for stay of execution being sought is against the taxed costs and not the judgment appealed against. It cannot therefore be argued that the appeal is from a negative order.
15. In the Judgment I delivered on 23rd February 2024, I not only dismissed the plaintiff's case, but I also awarded the defendant costs of the suit. It was therefore the duty of the Deputy Registrar and/or Taxing Master to ascertain the quantum the defendant was entitled to. To this end, I concur with the Court's finding in *Pius Musimba Muasya & 15; others v Onesmus Ndolo Ngeta & 3 others* [2022] KEELC 1749 (KLR) where it was held that it is trite that it is only through taxation that the costs can be ascertained.
16. It is not in contest that the plaintiff's appeal is against the entire Judgment delivered on 23rd February 2024, which means that the said Appeal encompasses the award of costs of the suit to the defendant, which quantum of costs has since been ascertained to be Kshs.671,833.00 vide a taxation Ruling delivered on 25th July 2024. Since the plaintiff seeks an order for stay of the taxed costs, the decree herein is a money decree.
17. When a decree is a money decree, Courts generally do not grant stay of execution pending Appeal unless it is clearly shown that the decree-holder lacks financial capacity to refund the decretal sum if the Appeal succeeds. The Court of Appeal in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR in addressing the issue of substantial loss held 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 this 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...
18. On perusal of the plaintiff's affidavit in support of the application herein, it is clear that it alleged that the defendant's ability to refund the taxed costs in the event that the plaintiff's Appeal will be successful is uncertain. It is noteworthy that the defendant did not file a replying affidavit in opposition and/or rebuttal to the averments contained in the plaintiff's supporting affidavit. This means that the allegations contained in the plaintiff's supporting affidavit remain unrebutted and are therefore prima facie true.
19. This Court notes that in as much as the defendant submitted that she is still a Director and shareholder of the plaintiff company, and that she runs a profitable company by the name Kencert (K) Limited which does international work, to signify that she is in a position to refund the taxed costs in the event that the plaintiff's Appeal is successful, the said submission has little to no probative value as it was not raised as an averment in an affidavit. It is now well settled that submissions are neither pleadings nor evidence, they are merely a marketing language for Counsel to persuade the Court to rule in favour of their clients. Cases are however made within pleadings, not through submissions.
20. In the end, it is my finding that the defendant has not demonstrated that she is likely to suffer substantial loss in the event that the application herein is allowed.



21. As to whether the application herein was filed timeously, it is evident from the record that the quantum of costs awarded to the defendant by the Court in its Judgment delivered on 23rd February 2024 was ascertained vide a taxation Ruling delivered on 25th July 2024 and a certificate of taxed costs was thereafter issued on 18th September 2024. It is not in contest that the instant application was filed on 24th September 2024, approximately two months after taxation of the costs in question. I am therefore persuaded that the instant application was filed timeously.

22. On the issue of security for the due performance of the decree, it is not disputed that following an order issued by this Court on 2nd October 2024, the plaintiff deposited the taxed costs in Court, as such, the defendant stands to suffer no prejudice in the event that the orders sought in this application are granted. In the case of *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, it was stated that-

Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.

23. This Court finds that the application herein is merited. It is hereby allowed in the following terms-

- i. An order for stay of execution of costs of Kshs.671,833.00 taxed on 25th July 2024, the Certificate of Costs dated 18th September 2024 & the Warrants dated 19th September 2024 is hereby issued pending the hearing and determination of Civil Appeal No. E485 of 2024 filed at the Court of Appeal ; and
- ii. The costs of the instant application shall abide the outcome of the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JULY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Makori for the plaintiff/applicant

Mr. Ong'ata holding brief for Mr. Masore Nyangau for the defendant/respondent

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI. J

