



**Athi River Shalom Community Hospital v Machuki & another (Suing as the Legal Representative of the Estate of Everlyne Moraa (Deceased)) (Civil Appeal E27 of 2020) [2025] KEHC 11634 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11634 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E27 OF 2020  
EN MAINA, J  
JULY 31, 2025**

**BETWEEN**

**ATHI RIVER SHALOM COMMUNITY HOSPITAL ..... APPELLANT**

**AND**

**EDNA KEMUNTO MACHUKI ..... 1<sup>ST</sup> RESPONDENT**

**JAMES MACHUKI ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EVERLYNE MORAA (DECEASED)**

**RULING**

1. The Appellant/Applicant's Notice of Motion dated 2<sup>nd</sup> April, 2025 seeks orders as follows:-
  - a. (Spent)
  - b. That pending the hearing and determination of this application, this court to issue an interim order of stay of execution of its judgment of 27<sup>th</sup> March 2025 and an interim order of stay of execution of the decree in Mavoko CMCC Civil Suit No. 1051 of 2016: Edna Kemunto Machuki & Anor v Athi River Shalom Community Hospital.
  - c. That upon hearing of this application, this court to grant an order of stay of execution of its judgment of 27<sup>th</sup> March 2025 and an order of the decree in Mavoko CMCC Civil Suit No. 1051 of 2016: Edna Kemunto Machuki & Anor v Athi River Shalom Community Hospital pending the hearing and determination of the appeal filed by the Appellant/Applicant.



- d. That the Respondent be permanently barred from executing against the Appellant/Applicant herein by way of attachment of assets.
  - e. That this Court do make any other order as it may deem just and equitable in the circumstances.
  - f. That the costs be in the cause.”
2. The gravamen of the application, as can be discerned from the grounds on its face and in the facts deposed to in the supporting affidavit, is that the Appellant/Applicant being aggrieved by the judgment of this court dated 27<sup>th</sup> March, 2025 has appealed to the Court of Appeal and the Appeal shall be rendered nugatory should stay not be granted hence defeating its right of appeal; that it shall suffer substantial loss because the Respondents will proceed to execute unlawfully and the Respondents whose means of income are unknown may not be in a position to refund the decretal sum. Further, that the Appellant/Applicant is ready and willing to deposit security and that there was no delay in filing this application.
3. The Respondents have vehemently opposed the application through the replying affidavit of Osike Daniel Ombasa Adovate, sworn on 10<sup>th</sup> April 2025. He deposes that the appeal has a very slim chance of succeeding; that no substantial loss has been demonstrated; that the Respondents shall be prejudiced and that the application is only intended to frustrate the estate of the deceased on whose behalf the suit was filed and more especially the child who was left behind by the deceased and hence the application should be dismissed.
4. The application was canvassed through written submissions. In summary learned Counsel for the Appellant, submitted that the Appellant/Applicant has satisfied the conditions for grant of the orders sought in that the application was filed timeously; that it has demonstrated substantial loss in that the Respondents have not shown that they are capable of refunding the decretal sum should the stay be refused and the appeal succeed and hence the appeal will be rendered nugatory and lastly that it has deposited the entire decretal sum in court as security.
5. For the Respondents, it was submitted that the Appellant/Applicant has not demonstrated the irreparable loss it stands to suffer, unlike the Respondents who have been suffering as a result of the Appellant/Applicant’s professional negligence. Learned Counsel for the Respondents invited this court to consider the overriding objective of the *Civil Procedure Rules* and uphold its duty to prevent abuse of the court process. Further, that the appeal does not raise any triable issues and therefore has no chances of success and that this court must balance the rights of the parties and allow the Respondents to enjoy the fruits of their judgment.
6. Whether or not to grant an order for stay of execution is in the discretion of the court. For the court to exercise its discretion in favour of a party, they must satisfy three conditions which are that the application must be brought timeously, they must demonstrate substantial loss and they must be willing to deposit such security as would be ordered by the court. See Order 42 Rule 6 of the *Civil Procedure Rules*.
7. In the present case the Appellant/Applicant has fulfilled the conditions for timely filing of the application and deposit of security given that it has already deposited the decretal sum in court pursuant to an order of this court issued on 23<sup>rd</sup> April, 2025. The only issue for determination therefore is whether it has demonstrated that it shall suffer substantial loss should the stay not be granted and the appeal succeeds.



8. In the case of *Century Oil Trading Company Ltd v Kenya shell Limited (Milimani)* HC MCA 1561 of 2007 (unreported) cited with approval in the case of *Katiwa v Masinde* (Civil Appeal E126 of 2025 [2025] KEHC 6817 (KLR) (26<sup>th</sup> May 2025) (Ruling) Kimaru J, as he then was defined substantial loss as follows:-

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent become an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

9. The Appellant/Applicant has contended that the Respondent is not capable of refunding the decretal sum in the event that the appeal is successful. The Respondents did not file a replying affidavit to demonstrate their capability to refund the decretal sum. The affidavit on record is sworn by their Advocate and he has not made reference to their means. In the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another* [2006] eKLR the Court of Appeal stated:-

“Once an applicant expresses a reasonable fear 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.”

10. It is therefore not even enough to assert. There must be proof that the Respondent is capable of refunding the decretal sum. Persuaded and guided by the above case and even while taking into account the age and circumstances of this case, I do find that the Appellant/Applicant has satisfied the limb on substantial loss. As it has also fulfilled the other two conditions this court is willing to exercise its discretion in its favour, and hereby grants an order for stay of execution pending appeal to the Court of Appeal. The stay shall be for sixty (60) days from the date of this ruling whereupon it may be extended in the Court of Appeal.
11. Prayer (d) of the application which seeks to permanently bar the Respondents from executing against the Appellant/applicant is dismissed.
12. The costs of this application shall abide the appeal.
13. Orders accordingly

**RULING SIGNED, DATED AND DELIVERED ELECTRONICALLY VIA EMAIL ON THIS 31<sup>ST</sup> DAY OF JULY 2025**

**E.N. MAINA**

**JUDGE**

The Advocates for both sides not being in attendance though duly aware of the date.

