



REPUBLIC OF KENYA



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**Nyabuto v Matundura (Civil Appeal (Application) E008 of 2025)
[2025] KEHC 12337 (KLR) (3 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL (APPLICATION) E008 OF 2025
RN NYAKUNDI, J
SEPTEMBER 3, 2025**

BETWEEN

MAUREEN BONARERI NYABUTO APPLICANT

AND

ERICKSON GWARO MATUNDURA RESPONDENT

RULING

1. Before this Court is a Notice of Motion dated 31st July 2025 seeking order to wit;
 - a. Spent.
 - b. That the Court be pleased to order Stay of Execution of the judgment delivered by Hon. T. W. Mbugua in SCCCOMM No. E907 of 2025 pending the hearing and determination of this application.
 - c. That this Honorable be pleased to issue Orders for stay of Execution in SCCCOMM No. E907 of 2025 pending the hearing and determination of this Appeal.
 - d. That costs be provided for.The application is supported by the Affidavit of Maureen Bonareri Nyabuto and based on the following grounds:
 - i. That judgment in default of the Applicant's appearance in SCCCOMM No. E907 of 2025 was entered on the 16/05/2025.
 - ii. That the Applicant learned of the judgment when she had visited the Eldoret Small Claims Registry to inquire on what was expected of her and to her surprise she was told that judgment had already been entered and that the Respondent had already applied for a Decree of the said judgment.



- iii. That the matter had been mentioned twice but the Respondent had not served the Applicant with a mention notice for the same mentions.
- iv. That immediately the Applicant was aware of the default judgment she sought advice from her counsel on the record and without delay filed an application seeking stay of execution, the judgment in default be set aside and further praying that the Draft Defence attached to her supporting affidavit be admitted as a response to the Respondent's Statement of Claim.
- v. That the learned Adjudicator, in her Ruling delivered to the said application on the 25/07/2025 dismissed the application without addressing herself on issues that goes to the substratum of the Applicant's application therein, further failing to issue a stay of execution as prayed in the application.
- vi. That aggrieved by the said Ruling and orders arising therefrom, the applicant has lodged an appeal before this Honorable Court, from which Appeal this application is anchored on.
- vii. That the Applicant is apprehensive that, since the Respondent had already applied for a Decree of the said judgment, he might proceed with execution of the said Decree against her with actions will render this Appeal nugatory and will be highly prejudicial to her.
- viii. That the Applicant has applied for copies of the proceedings, and requested for certified copies of the Orders issued; which documents ought to be part of her Record of Appeal hence the delay in filing the said Record of Appeal.
- ix. That the Applicant is apprehensive that before she manages to file her record of appeal and therefore this Appeal be set down for hearing, the Respondent will have already initiated execution against her.
- x. That the Applicant is a teacher and solely dependent on her small salary to take care of herself and her dependents, and therefore they stand to suffer irreparable injury if the prayers sought are not allowed.
- xi. That the Respondent will not be prejudiced in any way if this Honorable Court allows this application, especially owing to the fact that the said decretal sum continues to earn interest at court rates and therefore in the event the Appeal does not succeed he can still recover interest.

2. In response to the application, Erickson Gwaro Matundura swore a Replying Affidavit with the following highlights:

1. That the Applicants' application dated 31/07/2025 has been read to me by my Advocates on record, explained to me, and I would wish to respond as follows;
2. That on 16/5/2025 Judgement was entered in favour of the Respondent as against the Applicants in Eldoret Small Claims Civil Claim No. E907 of 2025 for the Kshs 407,000/= and the Applicants were given 30 days stay of execution.
3. That on 16/5/2025, we filed our bill of costs for Kshs 111,000/= which was due for taxation hence making a total of Kshs. 518,000/=.



4. That I am advised by my Advocates on record which advice I verily believe to be true that, the power to grant or refuse an application for stay of execution pending appeal is discretionary.
5. That I am further advised by my Counsel on record that, the Honorable Court in granting an application for stay of execution pending appeal must balance the interests of the Appellant with those of the Respondent.
6. That as per the above sequence, the Applicants have not demonstrated that I am impecunious, hence undeserving to be paid the decretal amount of Kshs 518,000/=.
7. That in any event, I am advised by my Counsel on record that the instant application does not meet the threshold for grant of stay of execution pending appeal for reasons that;
 - a. The Applicants have not sworn affidavits demonstrating that they are able to comply with any order as to security of costs, and interest if stay of execution pending appeal is granted
 - b. The application has not put in facts to show that I am unable to pay the decretal amount if the appeal is successful.
 - c. There is no credible evidence to enable the Court reach a conclusion that the Applicants will suffer substantial loss if the decretal sum is paid.
 - d. The refusal to grant stay of execution will not render the appeal nugatory as that case involves a money decree capable of being repaid.
 - e. the applicants are merely apprehensive that I am impecunious, and thus cannot be a basis of grant of stay of execution pending appeal without proof.
8. That as such, the applicants do not stand to suffer any substantial loss of over Kshs. 518,000/= plus costs, and interest if stay of execution is not granted.
9. That the Applicants have not given satisfactory reasons to properly invoke the findings of the learned trial Magistrate in awarding the Respondent Kshs. 407,000/= as the subject claim was admitted at the hearing.
10. That the Applicants have not given adequate reasons to warrant extension and/or enlargement of time within which to appeal against the judgment delivered on 16/5/2025 in Eldoret Small Claims Civil Claim E907 of 2025.
11. That the Applicants have therefore come to court with unclean hands, and equity aids the vigilant, and not the indolent.
12. That I am advised by my Advocates on record which advice I verily believe to be true that there has been an inordinate delay in filing this application as the judgment of the trial court was delivered more than three months ago.
13. That I am able to pay the decretal sum in case the appeal succeeds.
14. That in any event, I am amenable to have half of the decretal sum paid to me plus the assessed costs, and the balance to be deposited in a joint earning account as security as this is a money decree.
15. That the instant application is a delaying tactic made in bad faith, and I should be allowed to enjoy the fruits of the judgment in Eldoret Small Claims Commercial Claim No. E907 of 2025.



16. That the application dated 31/7/2025 is misconceived incompetent, lacks merit and an abuse of the court process.
17. That the instant application ought to be dismissed with costs.
3. In support of this application learned Counsel Ms Wangari filed written submissions urging this court to grant stay of execution pending the hearing and determination of the appeal arising from the judgment in SCCCOMM No. E907 of 2025. Learned Counsel in her contention, invited the Court to be guided by the principles laid down in *Kenya Shell Ltd v Benjamin Karuga Kibiu & Anor* [1986] KLR 410.
4. In rejoinder submissions, learned Counsel Mr. Mwaka for the Respondent opposed any grant of stay of execution on the strength that the condition precedent on substantial loss has not been established by the Applicant. According to learned Counsel Mr. Mwaka the Applicant has failed to answer the following questions in the affirmative as they lack any probative evidence to that effect for judicial discretion to be exercised in his favor:
 - a. She has not sworn an affidavit demonstrating that she is able to comply with any order as to security of costs, and interest if stay of execution pending appeal is granted.
 - b. She has not put in facts to show that I am unable to pay the decretal amount if the appeal is successful.
 - c. There is no credible evidence to enable the Court reach a conclusion that the Applicant will suffer substantial loss if the decretal sum is paid.
 - d. The refusal to grant stay of execution will not render the appeal nugatory as that case involves a money decree capable of being repaid.
 - e. The applicants are merely apprehensive that I am impecunious, and thus cannot be a basis of grant of stay of execution pending appeal without proof.
5. This remains to be the basis from which exercise of judicial discretion shall be balanced to decline or grant the remedy on stay of execution.

The Decision

6. The applicable law:
 - a. It is settled law that for an applicant to succeed on an application for stay of execution pending appeal under Order 42, Rule 4(1) and (2) of the Civil Procedure Rules, he has to satisfy the Court to which the application has been made that
 - (i) sufficient cause for the grant of the order exists
 - (ii) substantial loss that he is likely to suffer unless the order sought is granted
 - (iii) the application has been made without undue delay, and
 - (iv) such security as the Court may order for the due performance of the decree or order is given.
 - b. The power of the Court to grant or refuse an application for stay of execution is a discretionary power and the discretion should be exercised not capriciously but in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no other



overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should the appeal Court reverse the Lower Court's decision. (See *Butt v Rent Restriction Tribunal* [1982] Kenya Law Reports 417.

- c. The Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and the unique requirements and finally that the court in exercising its powers under Order 42, Rule 2(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion in which case the failure to put security for costs as ordered will cause the order for stay of execution to lapse.
 - d. It has also been held that a money decree cannot be the subject of a stay of execution order and that it is not normal of a court to grant stay of execution in monetary decrees save where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial and the fact that the Plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event that its appeal is successful. (See *Ujagar Singh v Runda Coffee Estates Ltd.* [1960] EA 263; *Kenya Shell Ltd v Benajamin Karuga* 1 KAR 1018 and *Odunga's Digest on Civil Case Law and Procedure* pg. 7438 paragraph (a) – (d).
7. In the case at bar, the Applicant is aggrieved with the decision of the trial Court and is desirous of having an Appeal's Court revisit the issues based on the memorandum of appeal dated 31st July 2025. The major complaint by the Applicant is on the learned Adjudicator infringing the provisions of Articles 50, 159(2) (d) of *the Constitution* and Sections 1A, 1B & 3A of the *Civil Procedure Act* and Section 3 of the *Small Claims Court Act*. On the face of it, the Applicant is inviting this Court to exercise discretion on grounds of the intended appeal arguable on points of law and it will be argued by grant of stay of execution so as not to render the intended appeal nugatory.
8. From the submissions of both Counsels, there seems to be contentious issues which cannot be decided at this interlocutory stage. Similarly, this forum being the only Court in which appeals on point of law are preferred by an aggrieved litigant I hereby exercise discretion by making the following orders:
- a. That stay of execution against the Judgment in SCCCOMM No. E097 of 2025 be granted pending the hearing and determination of the appeal.
 - b. The appeal be canvassed by way of written submissions with a rider that the Appellant files a brief record consistent with the letter and spirit of Small Claims Act.
 - c. The Appellant shall serve the Respondent with brief submissions on points of law as a basis of the appeal within 10 days from today's date.
 - d. Thereafter the Respondent shall also file rejoinder submissions to the appeal central to the issues which touch on points of law, also within 10 days of being served.
 - e. The highlighting of submissions to the substantive appeal be and is hereby scheduled on the 23rd September 2025.
 - f. The costs of this application to await the outcome of the appeal.
9. Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 3RD DAY OF SEPTEMBER 2025.

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R. NYAKUNDI
JUDGE

