



**Pentagon Agencies Limited v Khaemba (Civil Appeal E092 of 2025)  
[2024] KEHC 17002 (KLR) (Civ) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 17002 (KLR)

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

**CIVIL**

**CIVIL APPEAL E092 OF 2025**

**TW CHERERE, J**

**MARCH 20, 2024**

**BETWEEN**

**PENTAGON AGENCIES LIMITED ..... APPLICANT**

**AND**

**DOUGLAS KITUI KHAEMBA ..... RESPONDENT**

**RULING**

1. The Applicant herein has filed a Notice of Motion dated 04<sup>th</sup> February 2025, brought under Articles 50(1) and 159(2)(d) of *the Constitution*, Order 22 Rule 22, Order 42 Rule 6, and Order 51 Rules 1 and 15 of the Civil Procedure Rules, as well as Sections A, 1B, 3A, and 63(e) of the *Civil Procedure Act*. Through this application, the Applicant seeks the following orders:
  1. Stay of execution of the judgment delivered on 29<sup>th</sup> January 2025 in Milimani MCCC E3452 of 2020. pending the hearing and determination of the appeal.
  2. Costs of this application be provided for.
2. The application is premised on the following grounds:
  1. The applicant is aggrieved by the judgment and has preferred an appeal.
  2. There is a discrepancy between the registration number of the accident motor cycle as pleaded and as stated in evidence before the court.
  3. The appeal is arguable for the reason that there was no agency relation between the Applicant and the rider.
  4. The decretal sum is considerable, and the Applicant is likely to suffer substantial loss.



5. The application is made without unreasonable delay, as the judgment was delivered on 29<sup>th</sup> January 2025 and the application filed on 04<sup>th</sup> February 2025.
3. The application is also supported by an affidavit sworn on 04<sup>th</sup> February 2025 by Stephen Waigwa Murage, the Applicant's Managing Director. In the affidavit, he reiterates the grounds set out in the application and additionally states as follows:
  1. That the applicant is aggrieved by the judgment and has already filed an appeal against the same.
  2. That there is a discrepancy between the registration number of the accident motorcycle as pleaded in the plaint and as stated in the evidence before the court.
  3. That the applicant is likely to suffer substantial loss, as the decretal sum is considerable, and if the judgment is executed, the applicant will have no means of recovering the same if the appeal is successful.
  4. That the application is filed without delay, as it was filed within five days of the judgment being delivered.
4. The Respondent has opposed the application through a replying affidavit sworn on 12<sup>th</sup> March 2025. The respondent's grounds for opposition are as follows:
  1. The applicant has not demonstrated that substantial loss will occur if the stay is not granted.
  2. The applicant has not shown any evidence of their inability to repay the decretal sum.
  3. The applicant has waited for over three years to be heard, and this application is meant to frustrate the respondent's ability to enforce the judgment.
  4. The appeal is not arguable, and the application for stay is an attempt to delay the inevitable.

**Issues for Determination:**

5. The principles governing the grant of a stay of execution pending appeal under Order 42 Rule 6(1) Civil Procedure Rules (Rules) were articulated by the Court of Appeal in *Butt v Rent Restriction Tribunal* [1979] eKLR. In applying these principles, the court must be satisfied that:
  - a) The application has been made without unreasonable delay
  - b) The applicant has an arguable appeal with a probability of success
  - c) The applicant shall suffer substantial loss if the stay is not granted; and
  - d) The security for due performance of the decree has been provided.
6. In determining the present application, I will consider the following key issues:
  1. Whether the application has been filed without undue delay
  2. Whether the applicant has satisfied the conditions for the grant of a stay of execution as set out in Order 42 Rule 6 of the Civil Procedure Rules.
  3. Whether the applicant has demonstrated that substantial loss would be suffered if the stay is not granted.
  4. Whether the appeal is arguable
7. The impugned judgment was delivered on 29<sup>th</sup> January 2025, and this application for stay was filed on 04<sup>th</sup> February 2025 which is six days from the date of the judgment. The application was indeed filed timeously.



8. The burden of proving substantial loss lies with the Appellant. As held in *Standard Assurance Co. Ltd v Alfred Mumea Komu* [2008] KEHC 3879 (KLR):

“Substantial loss, in its various forms, is the cornerstone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

9. The Appellant has not provided any evidence to show that he stands to suffer any loss, substantial or otherwise if execution proceeds. Mere assertions of hardship are insufficient in law. In the absence of such evidence, there is no justification for keeping the Respondent from enjoying the fruits of the judgment.

10. The threshold for an arguable appeal is not whether the appeal will succeed but whether it raises a bona fide issue that ought to be fully ventilated before the appellate court. *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR held that:

“On arguability, an arguable appeal must not necessarily succeed, but one which ought to be argued fully before the court; one that is not frivolous. In addition, one ground of appeal can sufficiently fulfill this condition.”

11. The applicant argues that substantial loss would be suffered due to the considerable decretal sum in the judgment. The Court of Appeal in *Halai & another v Thornton & Turpin (1963) Ltd* [1990] KECA 65 (KLR) held that substantial loss must be real and not merely an inconvenience or economic hardship. Additionally, in *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR), the Court stated that the applicant must show that the loss is beyond the mere financial burden and that there is a risk of the Respondent being unable to repay the amount if the appeal is successful.

12. In the present case, while the Applicant has alleged substantial loss, it has not been sufficiently demonstrated.

13. The Applicant contends that the appeal is arguable, particularly with respect to discrepancies in the registration number of the accident motor cycle as pleaded and as stated in evidence before the court. The Applicant also challenges liability on the ground that there was no agency relationship between the Applicant and the rider of the accident motor cycle.

14. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] KECA 333 (KLR), the Court of Appeal stated that:

“It is to be remembered that in an application such as this, the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable.”

15. Upon reviewing the grounds set out in the memorandum of appeal, I find that the discrepancies in the motorcycle’s registration number and the agency relationship between the Applicant and the rider of the accident motorcycle raise arguable points for consideration on appeal.

16. The requirement to provide security is clearly stated in Order 42 Rule 6. The applicant has not offered any security for the due performance of the decree. Despite this omission, the arguable nature of the appeal warrants the court’s intervention in preserving the subject matter pending appeal (See *RWW v EKW* [2019] KEHC 6523 (KLR)).



17. In light of the foregoing analysis, I find that although the Applicant has not sufficiently demonstrated substantial loss or provided security for the due performance of the decree, the existence of an arguable appeal and the need to preserve the subject matter pending appeal justify the grant of a stay of execution.
18. Accordingly, I hereby make the following orders:
1. A stay of execution of the judgment delivered in Milimani MCCC E3452 of 2020 on 29<sup>th</sup> January 2025 is hereby granted, pending the hearing and determination of this appeal, on condition that the Applicant deposits the total decretal sum with the court
  2. Mention before the Deputy Registrar of this court on 24<sup>th</sup> April 2025 to confirm filing of record of appeal and for further orders
  3. Costs shall abide the costs in the appeal

**DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ubah

For Applicant - Mr. Kaburu for Ngari & Kaburu Advocates

For Respondent - Mr. Kuyoh for Kuyoh & Co. Advocates

