

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC SUIT NO. E016 OF 2022

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF

-VERSUS-

URBANUS WAMBUA MUSYOKA.....1ST DEFENDANT
FIONA MUTHOKI MUTISYA.....2ND DEFENDANT
ANTONY MBINDYO MUSYOKA.....3RD DEFENDANT
JOHN KIIO MAUNDU.....4TH DEFENDANT
MAGDALENE WANZA KIIO.....5TH DEFENDANT
SHARON NGINA KIKO.....6TH DEFENDANT
WAFIN INTERNATIONAL LIMITED.....7TH DEFENDANT
WISDOM HOLDINGS LIMITED.....8TH DEFENDANT
WEMMAR ENTERPRISES LIMITED.....9TH DEFENDANT
KIKOTO GENERAL MERCHANTS LIMITED.....10TH DEFENDANT

RULING

In its judgement dated 28th October 2024, this court forfeited to the government Kshs 740,692.90 transacted through Cooperative Bank account number 01116005777600 and Kshs 10,210,385.00 transacted through account number 0670191770235 held in Equity Bank. The court also entered judgement for the plaintiff against the defendants for Kshs 80,251,815.00. This was after the court found the money and related assets to have constituted unexplained assets under Section 55 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003.

The defendants were dissatisfied with the judgment of the court and lodged a notice of appeal dated 29-10-2024. They subsequently brought an application by way of notice of motion dated 7th November 2024 asking for the following orders;

- a. This application be certified as urgent and be heard ex-parte in the first instance on a priority basis.*
- b. Pending the hearing and determination of this application interpartes, this Honourable Court be pleased to grant a stay of execution of any decree, order, or other consequential directions arising from the judgment issued by Hon. Justice P.J. Otieno on the 28th of October, 2024.*
- c. This Honourable court be pleased to order a stay of execution pending the hearing and determination of the applicants' appeal to the Court of Appeal from judgment and any resulting decree or orders arising from the judgment rendered by the Honourable Justice P.J. Otieno on the 28th of October 2024.*
- d. The costs of this application be provided for.*

The application being one for stay of execution is brought under Order 42 Rule 6 of the Civil Procedure Rules. The conditions an applicant is required to satisfy for grant of an application for stay of execution are well settled. The applicant must establish that unless the application is granted, they stand to suffer substantial loss, the application must be filed without inordinate delay and the applicant must provide security for due performance of the decree.

The affidavit in support of the application has been sworn by the 1st defendant and contains averments which attempt to show that the defendants will suffer

substantial loss if the application is not granted and that the application was filed timely. The defendants have not proposed the nature of security they are willing to give for due performance of the decree.

The plaintiff opposes the application in reliance on grounds of opposition dated 14th November 2024. The plaintiff states that the application does not meet the threshold of substantial loss and has not provided security for due performance of the decree. It states further that the intended appeal will not be rendered nugatory as the plaintiff is capable of restituting the decretal sum and further that this being a public interest case, the orders for stay should not be granted. It also argues that the application is incompetent for having been brought under Section 92(2) of the Proceeds of Crimes and Anti Money Laundering Act which is not applicable.

I have read the application, the supporting affidavit, the grounds of opposition, the applicants' submissions dated 19th November 2024 and the respondent's submissions dated 27th November 2024. In addition to the limbs of substantial loss, timing of filing the application and security of costs, the defendants have submitted that their intended appeal is arguable and has high chances of success and that balance of convenience dictates that the application be granted in their favour.

It is not for this court to determine the merits or chances of success of the intended appeal. That is within the purview of the Court of Appeal as this court is *functus officio* in that respect. In any event, merits or chances of the intended appeal is not a ground for consideration in an application of this nature before the High Court. The same goes for the balance of convenience the applicants have put forth in their submissions. Applications for stay of execution are not considered on

balance of convenience but the three conditions given under Order 42 Ruel 6 of the Civil Procedure Rules.

I have no doubt and it has not been suggested to me that, the application was filed without inordinate delay. The judgment was delivered on 28th October 2024 and the application was filed on 7th November 2024. This is a period of ten days and the same cannot be said to be inordinate. What I need to consider in this application is whether the defendants are likely to suffer substantial loss if the application is not granted and the nature of security I should consider appropriate in the circumstances of the case.

What is substantial loss is a term which depends on circumstances of each case. The defendants have submitted that they are likely to suffer loss because the recovery of the decretal sum from the government once the same is forfeited will be a tortuous and bureaucratic task. The respondent has countered this argument by submitting that the forfeited funds are deposited in a recovery account maintained by it on behalf of the people of Kenya and it is able to meet any obligation arising from the intended appeal.

The above may be the case but I do believe that the forfeited money and the other decretal sum once paid into the recovery account will be in sole control of the plaintiff and out of the reach of the defendants. The court will not be in a position to monitor the money and there will be no restrictions on how the same will be utilised. The decretal amount is substantial and one cannot ignore the intricacies of recovering money or funds from the government once the same leaves the hands of the plaintiff to the government. In order to balance the rights of the parties, it is this court's considered opinion that the decretal sum should be kept in a neutral ground and that is the purport of a requirement for security for due

performance of the decree. I take position taken by my sister Honourable Justice Asenath Ongeri in **RWW v EKW (2019) KEHC 6523 (KLR)** where she held that;

'The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.'

Having said the above, the third condition for grant of stay of execution is not optional or for the applicant to decide. It is at the discretion of the court to decide what security is appropriate in each case depending on its circumstances as long as the same is sufficient to satisfy the decree. The main point of consideration in ordering provision of security is that the court should not suspend the successful party's enjoyment of the fruits of its litigation without giving it the comfort of a safe and smooth haven should the appeal not succeed. Honourable Justice Reuben Nyakundi put it more aptly in **Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd (2019) KEHC 7586 (KLR)** by stating that;

'Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.'

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal.'

I will in the circumstances make an order that the defendants provide security in form of a deposit. The plaintiff has proposed that the sum of Kshs 80,251,815.00 be deposited in court but in my opinion such amount should not be made to lie idle in court. It should be kept where it will attract interest noting that the period the intended appeal will take is not known.

In conclusion the application dated 7th November 2024 is allowed in the following terms;

- a. There shall be stay of execution of the judgement and decree of this court dated 28-10-2024 on condition that the defendants shall deposit Kshs 80,251,815.00 in an interest earning account with a reputable bank in Kenya to be operated jointly by the advocates for the plaintiff and the advocates for the defendants within the next ninety (90) days from the date of this ruling.
- b. Kshs 740,692.90 in Cooperative Bank account number 01116005777600 and Kshs 10,210,385.00 in account number 0670191770235 held in Equity Bank and any interests accruing therefrom shall remain preserved therein until the intended appeal is heard and determined.

- c. In the event the defendants do not deposit the aforesaid amount as ordered in (a) above within the said period, the order for stay and orders in (b) above shall automatically lapse.
- d. There shall be no orders as to costs in respect of this application.

Dated signed and delivered at Nairobi this 28th day of February 2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Makori for the plaintiff and Mr. Kimani holding brief for Mr. Wandugi for the defendants.