

KENYA / JUDGMENT

Lin-Cap Credit Ltd v Mukundi & 2 others [2026] KEHC 13619 (KLR)

[2026] KEHC 13619 (KLR)

COURT

High Court

CASE / FILE NUMBER

Commercial Appeal E314 of 2025

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Page 1 of 10 REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT NAIROBI COUNTY
MILIMANI HIGH COURT COMMERCIAL AND TAX DIVISION HCCOMMA E314 OF 2025 LIN-CAP
CREDIT LIMITED.....APPELLANT VERSUS TIMOTHY
MWANGI MUKUNDI.....1ST RESPONDENT ALICE WAMBUI
KARIUKI.....2ND RESPONDENT AND FAMILY BANK
LIMITED.....INTERESTED PARTY

RULING

1. This Ruling determines two rival Applications arising from an interlocutory order made at the Chief Magistrates Court at Milimani in the ongoing Case No. MCCOMMSU/E1245/2025 by Hon. Ruguru N. SPM on 11/12/2025, which order is the subject of this Appeal. The impugned order directed the Appellant to deposit, within 14 days, a sum of Kshs 5,725,000/- in Court, pending hearing and determination of the suit.
2. None of the parties has exhibited a copy of the Plaint and/or Defence filed in the primary suit thus limiting this Court's appreciation of the background of the matter. From what I can decipher however, the basis of the case is what has been described as a mortgage redemption arrangement wherein the Appellant was the Chargee, the 1st Respondent was the third-party Redeemer, and the 2nd Respondent, apparently a micro-finance company, was the Chargor. In simple terms however, from what I gather, the Appellant had advanced a loan facility to the 2nd Respondent on the security of the parcel of land known as L. R. No. 27596/5 (hereinafter referred to as the "suit property"). Subsequently, the 2nd Respondent introduced the 1st Respondent as the third party who was willing to pay off the outstanding balance of the loan then standing at Kshs 5,725,000/- on behalf of the 1st Respondent, upon which the title to the suit property and other security documents would be released, not to the 2nd Respondent (borrower) but to the 1st Respondent. This proposal was accepted by the Appellant which, through its Advocates, issued the letter dated 14/08/2025 undertaking to release the title to the 1st Respondent and execute a discharge instruments, upon receipt of full payment. Pursuant thereto, the 1st Respondent, on 15/08/2025, paid off the loan balance

in full. The problem however ensued when despite receiving the whole balance, the Appellant failed to release the title, claiming that it had been lost. It is after fruitless follow-up that the 1st Respondent filed the primary suit against the Appellant and the 2nd Respondent Milimani HCCOMM No. E314 of 2025 Page 2 of 10 for breach of Professional Undertaking and sought a refund of the settlement amount he had paid. He also sought freezing of the 1st Respondent's bank account held at the 3rd Respondent, through which the money had been paid.

3. The 1st Application, filed through Messrs Wilbur Anthony & Co. Advocates, is the Appellant's Notice of Motion dated 29/12/2025. In the substantive prayers now remaining, the Appellant seeks stay of the said order made by the lower Court on 11/12/2025, and also stay of further proceedings in the lower Court case. The Application is supported by the Affidavit sworn by Antony Mugodo, the Appellant's Counsel.
4. The Motion is also supported by a list of a whooping, but unnecessarily very lengthy, verbose and repetitive 39 grounds! which also contain legal arguments making it sound more like final Submissions than grounds. As I always advise Advocates, concise and brevity quickly delivering the intended message, rather than length or verbosity, is the cornerstone of proper drafting of pleadings. Listing a whole 39 grounds, complete with legal arguments, which will still be replicated and repeated in the Supporting Affidavit and again in the Submissions, defies the basic principles of proper drafting (see the comments made by C.B. Madan JA at page 25 of his Judgment in the case of Choitram & another v Nazari (Civil Appeal 8 of 1982) [1984] KECA 47 (KLR) (20 January 1984) (Judgment)). In this case, employment of a little bit of brevity would have easily reduced the 39 grounds to not more than 5 at most, and still remain as effective.
5. Be that as it may, the grounds of the Application are basically that on two occasions, 2/12/2025 and on 11/12/2025, the trial Magistrate unprofessionally issued adverse or prejudicial orders against the Appellant based on unprocedural motions by the 1st Respondent, and that the trial Magistrate's conduct of the proceedings was replete with errors, and abuse of discretion. The Appellant also alleges that by imposing the order for depositing of the money, the Trial Magistrate irregularly varied her earlier orders made pursuant to a spent application when no substantive application for review had been placed before him, and when he was already functus officio. It was also alleged in making the order, the trial Magistrate ignored the principle of "onus probandi actori incumbit (burden of proof lies on the Plaintiff), and he was further faulted for offering legal advice to Counsel for the Respondent. Milimani HCCOMM No. E314 of 2025 Page 3 of 10
6. In respect of this 1st Application, my sister, Mon'gare J, issued, on 31/12/2025, an interim order staying the order directing the depositing of the money, pending hearing and determination of the Application, which has remained in force since then.

7. The 2nd Application, filed through Messrs E.N. & James Advocates LLP, is the 1st Respondent's Notice of Motion dated 16/01/2026, by which he, seeks review, discharge and/or setting aside of the interim stay order issued herein on 31/12/2025 as aforesaid, in effect, restoration of the lower Court's order directing depositing of the money. In the alternative, he seeks an order directing the Appellant to furnish security pending determination of the appeal.
8. The Application is supported by the Affidavit sworn by the 1st Respondent and the grounds alleged are, principally, that the order was obtained by material non-disclosure and misrepresentation. It was urged that the Application is incomplete insofar as the Appellant had failed to exhibit a copy of the extracted order and proceedings forming the basis of the Appeal. Regarding non-disclosure, the Appellant was accused of failing to divulge that it had issued a professional undertaking upon reliance of which the 1st Respondent paid the said sum of Kshs 5,725,000/-, which undertaking the Appellant failed to honour, and also that prior Mareva Injunction issued to preserve the suit sum were frustrated and rendered nugatory by dissipation of funds. Regarding the claim that the lower Court varied its orders without a formal application for review, it was deposed that the Court merely exercised its inherent jurisdiction to grant an alternative preservative relief expressly prayed for after the Appellant frustrated the Mareva order. It was also pointed out that on 23/09/2025, Counsel for the Appellant had informed the Court that the Appellant would be ready to refund the money in the event that a Provisional Title was not issued within 60 days, and also that the 60 days contractual completion date had lapsed. Apart from other annexures, the 1st Respondent also exhibited typed copies of the proceedings of the Court.
9. There is also on record, in response to the 1st Application, the 1st Respondent's Grounds of Opposition dated 9/01/2026 and also his Replying Affidavit sworn on the same date, both which, in essence, reiterate the matters already recounted in the 1st Respondent's Supporting Affidavit to the 2nd Application.
10. Similarly, in response to the 2nd Application, there is the Appellant's Replying Affidavit sworn on 9/02/2026. The Appellant also filed the Further Affidavit sworn on 5/02/2026 by John Mungai Njogu, introduced as the Appellant's Operations Manager. Read together, the Milimani HCCOMM No. E314 of 2025 Page 4 of 10 two simply echo matters already recounted in the Appellant's Supporting Affidavit to the 1st Application. However, on the failure to exhibit the order of 11/12/2025, the Appellant pointed out that the order remains unpublished to date, and that its written requests to the trial Court to supply it with the same has not been acted upon to date.
11. The parties then filed written Submissions. The Appellant's Submissions is dated 25/02/2026, while the 1st Respondent's is dated 27/02/2026. The Appellant also, additionally, filed what is described as "Submissions Highlights" dated 13/04/2026. Apart from citing authorities, all the Submissions, essentially, simply recap the matters already captured and narrated above.

12. I have not come across any pleadings filed by the 2nd Respondent, and as regards the Interested Party, its Counsel, Mr. Munguti, informed the Court that they would not be participating in the Applications.

Determination

13. The issue that calls for determination in this matter is evidently “whether this Court should issue an order staying the Magistrate’s Court interlocutory order directing the Appellant to deposit the amount of Kshs 5,725,000/- pending hearing and determination of this Appeal, and therefore, whether the interim order obtained by the Appellant herein should be discharged, or vacated”.
14. In tackling the Applications, I must remind myself that in interim applications in appeals, such as in the instant one, the Court should avoid making final determinations on matters of fact. To this end, the Court of Appeal, in the case of Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1, guided as follows: “..... the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”
15. Appellate Courts also rarely interfere with interlocutory rulings unless the lower Court clearly abused its judicial discretion, acted on wrong principles, or misapprehended the facts. Appellate. Piecemeal interlocutory appeals on interlocutory orders are therefore generally discouraged as they disrupt, delay, and frustrate the expeditious hearing of the main Milimani HCCOMM No. E314 of 2025 Page 5 of 10 substantive suit. The course generally favoured is allowing the main dispute to be finalized, and allowing parties to challenge interlocutory irregularities alongside an appeal against the final judgment, unless a refusal to intervene immediately would cause irreparable prejudice or fundamentally derail the core proceedings. Courts thus prioritize substantive justice and timely disposal of cases over satellite litigation spawned by interlocutory grievances
16. Although as aforesaid, I should not delve deeply into determining substantive matters, to arrive at a reasoned verdict, the Court may still examine the facts deponed in the rival Affidavits and apply them to the law. Caution is however stressed.
17. In answering the issue cited above, I observe that by the letter dated 14/08/2025, the Appellant's Advocates accepted the proposed redemption arrangement upon payment of the outstanding balance of Kshs 5,725,000/-. The letter stated, inter alia, that upon receipt of that amount in full settlement of the borrower's loan obligations, the Appellant would release the certificate of title and other security documents and execute the discharge instruments. The Kshs 5,725,000/- was subsequently paid into the Appellant's designated Bank account but the title and completion documents were never released as agreed. The Appellant's explanation for this apparent breach was that the title could not be traced by its previous Advocates, and promised that steps had consequently been commenced to seek issuance of a replacement title.

18. As aforesaid, I will not address the nature or legal effect of the undertaking at this stage. Whether the letter constituted an enforceable professional undertaking is an issue that touches substantially on the merits of the pending lower Court proceedings.
19. In tracing the chronology of events however, I observe that on 29/08/2025, the 1st Respondent instituted the primary suit and simultaneously sought interlocutory relief. On 23/09/2025, the trial Court issued prayers 4 and 5 of the Application, namely, an order freezing the Appellant's Bank account held at the Interested Party, and a Mareva injunction restraining the Appellant from adversely dealing with the suit property. Having issued those orders, the Court marked the application as "spent" and fixed the matter for pre-trial conference.
20. The above narration is important because one of its relevant aspects is that when the matter came up on 2/12/2025, concerns were raised regarding the whereabouts of the money which the 1st Respondent's Counsel alleged had been withdrawn, but which allegation the Milimani HCCOMM No. E314 of 2025 Page 6 of 10 Appellant's Counsel disputed. Pursuant thereto, the trial Court directed the Appellant to produce bank statements. The statements were accordingly filed on 10/12/2025 and indicated a balance of only about Kshs 234,637/- in the account, way below the Kshs 5,725,000/- that had been paid into the account, thus confirming the 1st Respondent's fears.
21. The above development spurred the 1st Respondent to file the Notice of Motion dated 10/12/2025 seeking contempt of Court sanctions. Of particular significance to this Appeal is that prayer 3 of that application for contempt expressly sought an order compelling the Appellant to deposit the said sum Kshs 5,725,000/- into a joint interest-earning account, or in Court as security pending determination of the suit. This fact merits mention because the Appellant has repeatedly submitted that there was "no application" whatsoever capable of supporting the deposit order. Clearly, the record does not support that broad proposition. There was, in fact, the application dated 10/12/2025 containing specifically that prayer. What however remains genuinely in contention is the procedural manner in which the trial Court ultimately dealt with that prayer viz-a-viz its earlier order of 23/09/2025.
22. Be that as it may, on 11/12/2025, the trial Court declined to hold the Appellant in contempt of Court, finding that there was insufficient evidence on whether the Appellant had withdrawn the funds after issuance of the order of 23/09/2025. Counsel for the 1st Respondent nonetheless pressed for depositing of the Kshs 5,725,000/-, which the Appellant objected to, contending, inter alia, that the earlier application had been marked as "spent" and that the Court could not review or vary the previous order in the absence of a proper application for review. As aforesaid therefore, the Appellant's own account of those proceedings confirm that indeed, the Appellant was afforded an opportunity to make those objections.
23. The Court ultimately accepted the 1st Respondent's plea, and directed the Appellant to deposit the Kshs 5,725,000/- in Court within 14 days pending determination of the suit. The extracted order now before this Court confirms that direction.

24. Regarding the contention that the Appellant is guilty of non-disclosure of material facts and as such, obtained the interim order herein by deceit, it is true that a litigant who approaches the Court ex parte owes a duty of full and frank disclosure. However, the question is not merely whether some document was absent from the bundle placed before the vacation Judge since to make a finding of non-disclosure, the Court must examine whether a material fact known to the Appellant was concealed or presented in such a manner as to materially distort exercise of the Court's discretion. In this case, upon examining the Appellant's supporting material, I am unable to accept the 1st Respondent's contention that the Appellant concealed the history of the transaction, or the earlier preservation proceedings, and the dispute concerning the Kshs. 5,725,000/-. I say so because the Appellant exhibited the letter dated 14/08/2025 containing the undertaking, material on the earlier interlocutory proceedings, and, more importantly, the 1st Respondent's Notice of Motion dated 10/12/2025 containing the prayer for depositing of the money.
25. Regarding the accusation that the Application is defective because the Appellant failed to exhibit the extracted order of 11/12/2025, it is also true that neither a copy of the order nor the typed proceedings were initially before this Court. There is now however material indicating that the Appellant applied for supply of the order and certified proceedings on 11/12/2025. The Appellant has also pointed out that the order had not yet been uploaded to the Judiciary case-tracking system (CTS) online portal when the instant Application was filed. There is therefore no basis for the allegation that the interim order was obtained through deliberate non-disclosure. I may however just clarify that a copy of the order was subsequently annexed to the Appellant's Further Affidavit, and as such, it is now on record.
26. On the prayer for stay pending Appeal, the governing provision is Order 42 Rule 6 of the Civil Procedure Rules, which requires the Court to be satisfied as to "substantial loss", absence of unreasonable delay and provision of such security as the Court may order for due performance of the decree or order that may ultimately bind the applicant.
27. On "delay", there is little difficulty. The impugned order was made on 11/12/2025, while the instant Application was filed on 29/12/2025, during the Christmas vacation. The Application was therefore clearly brought without delay.
28. On whether the Appeal is "arguable", I agree, as affirmed by the Court of Appeal in the case of Attorney General v W.O.1 Samuel Chege Gitau & 283 Others [2023] KECA 1386), that, generally, once a Court order has been perfected, a Court ordinarily cannot undertake a fresh merit-based decisional engagement with the matter except through the recognized powers of review or the limited exceptions to the doctrine of *functus officio*. In this case, the order of 23/09/2025 was perfected and the application giving rise to it expressly marked as spent. The Appellant is therefore entitled to argue that the apparent subsequent proceedings thereon raise questions as to the juridical basis upon which that order was revisited. Also arguable are the issues whether the application dated 10/12/2025 was a sufficient procedural foundation for the ultimate order, whether

the order of 11/12/2025 amounted to a review without a formal Application giving rise to it, whether inclusion of the prayer for depositing of the money in the Application dated 10/12/2025 was proper, and whether the notice afforded to the Appellant to respond to those issues was adequate in the circumstances. The Appeal cannot therefore be described as one that does not raise arguable points. It clearly does.

29. Even as I say so, it must be recalled that as codified in Section 3A of the Civil Procedure Rules, Courts possess powers to exercise inherent jurisdiction to “meet the ends of justice” and to “prevent an abuse of the court process”. The Court may also exercise its inherent powers to handle unforeseen circumstance, to give effect to its orders, to fill procedural gaps and ensure a fair trial. In this case, the 1st Respondent has submitted that this is what the Court did, and has, as such, trashed the claims that the Court reviewed its earlier orders. All these are matters that form part of the substantive matters to determined in this Appeal. I also note that the trial Magistrate, in his Ruling of 11/12/2025, justified the exercise of his powers of review of the earlier orders by stating that although the earlier order granting only the bank account “freezing” prayer was “spent”, that order had been given under the false belief that the funds were still in the account.
30. The question of “substantial loss” is however less straightforward since it turns on whether the appeal shall be rendered practically hollow by an unconditional enforcement of the impugned cash-deposit order before those questions are heard. The other aspect is whether it is appropriate at this interlocutory stage to ignore the fact that the appeal raises arguable questions inviting close interrogation, and decline to stay the impugned order.
31. In determining this matter, I observe that the Appellant claims that unless the order is stayed, it will be compelled to comply notwithstanding its challenge to the legality thereof and will suffer prejudice, loss and inconvenience. No evidence of any kind has however been presented to demonstrate that a cash deposit of Kshs 5,725,000/- would render the Appellant insolvent or incapable of operating its business. An order directing money to be deposited in Court is materially different from an order requiring immediate payment of that money to the opposing litigant since if the appeal succeeds, the deposited money is restored to the depositor. It is also not disputed that the 1st Respondent has fully performed his part of the bargain, and also, there is admission from the Appellant that the title property has been lost while in its custody. As it stands, the Appellant holds both the money and the title/security, while the 1st Respondent is totally dispossessed of any. Considering these facts, noting the Milimani HCCOMM No. E314 of 2025 Page 9 of 10 clear undertaking given by to the trial Court by Counsel for the Appellant that the Appellant would be ready to refund the money in the event that a Provisional Title was not issued within 60 days, and also noting that the 60 days contractual completion date has lapsed, I find that granting the stay would mean leaving the 1st Respondent wholly unsecured, pending determination of the Appeal, which action would be wholly inequitable and expose the primary suit to being rendered academic. In the circumstances, I decline to issue any order of stay in the absence of demonstration of any risk of the Appellant suffering any “irreparable loss”, if at all.

32. Regarding the prayer for stay of proceedings, it is agreed that such order is an exceptional remedy because it interrupts a litigant's right to his suit being expeditiously heard and determined. The Court must therefore weigh the arguability of the appeal against the need for expeditious disposal of proceedings, efficient use of judicial time, and whether continuation of the suit would render the appeal futile (see the holding of Ringera J (as he then was) in *Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000*).
33. Applying the above principles to the facts of this case, I must say that this Appeal is directed at an interlocutory preservatory order directing for depositing of money pending determination of the suit. The Appeal will not therefore finally determine the 1st Respondent's substantive claim, the nature and effect of the undertaking, the rights of the 2nd Respondent, or the parties' ultimate liability under the redemption arrangement. It has not been shown that allowing pleadings, case management, discovery, taking of evidence or the eventual hearing in the trial Court to proceed will deprive the Appellant of the benefit of its appeal against the deposit order. To stay the entire suit because of an appeal against such interlocutory preservatory order would, in my view be clearly disproportionate. It would also unnecessarily delay resolution of the very questions which have generated the present multiplicity of proceedings. I therefore decline to stay proceedings of the primary suit. Final Orders
34. Consequently, I make the following orders: i) The Appellant's Notice of Motion dated 29/12/2025 is dismissed, with the result that the 1st Respondent's Notice of Motion dated 16/01/2026 is allowed and as such, the interim orders earlier granted in this Appeal now stand discharged, vacated and/or set aside. Milimani HCCOMM No. E314 of 2025 Page 10 of 10 ii) The period for depositing the amount of Kshs 5,725,000/- as directed by the lower Court is however extended by thirty (30) days to be computed from the date hereof. iii) I also grant the Appellant the option, within the same thirty (30) days to, instead, or in the alternative, deposit the said amount in an interest earning bank account to be opened in the joint names of the Advocates on record in the lower Court suit, namely, Milimani Chief Magistrates Civil Court Case No. MCCOMMSU/E1245/2025. iv) In the event of default, the 1st Respondent shall have the liberty to return to the lower Court to seek, under the primary suit, for appropriate sanctions or penalties.
- v) Costs of the two Applications shall abide the outcome of this Appeal. DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2026
WANANDA JOHN R. ANURO JUDGE Delivered in the presence of: Mr. Omondi h/b for Mr. Mugodo for the Appellant Ms. Maina for the 1st Respondent Mr. Edwin Otieno h/b for Mr. Anzala for the Interested Party Court Assistant: Amos Boso Milimani HCCOMM No. E314 of 2025

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