



REPUBLIC OF KENYA



**KENYA LAW**  
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**Krystalline Salt Limited v Ngolo & 6 others (Civil Appeal  
11 of 2022) [2022] KEHC 15430 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 15430 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 11 OF 2022  
SM GITHINJI, J  
OCTOBER 26, 2022**

**BETWEEN**

**KRYSTALLINE SALT LIMITED ..... APPLICANT**

**AND**

**KADZO NGUMBAO NGOLO & 6 OTHERS ..... RESPONDENT**

*(Being an Appeal against the Judgment of Hon. W. K. Chepseba read by Hon.  
E. K. Usui delivered on 7th February, 2022 in Malindi Civil Suit No. 244  
of 2018; Kadzo Ngumbao Ngolo & 6 others versus Krystalline Salt Limited)*

**RULING**

1. This ruling is in respect to a notice of motion application filed under certificate of urgency dated the February 22, 2022 seeking the following orders;
  - i. Spent
  - ii. Spent
  - iii. That the honourable court be pleased to grant a stay of execution of the judgment in Civil Suit No 241 of 2018- *Kadzo Ngumbao & 6 Others v Krystalline Salt Limited* delivered on 7<sup>th</sup> February, 2022 together with the consequent decree or orders, pending the hearing and determination of the appellant/ applicant's appeal to this honourable court;
  - iv. That the honourable court be pleased to grant such further orders as may be necessary, just and expedient in furtherance of prayers 3 & 4 above.
  - v. That costs in respect of this application be provided for.
2. The application was supported by grounds on the face of the application and supporting affidavit sworn by Hasmita Patel sworn on the February 22, 2022.



3. He deponed that judgment was indeed delivered in the matter on the February 7, 2022 for a sum totaling to Kshs 1,050,000/= together with costs and interest and the appellant intends to appeal the entire decision and is seeking a stay of execution pending such appeal and is willing to deposit security if this honourable court so directs. That the plaintiffs/ respondent will be at liberty to execute against the appellant/applicant if the orders sought in the application are not granted and the ensuing appeal will be rendered nugatory.
4. In response, a replying affidavit was sworn by Kadzo Ngumba Ngolo on the February 28, 2022. He deponed that the application for stay of execution pending appeal is pre-mature as no execution has ensued and that the applicant has not demonstrated the substantial loss it is likely to suffer should the court decline to grant an order for stay of execution.
5. He asserted that the grounds adduced for which the application is anchored are unsubstantiated and cannot elicit the court's discretion to warrant a stay of execution. That they have a right to enjoy the fruits of their judgment and there is no sufficient reason why they should be kept any longer from enjoying the fruits of the judgment.

### Submissions

6. The appellant filed written submissions on the May 24, 2022 through their advocate Arwa & Change Advocates.
7. Counsel submitted that the purpose of an application for stay of execution pending 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. Counsel proceeded to cite the provisions of order 42 rule 6 of the Civil Procedure Rules where a party ought to prove that they shall suffer substantial loss, that the application has been made without undue delay and such security as to costs provided.
8. On whether the applicant shall suffer substantial loss, counsel relied on a number of cases, Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi (Milimani) No 1562 of 2007 submitting that the loss that would occasion the applicant is that the appeal will be rendered nugatory.
9. Counsel submitted that the application has been made without undue delay having been filed on February 24, 2022. On whether the applicant has furnished such security for costs, he submitted that they are ready to deposit the entire decretal sum as security. He relied on the cases of Tabro Transporters Ltd v Absalom Dova Lumbasi (2012) eKLR and Focin Motorcycle Co Limited vs Ann Wambui Wangui & Another (2018) eKLR.
10. The respondents on the other hand filed submissions on the June 9, 2022. Counsel addressed the court on two major issues; whether the application has merit and whether the applicant has offered reasonable explanation. Counsel relied on the case of Halai & another V Thornton & Turpin (1963) Ltd (1990) eKLR.
11. It was his submission that the applicant has failed to demonstrate what substantial loss they are likely to suffer in the event that the order for stay is not granted. That the respondents who are the successful candidates have the right to enjoy the fruits of the judgment that was in their favour. It was also counsel's submission that no plausible explanation has been demonstrated by the applicant to warrant granting of the stay of execution pending appeal.



## Analysis and Determination

12. I have considered the application, the supporting affidavit, the replying affidavit in response and the submissions filed as well as the authorities relied upon.

13. Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

14. What this court is being called upon to determine is whether the conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security and whether the application has been made without unreasonable delay, has been met by the applicant. More so, the court in deciding whether or not to grant the stay must consider the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#). The section stipulates that; -

“The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”

15. I am duly guided by Kimaru, J in [Century Oil Trading Company Ltd v Kenya Shell Limited](#) Nairobi (Milimani) HCMCA No 1561 of 2007 where he stated 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 or 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 becomes 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.”



16. In *Kenya Shell Limited v Kibiru* [1986] KLR 410 Gachuhi, Ag JA (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of KShs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that *status quo* should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment.”

17. Having weighed the interests of both parties, it’s in interest of justice to grant stay of execution pending the hearing of this appeal on condition that the appellant pays half of the decretal sum to the respondents and deposits the balance in a joint interest earning account in the names of the advocates; which conditions should be complied with within the next 30 days from the date of this ruling and in default the orders be deemed vacated.

18. The costs of this application will be in the appeal.

19. It is so ordered.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the presence of:-**

1. Arwa & Change Advocates LLP for the Appellant.
2. Chamwada & Co. Advocates for the Respondents

