



**Taib (Legal Representative of the Estate of Sheikh Ali Taib Bajaber
- Deceased) v SDV Transami Kenya Limited (Environment and Land
Appeal E042 of 2023) [2025] KEELC 3153 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E042 OF 2023**

YM ANGIMA, J

APRIL 3, 2025

BETWEEN

**ABDALLA ALI TAIB (LEGAL REPRESENTATIVE OF THE ESTATE OF SHEIKH
ALI TAIB BAJABER - DECEASED) APPELLANT**

AND

SDV TRANSAMI KENYA LIMITED RESPONDENT

RULING

A. Appellant's Application

1. By a notice of motion dated 12.09.2024 expressed to be in brought pursuant to Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, Section 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act* and all other enabling provisions of the law, the appellant sought a stay of execution of the judgement and decree dated 12.06.2023 in Mombasa CMELC NO. 1791 OF 2008 pending the hearing and determination of the appeal.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Abdala Ali Taib on 06.12.2024. It was the appellant's case that if stay of execution was granted as prayed, he stood to suffer substantial loss and irreparable loss as the respondent may at any moment execute for the costs and render this appeal nugatory. The court was urged to find that the respondent was unlikely to compensate the appellant in damages and costs incurred, if the appeal succeeded. The appellant contended that he was only able to secure typed proceedings in September 2024, which was the time the respondent also moved to court for assessment and execution of the costs awarded. It was argued that the appellant was only able to make this application after the respondents sought recovery of their costs, hence the appellant saw no delay in bringing the application.



B. Respondent's Response

3. The respondent filed a replying affidavit sworn by Lugadiru Maurice on 30.12.2024 in opposition to the application. It was stated that the dispute before the court was one of pure monetary claim therefore the court had no jurisdiction to entertain the appeal. Further, it was deposed that the appellant was guilty of an unexplained 15-month delay in filing and serving the application for stay hence he had failed to meet the three conditions for granting a stay of execution. In addition, the respondent argued that there was no imminent execution since no certificate of costs had been issued by the court.

C. Directions on Submissions

4. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The appellant filed his submissions dated 12.02.2025 while the defendant filed its submissions dated 09.02.2025.

D. Issues for Determination

5. The court has perused the application dated 12.9.2024, the response thereto and the material on record. The court is of the view that the following key issues arise for determination herein:
 - a. Whether the appellant has made out a case for the grant of a stay pending appeal
 - b. Who shall bear the costs of the applications

E. Analysis and Determination

- a. Whether the appellant has made out a case for the grant of a stay pending appeal
6. Order 42 Rule 6 of the *Civil Procedure Rules* provides for a stay of execution as follows;
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 sub rule (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.
7. The appellant was pleaded that if the decree was executed and the appeal becomes successful, he shall have difficulty recovering the costs from the respondent hence rendering the appeal nugatory. The court is unable to find evidence of substantial loss to the appellant since there is no imminent execution facing the appellant. There is also no credible evidence to demonstrate that the respondent is unlikely to repay the decretal sum if the appeal is successful.



8. The court in *Kenya Shell Limited v Benjamin Karuga Kibiru and Ruth Wairimu Karuga* [1986] eKLR held;

“It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory...If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”

9. The instant application was filed on 19.09.2024 whereas the judgment sought to be stayed was delivered on 12.06.2023. What is unreasonable delay is dependent on the surrounding circumstances of each case. In this case, the application was brought about 15 months after the delivery of judgment with no plausible for the delay.

10. The court is thus of the view that the appellant has not only failed to demonstrate the element of substantial loss but has also failed to demonstrate expedition in filing the application. The court is not satisfied that there is sufficient reason to deny the successful litigant the fruits of his judgment.

b. Who shall bear the costs of the application

11. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the respondent shall be awarded the costs of the application.

F. Conclusion and Disposal Order

12. The upshot of the foregoing is that the court finds and holds that the defendant has failed to satisfy the requirements set out in Order 42 Rule 6 of the *Civil Procedure Rules*. As a consequence, the court makes the following orders for the disposal of the application:

a. The appellant’s notice of motion dated 12.09.2024 be and is hereby dismissed in its entirety.

b. The respondent is hereby awarded the costs of the application.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 3RD DAY OF APRIL 2025.

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Y. M. ANGIMA

JUDGE

In the presence

Court assistant Gillian

Mr. Ochieng Odipo for the appellant

Mr. Njeru for the respondent

