



**Petrazo Limited (Formerly Brighton Limited) & another v New
Oshwal Distributor Limited & 4 others (Environment & Land Case
E031 of 2022) [2025] KEELC 1120 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E031 OF 2022**

**LL NAIKUNI, J
MARCH 7, 2025**

BETWEEN

PETRAZO LIMITED (FORMERLY BRIGHTON LIMITED) 1ST PLAINTIFF

FUSION FOOD LIMITED 2ND PLAINTIFF

AND

NEW OSHWAL DISTRIBUTOR LIMITED 1ST DEFENDANT

PRIME BANK (K) LIMITED 2ND DEFENDANT

**TRITON PETROLEUM COMPANY LIMITED (IN RECEIVERSHIP) 3RD
DEFENDANT**

TRITON SERVICE STATION LIMITED 4TH DEFENDANT

JAGUAR PETROLEUM COMPANY LIMITED 5TH DEFENDANT

RULING

I. Introduction

1. This Honorable Court was tasked to make a determination on the filed Notice of Motion application dated 30th October, 2024. It was instituted by New Oshwal Distributors Limited, the 1st Defendant/Applicant herein. It was brought under the dint of the provision of Sections 1A, 1B, 3A, 38A and 51 of the *Civil Procedure Act* Cap. 21 and Order 42 Rule 6 (2) of the Civil Procedure Rules 2010.
2. Upon service of the application to the Plaintiff/ Respondent, while opposing it, they responded through filing of a Replying Affidavit dated 15th November, 2024.



II. The 1st Defendant/Applicant's case

3. The 1st Defendant/Applicant sought for the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That the Honourable Court be pleased to grant a Stay of Execution of the judgement delivered on 8th October, 2024 pending the hearing and determination of the Appeal.
 - d. That the Honourable Court be pleased to allow the Applicant to deposit Kshs.1,000,000 as security for due performance the Court to hold the same pending determination of the Appeal
 - e. That the cost of this application abide the outcome of the appeal and/or any other relief that the court deems fit to grant in the interest of justice.

4. The application was premised on the grounds, testimonial facts and averments made out under the Supporting Affidavit of –Umesh Chanderia, a director of the Applicant, sworn and dated the same day with the application. The Applicant averred that:
 - a. On 8th October 2024, Judgement was entered in favour of the Respondent against the Applicant.
 - b. The Applicant had already filed and served a Notice of Appeal and Requested for typed proceedings from the Honorable Court herein and intends to challenge in the Court of Appeal the whole Judgement of the Honourable Court rendered on the 8th October, 2024 for falling short on numerous counts of the law and on facts. Particularly, appeals against an Order directing the Landlord to pay the alleged Tenants a sum of Kenya Shillings Fourty Two Million (Kshs. 42,000,000) notwithstanding that they consumed the same as rent over the last 11 years among others as per their own Agreements produced into evidence. Annexed in the affidavit and marked as UC1.
 - c. The Application herein had been made without unreasonable delay and, the Applicant was ready to deposit in courts a reasonable amount as security for due performance. However in the alternative to the above, since the Respondent's remain Tenants, the Applicant was willing to allow them to hold unto Rent for the next 2 years as security. The said Rent should be payable upon the conclusion of the Appeal.
 - d. The Applicant stood to suffer substantial loss to a tune of a sum of Kenya Shillings Fouty Two Million (Kshs. 42,000,000/) as awarded by the Honorable court as a result of looming execution of the Courts Orders which are the subject of the intended Appeal unless an Order staying execution was granted.
 - e. The effluxion of 30 days stay renders the threat of execution by the respondent imminent. A step that will render the Intended Appeal nugatory and the further expose the Applicant to a double loss of a sum of Kenya Shillings Fourty Two Million (Kshs.42, 000,000) to the Respondents who have not paid rent for the last 11 years.
 - f. The Applicant was convinced that the intended Appeal was merited, arguable and raised pertinent points of law with overwhelming chances of success and that the stood to suffer irreparable loss and damages if the orders sought herein are not granted.



- g. The Applicant had already filed and served a Notice of Appeal together with a request for typed proceedings.
- h. It was in the interest of Justice that the Honourable Court herein exercises its discretion to preserve justice and the sanctity of the intended Appeal. The Appeal was pending for the reasons that the Court herein is yet to furnish it with the already requested Typed Proceedings in the matter and thus is it just, fair and equitable that Application herein be allowed.
- i. It was in the interest of justice that the Application herein be allowed.
- j. The interests of justice could only be met by granting this Application as the Respondent stood to suffer no prejudice.

III. The Plaintiff/ Respondent's case

5. The Plaintiff/Respondent opposed the Notice of motion application dated 30th October, 2024 through an 12th paragraphed Replying Affidavit sworn by MANOJ SHAH, a Director of the Plaintiff/ Respondent herein. The deponent averred as follows:-
 - a. This Honourable Court delivered a judgment in favor of the Plaintiffs on the 8th of October 2024, awarding the Plaintiff a sum of Kenya Shillings Forty Two Million (Kshs. 42, 000,000./) plus interest thereon.
 - b. Upon the delivery of the judgment, this Honorable Court, granted a 30-day stay of execution on the 1st Defendant's Application, allowing them sufficient time to consider and prepare an appeal if dissatisfied with the judgment. The Plaintiffs, in good faith, did not oppose this initial stay application by the Applicant.
 - c. By the 25th October 2024, the Court had already availed a typed and signed copy of the Judgment, which was fully accessible to the Applicant and sufficient for them to begin drafting an appeal. However, as of the date of this application, the Applicant had failed to annex any draft or copy of the appeal to their Application for Stay, thus failing to demonstrate that there was an arguable appeal before this Court.
 - d. The Application failed miserably to satisfy the court that substantial loss may result to the applicant unless the order of stay was granted.
 - e. In response to Paragraph 7 of the Supporting Affidavit, the Applicant's failure to file or annex any appeal, or to otherwise show the existence of an arguable appeal as alleged renders the averments therein speculative and untenable.
 - f. In response to the Applicant's offer to deposit a security of a sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00) against a Judgment sum of Kenya Shillings Fourty Two Million (Kshs. 42, 000, 000/), this offer is in bad faith and grossly inadequate to protect the Plaintiff's interests. If the Applicant is serious about pursuing an appeal, the only reasonable security would be the full judgment sum of sum of Kenya Shillings Fourty Two Million (Kshs. 42, 000, 000/), to be deposited in a joint interest-earning account maintained by the advocates for both parties.
 - g. This Application evidenced a lack of seriousness and reflected the Applicant's intention to delay execution rather than to pursue any genuine appeal. It was thus a clear abuse of the Court process, calculated solely to prevent the Plaintiffs from enjoying the fruits of its valid Judgment.



- h. It was in the interests of justice that the Application herein be dismissed with costs, as granting this application under the present terms would only serve to prejudice the Plaintiff by denying it the right to enjoy the fruits of its judgment.
- i. In the alternative, should this Honourable Court be inclined to grant any further stay of execution, he respectfully urged the Court to make it conditional upon the Applicant.
- j. In the alternative, should this Honourable Court be inclined to grant any further stay of execution, he respectfully urged the Court to make it conditional upon the Applicant depositing the entire Judgment sum of sum of Kenya Shillings Fourty Two Million (Kshs. 42, 000, 000/) in a joint interest-earning account in the names of the respective advocates for both parties.

IV. Submissions

6. On 20th November, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 30th October, 2024 be disposed of by way of written submissions and all the parties complied. Subsequently, on 29th January, 2025 a ruling date was reserved for 7th March, 2025 accordingly.

A. The Written Submissions by 1st Defendant/Applicant

7. The 1st Defendant/Applicant through the Law firm of Messrs. Taibjee & Bhalla Advocates filed its written submissions dated 26th November, 2024. Mr. Clipton Advocate submitted that aggrieved by the Judgement dated 8th October, 2024 and having filed a Notice of Appeal and requesting typed proceedings on the same day. The Applicant averred that the reason for the application was the apprehension of the impending execution. To the Applicant, there was danger after the effluxion of the 30 days even before the applicant is furnished with the requested typed proceedings. Typed proceedings remained unprovided to date. Consequently, the execution by the Respondent upon Applicant stood to render the Intended Appeal nugatory.
8. In a bid to dispel all fears, the Applicant had proved a willingness to make a reasonable deposit as security of due performance (Kenya shillings one million) and in the alternative to that, had offer a further period wherein the Respondents would be allowed to withhold rent but only pay it upon conclusion of the Appeal. In the absence of any foreseeable prejudice to be suffered by the Respondent and in light of discretionary powers vested in this honorable court, the Applicant avers that this is the clearest case for grant of orders sought. Contrary to shutting out the Applicant from all remedies.
9. The Learned Counsel relied on the only issue necessary for determination which was whether the Application seeking stay of execution was merited. The Learned Counsel resolved to submitted that the Application was premised on Order 42 rule 6(2) of the Civil Procedure Rules, 2010 which provides that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings 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 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.”
10. The Learned Counsel averred that the Applicant was thus alive to Judgment in the case of:- “Vishram Ravji Halai – Versus - Thornton & Turpin Civil Application No. Nairobi 15 of 1990 (1990) KLR 365”. Where it was held among others that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. Similarly, the Court in the case of:- “RWW – Versus - EKW [2019] eKLR”, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:
- “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.”
11. On substantial loss, the Learned Counsel submitted that on the first condition, the Court in the case:- “Tropical Commodities Supplies Ltd and Others – Versus – International Credit Bank Limited (In Liquidation)(2004) E.A. LR 331”, defined substantial loss in the sense of Order 42 rule 6 as follows:-
- “.....Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”
12. Additionally, in the case of:- “Masisi Mwita – Versus - Damaris Wanjiku Njeri [2016] eKLR”, the Court relied on the case of “Equity Bank Ltd – Versus - Taiga Adams Company Limited [2006] eKLR” to explain the onus of the Applicant where the court stated a follows:-
- “.....The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent-that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse-as/he is a person of no means.”
13. Further to this, in the case of:- “National Industrial Credit Bank Ltd – Versus - Aquinas Francis Wasike & another [2006]eKLR” Court of Appeal held thus:-
- “Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”
14. According to the Learned Counsel, the Respondent had not set out whether or not the Applicant's fear are misplaced. They had not proved that they have the means outside, paying in kind pay to a sum of Kenya Shillings Fourty Two Million (Kshs. 42,000,000/-) on top the accrued rent since 2021 when the Applicant notified them of his ownership currently in tens of Millions. Consequently, if the decretal sum was paid over to the Respondents, they mightnot be able to repay it back and in that



case, if the Applicant's intended appeal were to succeed, that success would be rendered nugatory. The Applicant's contention was that there was an imminent threat of execution by the Respondent, a step which render the application nugatory and the intended appeal useless.

15. In the case of:- "George Kimotho Ilewe Annastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza-deceased)" the Court stated that:-

"It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant's business."

16. Despite the Respondent not stating in its replying affidavit whether they're capable of refunding the decretal amount of a sum of Kenya Shillings Fourty Two Million (Kshs. 42,000,000/-) on top of the accrued rent since 2021 when the Applicant notified them of its ownership which rent is currently in tens of Millions or furnishing the court with documentary evidence if paid to them, the Applicant has demonstrated what substantial loss it will suffer. The Applicant avers that the respondents are without sufficient means and is apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.

17. It is trite law 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 a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful.

18. The Learned Counsel averred that the Court had to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his Judgement. In other words, the court should not only consider the interest of the Applicant but has also to consider, in all fairness, the interest of the Respondent who has been denied the fruits of his Judgment and it's for that reason, that the Applicant has offered to deposit of a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) in court and in the alternative to permit the Respondents to hold onto rent only to pay it upon conclusion of the Intended Appeal.

19. On the unreasonable delay, the Learned Counsel contended that on the second condition, the Applicant filed a Notice of Appeal and requested for Typed Proceedings 30 minutes after the delivery of the impugned Judgment and filed the current Application immediately and without delay. There could not be any demonstrable delay in the current application.

20. On the furnishing of security, the Learned Counsel submitted that the Applicant in this Application sought inter alia that the Honorable Court be pleased to allow the Applicant to deposit a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) as security for due performance and the Court to hold the same pending determination of the Appeal. However, in the alternative to the above, the Applicant is willing to allow them to hold unto Rent for the next 2 years as security. The said Rent shall be payable upon the conclusion of the Appeal. It is understandable that the Honourable court found that they're tenants and tenant have to pay rent.

21. The Court in the case of:- "Focin Motorcycle Co. Limited – Versus - Ann Wambui Wangui & another [2018] eKLR", stated that:-

"Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of



judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

22. It follows therefore that it was the discretion of the court to determine the security and whether the bank guarantee is sufficient security taking note of the Respondent's Concerns on the bank security as a guarantee.
23. In conclusion, the Learned Counsel submitted that there was sufficient reason to grant the Applicant herein and provide the applicant with room to pursue their right to appeal to the highest possible court with Jurisdiction as the law permits. There's no prejudice to be suffered by the Respondent. Therefore the interest of justice would favour herein the application be granted.

V. Analysis & Determination.

24. I have carefully read and considered the pleadings herein by the 1st Defendant/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
25. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 30th October, 2024 seeking to Stay of Execution of the judgement delivered on 8th October, 2024 pending the hearing and determination of the Appeal is merited?
 - b. Whether the parties herein were entitled to the reliefs sought.
 - c. Who will bear the Costs of Notice of Motion application dated 30th October, 2024.

ISSUE No. a). Whether the Notice of Motion application dated 30th October, 2024 seeking to Stay of Execution of the judgement delivered on 8th October, 2024 pending the hearing and determination of the Appeal is merited

26. Under this Sub – title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Judgement or Decree of the Court. The law concerning stay of execution pending Appeal is found in the provision of Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which stipulates as follows:

“No Appeal or second Appeal shall operate as a stay of execution or proceedings 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 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.

27. It is trite law that stay of execution pending appeal is a discretionary power bestowed upon this court by the law. In the initial stages of building Jurisprudence around this legal aspect, the Court of Appeal in the case of “Butt –Versus- Rent Restriction Tribunal {1982} KLR 417” gave guidance on how a court should exercise the said discretion and held that:
 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.
 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

28. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in the provision of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act*, Cap. 21 or in the interpretation of any of its provisions.

29. The provision of Section 1A (2) of the *Civil Procedure Act*, cap. 21 provides 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” while under the provision of Section 1B some of the aims of the said objectives are:- “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

30. There are three conditions for granting of stay order pending Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which:
 - i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and



- iii. 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.
31. I find issues for determination arising therein namely:
- i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of judgment pending Appeal.
 - ii. What orders this Court should make?
32. The purpose of stay of execution is to preserve the substratum of the case. In the case of “Consolidated Marine – Versus - Nampijja & Another, Civil App.No.93 of 1989 (Nairobi)”, the Court held that:-
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
33. As such, for an applicant to move the court into exercising the said discretion in his favour, the applicant must satisfy the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
34. As for the applicant having to suffer substantial loss, in the case of “Kenya Shell Limited – Versus - Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018” the Court of Appeal pronounced itself to the effect that:
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
35. The Court of Appeal in the case of “Mukuma – Versus - Abuoga (1988) KLR 645” where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
36. The Applicant has a burden to show the substantial loss they are likely to suffer if no stay is ordered. This is in recognition that both parties have rights; the Applicant to the Appeal which includes the prospects that the Appeal will not be rendered nugatory; and the Decree - Holder to the decree which includes full benefits under the decree. The Court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination. {See the case of “Absalom Dora –Versus -Turbo Transporters (2013) (eKLR)”}.
37. As F. Gikonyo J stated in the case of:- “Geoffery Muriungi & another – Versus - John Rukunga M’imonyo suing as Legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR” and which wisdom I am persuaded with: -
- “.....the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as



“substantial loss” within the jurisprudence in the High Court, or “rendering the appeal nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal...”

38. Having established the law and authority as to the grant of stay of execution orders I shall proceed to evaluate if the prayers sought by the Applicant.

ISSUE NO. b). Whether the parties herein were entitled to the reliefs sought

39. Under this sub heading, the Honourable Court now wishes to apply the above legal principles to the instant case. From the proceedings, the Applicant herein filed an application dated 30th October, 2024 seeking orders to stay the execution of the Judgment in this matter delivered by this Honourable Court on 8th October, 2024. According to the applicant, the said Judgment was entered in favour of the Respondent against the Applicant. The 1st Defendant was aggrieved by the whole judgment and has filed a Notice of Appeal dated 8th October, 2024.
40. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly such security as the court orders for the due performance of such decree or order as may ultimately be binding on them has been given by the Applicant.
41. Regarding the pre-requisite conditions evolving from the law is on substantial loss occurring to the Applicant. The court has already deliberated on this aspect and taken into consideration of it from the case of:- “Kenya Shell Limited (Supra)”. From the surrounding facts and inferences of the instant case, I am strongly persuaded that indeed, the 1st Defendant/Applicant has proved that it will suffer substantially if the orders for stay of the execution are not granted as prayed. For that reason, the application should succeed.
42. On the second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the judgment being appealed against was delivered on 8th October, 2024 and the application herein was filed on 30th October, 2024, the Notice of appeal on 8th October, 2024. This application was filed after about twenty two (22) days after the judgment. Clearly, in this Honourable Court’s assessment, the application was made timeously without any delay. Indeed, the application was filed expeditiously and without undue delay.
43. On the last condition as to provision of security, I find that the provision of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules, 2010 stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. Has made no provisions for security in his application.
44. This provision of the law notwithstanding from the face value, this court is not bound by the type of security offered by an applicant. It can make appropriate orders which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.
45. In saying so I seek refuge from the case of “Aron C. Sharma – Versus - Ashana Raikundalia T/A Rairundalia & Co. Advocates” the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment



is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

46. Therefore, in the interest of justice and fairness, it behooved the Applicant herein to furnish security as stipulated by the law. Stay of execution is exactly what it states. It is an order of the court barring a Decree Holder from enjoying the fruits of his Judgment pending the determination of some issue in contention. It matters not whether the issue in contention is the amount awarded in the Judgment Debt, or liability or legality of the extracted warrants as in this case. Where a party seeks to stay execution, the Court must be guided by the parameters set out in the provision of Order 42 Rule 6 of the Rules.
47. The Court observed in the case of:- “Gianfranco Manenthi & Another – Versus - Africa Merchant Assurance Company Limited [2019] eKLR”, thus:-
- “..... 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 decree 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 ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree. (Underlining mine for emphasis)
48. As already demonstrated in the case of “James Wangalwa & Another – Versus - Agnes Naliaka Cheseto (Supra)” the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the Applicant herein, though they brought this Application without undue delay and adequately demonstrated the substantial loss that they would suffer as stipulated by sub-rule 2b.
49. According to the Plaintiff/Respondent the Application failed miserably to satisfy the court that substantial loss may result to the applicant unless the order of stay is granted.
50. In the result, I am persuaded to grant the order for stay of execution of the Judgment but strictly on condition that the Applicant shall furnish security being a reasonable sum equivalent to the



outstanding amounts in contention being a sum of Kenya Shillings Twenty-One Million (Kshs. 21,000,000/-) into a joint interest earning account being half the decretal sum.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 30th October, 2024.

51. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh (2014) eKLR” and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, (2014) eKLR”.
52. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

VI. Conclusion & Disposition

53. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the Preponderance of Probabilities and balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the following orders:-
 - a. That the Notice of Motion application dated 30th October, 2024 be and is hereby found to have merit and hence allowed subject to the fulfilment of the Pre – Conditions stated herein.
 - b. That this Honourable Court do hereby issue an order to stay the execution of its decree arising from the Judgment of this Honorable delivered on 8th October, 2024 pending the hearing and determination of the Intended appeal in the Court of Appeal.
 - c. That an order be and is hereby made directing the 1st Defendant/Applicant to deposit a sum of Kenya Shillings Twenty One Million (Kshs. 21,000, 000/-) as security deposit for the performance of the decree from the Judgement of this Honourable Court in a Joint Escrow bank account of a reputable Commercial bank to be held in the names of the Law firms of Messrs. Taibjee & Bhalla Advocates LLP, S. Ruwa & CO. Advocates and Mutua – Waweru & CO Advocates Within The Next Thirty (30) days from the delivery of this Ruling pending the hearing and determination of the appeal.
 - d. That failure to adhere with the condition under Clause (c) herein above of this Ruling the Notice of Motion application dated 30th October, 2024 shall automatically stand dismissed thereof and execution of the Decree shall ensue procedurally as provided for by law
 - e. That there shall be no orders as to costs.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF MARCH 2025.

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HON. MR. JUSTICE L. L. NAIKUNI,



**ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Clapton Advocate for the 1st Defendant/Applicant.
- c. Mr. Mutua Advocate for the 2nd Defendant.
- d. No appearance for the Plaintiff/ Respondent.

