



**Kamundi & another (Practising as Kinyua Muyaa & Co Advocates)
v South Coast Holdings Limited (Miscellaneous Civil Application
E004 of 2024) [2025] KEELC 5817 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5817 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
MISCELLANEOUS CIVIL APPLICATION E004 OF 2024**

LL NAIKUNI, J

JULY 3, 2025

BETWEEN

F KINYUA KAMUNDI 1ST ADVOCATE

DT MUYAA 2ND ADVOCATE

PRACTISING AS KINYUA MUYAA & CO ADVOCATES

AND

SOUTH COAST HOLDINGS LIMITED CLIENT

RULING

I. Introduction

1. This Honorable Court was tasked to make a determination on the filed Notice of Motion application dated 14th May, 2025 by South Coast Holdings Limited, the Client/Applicant herein (Hereinafter referred to as “The Applicant”). It was brought under the dint of Sections 1A, 3A & 63 (e) of the [Civil Procedure Act](#), Cap. 21 Laws of Kenya, Order 42 Rule 6 and Order 51 Rules (1), (3) of the Civil Procedure Rules, 2010 and all other enabling provisions of the law).
2. While opposing the application, the 1st & 2nd Advocates/Respondents (Hereinafter referred to as “The Respondents”) filed their replies vide a Replying Affidavit dated 23rd May, 2023. The Honourable Court shall be dealing with it indepth at a later stage of this Ruling.

II. The Applicant’s case

3. The Applicant’s sought for the following orders: -



- a. That pending inter - partes hearing of this Application, this Honourable Court be pleased to order a stay of execution of the ruling delivered by this Honorable Court on the 24th of April 2025 in ELC Misc. Civil Application CASE No. E004 OF 2024.
 - b. That pending the hearing and determination of the intended Appeal, this Honourable Court be pleased to order a stay of execution of the ruling delivered by this Honorable Court on the 24th of April 2025 in ELC Misc. Civil Application CASE No.E004 OF 2024.
 - c. That pending the hearing and determination of the intended appeal, this Honourable Court be pleased to stay all further proceedings arising from the ruling delivered on 24th April 2025 in ELC Misc. Civil Application No. E004 of 2024, including the re-taxation of the Advocate/ Client Bill of Costs dated 1st February 2024.
 - d. That pending the hearing and determination of this instant Application and intended appeal, this Honourable Court be pleased to order a refund of the taxed amount of Kshs. 1,173,387.00, which was paid upon the Applicant on 9th September 2024, following the ruling delivered by the Taxing Officer on the 31st July, 2024 in respect to the Advocates and Client Bill of Costs dated 1st February, 2024.
 - e. That cost of this application be provided for.
4. The application was premised on the grounds, testimonial facts and the averments under the 16 Paragraphed supporting affidavit of SULTAN KHIMJI sworn and dated 14th May, 2025 together with three (3) annexures marked as “SK – 1 to 3” annexed thereto. He averred as follows:-
- a. He was the Director of the Client/Applicant well versed in the facts of this matter and therefore competent to swear this Affidavit.
 - b. On 31st of July 2024, the Honourable Deputy Registrar, sitting as the Taxing Officer, rendered a ruling on the Advocate/Applicant’s Bill of Costs dated 1st February 2024, taxing the Bill at a sum of Kenya Shillings One Million One Hundred and Seventy Three Thousand Three Eighty Seven Hundred (Kshs.1,173,387.00/=), and taxing off the sum of Kenya Shillings Thirty Six Million Eight Thirty Thousand Eight Sixty Nine Hundred (Kshs.36,830,869.00), representing more than one-sixth of the total amount claimed.
 - c. Pursuant to the said ruling, the Respondent promptly paid the taxed amount of a sum of Kenya Shillings One Million One Hundred and Seventy Three Thousand Three Eighty Seven Hundred (Kshs. 1,173,387.00/=) to the Advocate/Applicant on 9th September 2024, thereby fully settling the taxed costs.
 - d. Thereafter, the Advocates/Respondents filed a Chamber Summons application dated 16th August 2024 seeking, “inter alia”, enlargement of time to file a Reference, setting aside of the Taxing Officer’s determination, re-assessment of the instruction fees, award of interest at court’s rate, and re-taxation of the Bill of Costs by the Court directly.
 - e. In response, the Client/Respondent filed a Preliminary Objection, Grounds of Opposition, and a Replying Affidavit all dated 1st October 2024 opposing the said application.
 - f. On 24th April 2025, the Honourable Court rendered its ruling, wherein it found that the Taxing Officer erred in principle in determining the value of the subject matter and the instruction fees, and accordingly set aside the ruling on those items. The Court further directed



that the Bill of Costs be remitted to a different Taxing Officer for re-taxation and awarded costs of the application to the Advocates/Respondents.

- g. Being dissatisfied with the said ruling, the Respondent was desirous of preferring an appeal and had filed a Notice of Appeal to notify this Honourable Court of its intention to appeal.
- h. Subsequently, it had also filed a Memorandum of Appeal dated 6th May 2025. Annexed herein and marked as “SK - 1 and 2” were copies of the said documents.
- i. The intended appeal particularly challenged the Court’s failure to take judicial notice of the fact that the taxed amount of a sum of Kenya Shillings One Million One Hundred and Seventy Three Thousand Three Eighty Seven Hundred (Kshs. 1,173,387.00/=) had already been paid in full to the Advocates/Respondents, thereby rendering any further re-taxation unwarranted and unjust.
- j. Had the Honourable Court duly appreciated that the taxed amount had been fully paid, it would not have disturbed the Taxing Officer’s ruling or remitted the matter for re-taxation, thereby occasioning substantial prejudice to the Client/Applicant.
- k. In a further effort to proceed with execution and or re - taxation, the said Respondent herein through their advocates on record had written to the Deputy Registrar vide a letter dated 28th April 2025 requesting that the matter be listed immediately before the Judge, which had heightened the imminent risk of execution or further adverse proceedings. Annexed herein and Marked as “SK -3” was a copy of the said letter.
- l. Unless the orders for stay of execution are granted, there was a real risk that the Advocates/ Applicants may proceed to execute for further sums arising out of the re-taxation, yet the Respondent had already fully satisfied the taxed amount.
- m. Any such sums may not be recoverable from the Advocate/ Respondents, thereby rendering the intended appeal nugatory and -occasioning substantial and irreparable loss to the Respondent.
- n. The matter had been placed for mention before this Honorable Court on 16th June 2025, and there was an imminent risk of the proceedings being continued, including the re taxation process, without consideration of the amounts already paid.
- o. The Client/Applicant herein also sought to stay proceedings of the re-taxation of the Bill of Costs, to preserve and to prevent any further unnecessary financial exposure for the Respondent and to ensure that no further actions were taken pending the determination of the intended appeal.
- p. This Application had been made timeously and in utmost good faith in order to preserve the substratum of the intended appeal and protect the Respondent’s rights pending the hearing and determination of the appeal.

III. The Replying Affidavit by the 1st & 2nd Respondents

- 5. While opposing the Notice of Motion Application dated 14th May,2025, the 1st & 2nd Respondents filed their 26 Paragraphed Replying Affidavit dated 23rd June, 2025 and sworn by F. KINYUA KAMUNDI. He averred as follows:-
 - a). He was an advocate of this Honourable Court practicing as M/s. Kinyua Muyaa & Co. Advocates alongside his partner M/s. D. Muyaa.



- b). They were the Advocates/Applicants on the Advocate/Client Bill of Costs dated 1st December, 2024 whose taxation resulted in the filing of a Reference by their Chamber Summons application dated 16th August, 2024, determined by a Judge of this Honourable Court by Ruling delivered on 24th April, 2025.
- c). He had perused the said application the affidavit in support by the Respondent's Director Mr. Sultan Kimji on 14th May, 2025 along with its annexures and respond as follows.
- d). A Ruling by a Deputy Registrar sitting as Taxing Master in the re-taxation of their Advocate - Client Bill of Costs never conclusively determined the rights of parties on the issue of taxation.
- e). In the said Ruling, the Judge made a finding that there was an error on principle by Taxing Master in the determination of the value of the subject matter and by extension the instruction fees and in the Taxing Officer's failure to award interest.
- f). Resultantly, the Court set aside the Taxing Officer's determination of the value of the subject matter and the instruction fees in paragraphs 1 and 2 on page 3 of the Taxing Officer's Ruling dated 31st July, 2024 and remitted the bill to a different Deputy Registrar / Taxing Master for taxation afresh on the instruction fees, applying interest appropriately as guided in that Ruling while awarding costs to them, securing either party's leave to appeal that decision.
- h). The subject Advocate/Client Bill of Costs had not yet been allocated to another Taxing Master and the bill not having been re-taxed the Respondent's application for stay of execution was premature as no execution for taxed fees could issue at this stage in the proceedings.
- i). Any execution could only issue upon re-taxation of the Advocate/Client Bill of Costs dated 1st February, 2024 and the Respondent would have the occasion to file for stay of execution on a later stage upon re-taxation of the Bill when the threat of execution was real, depending on the outcome of such re-taxation.
- j). The Taxation of Costs was a special jurisdiction reposed only in taxing officers of the Court. It was not reposed in Judges.
- k). This Honourable Court had no jurisdiction to interfere, by way of stay, with the process of re-taxation of their Advocate - Client Bill of Costs dated 1st December, 2024.
- l). The Respondent's application was for this additional reason, premature as this Honourable Court's jurisdiction to order stay only applied upon such re-taxation, in a manner to stay execution of a Decree for Costs hence a Judge of the Environment & Land Court could not at this stage, make an order to prevent the determination of such costs by taxation otherwise the Judge would appear to micromanage the Taxing Master in the exercise of his/her discretion to re-tax the bill within the parameters set by a single Judge of this Honourable Court in the Ruling or the determined Reference.
- m). The taxation of costs would not prejudice the Client/Applicant Respondent as it would have adequate recourse to this Honourable Court by way of a Reference against whichever decision the Taxing Master made.
- n). The Applicant stood to suffer substantial loss at all from the re-taxation of their Advocate/Client Bill of Costs dated 1st February, 2024 as the Taxing Master's exercise of his/her discretion to re-tax the bill shall be confined to the assessment of the value of the subject matter and instruction fees ultimately applying interest appropriately.



- o). In so doing, the Applicant's appeal shall not be rendered nugatory noting particularly that they never went on a reference to a single Judge upon initial taxation of that bill and was estopped from taking up the point that enforcement of Judge's Ruling to re-tax the Bill within lawful parameters would jeopardize its appeal.
- p). The Applicant had failed to demonstrate what substantial loss they were likely to suffer by the re – taxation of the Bill of Costs being a core to the grant of an order for stay pending appeal.
- q). The application for an order for the refund of fees paid to them the sum of Kenya Shillings One Million One Seventy Three Thousand Three Eighty Seven Hundred (Kshs. 1,173,387.00/=) upon initial taxation of their Advocate - Client of Bill of Costs pre the determination of their Reference to a single Judge of this Honourable Court, was equally pre-mature as the Applicant could not at this stage pre-empt the outcome of the re- taxation particularly when the value of the subject matter had to be re-evaluated for purposes of instruction fees and interest ultimately applied to the final award.
- s). It would be inappropriate for this Honourable Court to entertain the issue of a refund given that the re-taxation process was yet to be initiated before another Taxing Master.
- t). Any measure of fees paid to them would be taken into account in the recovery of the taxed costs and the mere fact that some fees were paid to us upon the Taxing Master's initial taxation of our Advocate/Client Bill of Costs, was not real ground to order stay or to even warrant an appeal from the Judge's Ruling on their Reference from such Ruling on taxation.
- u). The Advocates/Respondents were in the Law practice whereby their Law firm made fees from the representation of clients and in the execution of various instructions received in the course of their day to day practice of law. Thus, although the order would be prejudicial to them, but they were capable of refunding fees paid to them upon the initial Ruling on taxation were the appeal to succeed and affect the Judge's findings one way or the other.
- w). Justice delayed is justice denied. Hence, stay would occasion an unnecessary delay in the re-taxation of our Advocate/ Client Bill of Costs leading to immense prejudice upon them. Even this Court would not pre – empt the outcome of the re – taxation.
- x). This Honourable Court had already ordered that this application be determined pre the referral of the Court file before another Deputy Registrar for re- taxation. The Advocate/ Respondent had already suffered a delay in the referral of the file to the Mombasa Environment & Land Court for re-allocation to a different Taxing Master for re-taxation.
- y). The application was contradictory and incompetent. The Client relied on payment of a sum of Kenya Shillings One Million One Seventy Three Thousand Three Eighty Seven Hundred (Kshs. 1,173,387.00/=) in seeking stay of execution while in prayer (5) the Client seeks an order for the refund of that deposit. The Client could not approbate and reprobate.
- z). There was no evidence of filing of the Memorandum of Appeal annexed to the affidavit of Mr. Sultan Khimji. There was no serial number in the alleged appeal.
- aa). Additionally, it was not true that the Advocates/Respondents took over the primary suit from any advocate. They filed the Memorandum of Appearance, the Defence and other documents in the primary suit, ELC No. 171 of 2018 (Mombasa). Those documents and the Court filing Receipts were annexed to the Deponent's affidavit in support of the Bill of Costs.



- ab. It was in the best interest of justice to decline and dismiss the Applicant's Notice of Motion application dated 14th May, 2025 with costs.

IV. Submissions

6. On 26th June, 2025 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 14th May, 2025 be disposed of by way of written submissions. Subsequently, I supposed due to the short duration in between the parties decided to file a list of authorities in lieu of written submissions. Nonetheless, the Honourable Court has relied on while penning down this decision. Thereafter, the Honourable Court reserved a Ruling date of 3rd July, 2025 accordingly.

A. The Submissions by the Applicant.

7. As indicated above, the Applicant through the Law firm of M/s. Anne Wamithi Advocates filed a List of authorities dated 30th June, 2025. The Honourable Court has had ample opportunity to critically assess and considered them while making this decision. These were:-



Case Citation	Legal Issue	Rationale
1. Ouandji v Bank of India & 2 Others [2022] KEHC 112	Stay of taxation pending appeal	Taxation would render appeal nugatory; risk of execution was real and imminent.
2. Mugambi & Co Advocates v Kiama Wangai [2022] KEHC 13414	Stay of taxation proceedings	Discretion used by Taxing Officer not to be easily overturned; court emphasized risk of prejudice if taxation proceeds before appeal
3. Harvway Ltd V Commissioner of Domestic Taxes [2023] KEHC 1629	Stay pending tax appeal	Substantial loss includes forced payment on a disputed sum; appeal was arguable
4. James Wangalwa & Another v Agnes Cheseto [2012] eKLR	General stay under Order 42 Rule 6	Rationale Defined "substantial loss" as something that would render appeal nugatory; still the leading authority
5. Trust Bank Ltd v Ajay Shah & 9 Others [2013] eKLR	Stay of execution	Confirmed that once appeal is arguable and enforcement threatens appeal's success, court should grant stay.
6. Access Bank Kenya PLC v Mengich & another (Civil Appeal E003 of 2024) [2024] KEHC 5682 (KLR) (22 May 2024) (Ruling)	Stay of Proceedings	<p>The Honourable Court outlined strict criteria for granting stays of proceedings pending interlocutory appeals:</p> <ol style="list-style-type: none"> i. The appeal must raise substantial or arguable questions; ii. The appeal would be rendered nugatory if proceedings continue; iii. There must be exceptional circumstances justifying the stay; <p>There should be no undue delay in applying.</p> <p>It emphasized that stays are "rare and exceptional" to avoid piecemeal appeals and undue delay.</p>



<p>7. RWW VS EKW [2019] KEHC 6523 9KLR</p>	<p>Stay of Execution</p>	<p>No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.</p> <p>The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question.</p> <p>The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus: "...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."</p>
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B. The Submissions by the Advocates/Respondents

8. Likewise, the Advocates/Respondents through the Law firm of Kinyua Muyaa and Company Advocates filed a List of authorities dated 23rd June, 2025. Equally, the Honourable Court has had ample opportunity to critically assess and considered them while making this decision. These were as follows:-



- a. Premier Bag & Cordage Limited – Versus - National Irrigation Board [2012] KEHC 5896 (KLR). It was for the position that a Judge has no jurisdiction to stay the taxation or re-taxation of a Bill of Costs, a matter within the Taxing Master's Power to tax or re-tax, that one must meet certain grounds to succeed on an application for stay pending appeal.
 - b. Galaxy Auctioneers – Versus - E.N Ng'ng'a & Co. Advocates & National Irrigation Board [2004] eKLR. This was on the position that a Judge's order for taxation or re-taxation of a Bill never granted a Taxing Master power to conclusively determine the rights of parties. A Party aggrieved by a Taxing Master's findings upon taxation or re-taxation could always exercise the recourse set in law to proceed on a Reference and a subsequent appeal as the case may be.
 - c. Kenya Wildlife Service – Versus - James Mutembei [2019 KEHC 10478]. For the proposition that "stay of proceedings is a grave judicial action which seriously interferes with the rights of a litigant to conduct its litigation. It infringed on the right of access to justice, rights to be heard without delay and overall, right to a fair trial therefore the test for stay of proceedings was high and stringent.
9. The Learned Counsel referred Court to the provision of Articles 25 (c), 48, 50 (1) of *the Constitution* of Kenya that guarantee the right to a fair trial, access to justice and the right to fair hearing as well as Article 59(2)(b) of *the Constitution* that justice shall not be delayed.

V. Analysis & Determination.

10. I have carefully read and considered the pleadings herein by the Applicants and Respondent, the myriad of authorities cited herein by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
11. 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. What are legal parameters governing the grant of Stay of execution?
 - b. Whether the Notice of Motion application dated 14th May, 2025 seeking to stay execution of the of the order of this Honourable Court issued on the 24th April 2025 in ELC Misc. Civil Application Case No. E004 of 2024 by this Honourable Court pending the hearing and determination of the Appeal is merited?
 - c. Who will bear the Costs of Notice of Motion application dated 14th May, 2025.

Issue No. a). What are legal parameters governing the grant of Stay of execution?

12. Under this Sub – title, the main gist of the matter is on whether or not to grant Stay of Execution from a delivered Ruling or Order 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.

13. The purpose for the stay of execution was well spelt out in the case of “RWW – Versus - EKW [2019] eKLR”, the Court opined:-

“...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 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 (Supra) 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.”

14. 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.



15. 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.”
16. 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.
17. 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
18. 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”.
19. This principle was enunciated in the decision of Gikonyo J. in the case of:- “Absalom Dova – Versus - Tarbo Transporters (2013) eKLR, where he stated:
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights: the Appellant to his 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...”



Substantial loss.

20. The case of “Tropical Commodities Suppliers Ltd & Others – Versus - International Credit Bank Ltd (in liquidation) [2004] 2 EA 331” where Ogolla J, stated that:-

“...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...”

21. 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.

22. 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.”

23. 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.”

24. 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)”}.

25. 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...”

Unreasonable delay.

37. That the application has been made without undue delay. The case of “Maitai – Versus - Silas (Suing as the personal representative of the Estate of Douglas Muchui - Deceased) (Miscellaneous Civil



Application E047 of 2024) [2024] KEHC 5846 (KLR) (23 May 2024) (Ruling) where Edward M. Muriithi J upon finding an application for stay of execution pending appeal meritorious held that:-

“.....12.The Court has already found above that the delay in the matter was for a period of 5 months which cannot be termed as manifestly unreasonable...”

Security for costs.

26. Finally, the applicant has given security or is ready to give security for due performance of the decree. In the case of:- “Samvir Trustee Limited – Versus -Guardian Bank Limited [2007] eKLR” in that:-

“.....the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment...”

Issue NO. b). Whether the Notice of Motion application dated 14th May, 2025 seeking to stay execution of the of the decree of this Honourable Court issued on the 24th April, 2025 in ELC Misc. Civil Application Case No. E004 of 2024 by this Honourable Court pending the hearing and determination of the Appeal is merited?

27. Under this sub heading, the Honourable Court now wishes to apply the above legal principles to the instant case. From the proceedings, the Client/Applicant herein filed an application dated 14th May, 2025 seeking orders to stay the Ruling in this matter delivered by this Honourable Court on 24th April, 2025. According to the Applicants, on 31st July, 2024 the Taxing Master made a taxation decision onto the Advocates/Respondents Bill of Costs assessing instruction fees at a sum of Kenya Shillings Five Hundred and Ninety Thousand (Kshs. 590, 000.00/-) instead of a sum of Kenya Shillings Twelve Million Seven Eighty Five Thousand Eight Eighty Hundred (Kshs. 12, 785, 880/-) according to them and which was a violation of Paragraph 4 of the Advocates Remuneration Order (ARO) on undercutting. Being aggrieved by the said decision and mainly on the issue of the instruction and getting up fees, the Respondents herein made a Reference before the Judge of this Court this Court delivered a Ruling causing the taxation matter to a Re – taxation before any other taxing Master away from the one who had made this determination. Pursuant to that, the Client/Applicant was aggrieved by the whole Ruling and has preferred an appeal at the Court of Appeal through a Notice of Appeal dated 29th April, 2025 and filed on 30th April, 2025 and a Memorandum of Appeal dated 8th May, 2025 and filed on 15th may, 2025. They are all marked as “SK – 1 & 2” of their annexures thereof.

28. 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 Applicants.

29. Regarding the pre-requisite conditions evolving from the law is on substantial loss occurring to the Appellants. 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 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.

30. On the second issue to determine is where the application for stay of execution was made without inordinate delay. From the record, the Ruling being appealed against was delivered on 24th April, 2025



and the application herein was filed on 14th May, 2025, the Notice of appeal on 29th April, 2025 and the Memorandum of Appeal dated 8th may, 2025. Clearly, in this Honourable Court's assessment, the application was made timeously and expeditiously after the Ruling was delivered. It was with undue delay.

31. On the last condition as to provision of security, I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules 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. I have noted that the Applicant - both on the face of the application and in the supporting affidavit – never mentioned at all - let alone show any willingness to deposit - any form of security such as a bank guarantee or proposal to deposit at least part of the damages in court or in an interest-earning bank account in the joint names of the advocates herein pending the hearing and determination of the appeal. The High Court in the case of:- “Gianfranco Manenthi & Another (Supra) held inter alia:

“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 a 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 o(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 Judgement in case the appeal falls.

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 judgment involves a money decree.”

32. The Court of Appeal in the case of:- “Nduhiu Gitahi – Versus - Warugongo [1988]KLR 621; 1 KAR 100; [1988-92] 2 KAR 100...expressed itself as follows:-

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where Judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the Defendant while giving no legitimate advantage to the Plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the Plaintiffs are secured in one way rather than another. It would be easier for the Defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and I that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the Defendant



because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

33. Further, the High Court in the case of “Nzyuko – Versus - Matheka (Civil Appeal E061 of 2023)[2023] KEHC 23844 (KLR)” held, inter alia:

“ 24. The third principle that the court must establish is whether failure to grant stay of execution the Applicant is likely to suffer substantial loss. In the case of James Wangalwa & Another – Versus - Agnes Naliaka Cheseto [2012] eKLR, where it was held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal.”

34. In a very recent ruling (March, 2024), the High Court in “Guardian Coach – Versus - Mutai (Suing as the Legal Representatives of the Estate of Nickson Kiprotich Mutai) (Civil Appeal E057 of 2023) [2024] KEHC 2779 held inter alia:-

“ 18. Similarly, the Court of Appeal in Caneland Limited Malkit Singhpandhal & another – Versus - Delphis Bank Limited (2000) eKLR held:

“We now turn to apply these principles to the facts of the present case. Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits or otherwise that the respondent will be unable to refund to the defendants any sums of money paid in satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue....”

20. Based on the evidence before me, it is my finding that the Applicant has not proved the substantial loss that it would suffer. Therefore, he failed to prove the first condition for the grant of stay of execution.

28. This principle was enunciated in the decision of Gikonyo J. in Absalom Dova – Versus - Tarbo Transporters (2013) eKLR, where he stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights: the Appellant to his 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...”



35. 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.
36. 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.”
37. 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.
38. 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.
39. In the result, I am persuaded to grant the order for stay of execution but strictly on condition that the Applicants shall furnish security being a reasonable sum equivalent to half of the outstanding amount in contention being a sum of Kenya Shillings Twelve Million Seven Eighty Five Thousand Eight Eighty Hundred (Kshs. 12, 785, 880.00/=) ideally amounting at a sum of Kenya Shillings Five Eighty Six Million Three Ninety Two Thousand Nine Fourty Hundred (Kshs. 6, 392, 940/-). Be that as it may, the Honourable Court applying the principles of natural Justice, Equity and Conscience and without prejudice to the anticipated Re – taxation proceedings and outcome before the Taxing Master strongly feels that a sum of Kenya Shillings Three Million Five Hundred (Kshs. 3, 500, 000/=) should be a fair sum to be deposited into a joint escrow account of a reputable Commercial institution to be held by both the Advocates for the Client/Applicant and the Advocates/Respondents.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 24th May, 2025.

40. 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”.



41. 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

42. Ultimately, the Honorable Court having caused an indepth and expansive analysis of the framed issues herein and having regard to the Principles of Preponderance of Probabilities and balance of convenience, I proceed to make the following orders:-

- a. That the Notice of Motion application dated 14th May, 2025 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 Order arising from the Ruling of this Honorable delivered on 24th April, 2025 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 Applicant to deposit a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3, 500, 000/-) as security deposit for the performance of the Order from the afore stated Ruling 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. Anne Wamithi & Company Advocates and the Messrs. Kinyua Muyaa & Company Advocates within the next fourty five (45) days from the delivery of this Ruling pending the hearing and determination of the appeal.
- d. That pursuant to this orders, the direction that the matter be referred to the Taxing Master at Mombasa on 9th July, 2025 be and is hereby deferred awaiting further direction during the mention of this matter on 13th October, 2025 when the Court will be informed of the progress made and further orders.
- e. That failure to adhere with the condition under Clause (c) herein above of this Ruling the Notice of Motion application dated 14th May, 2025 shall automatically stand dismissed thereof and execution of the Order shall ensue procedurally as provided for by law.
- f. 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 3RD DAY OF JULY 2025.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT
KWALE**

Ruling delivered in the presence of:

- a. M/s. Daniel Disii, the Court Assistant.
- b. M/s. Nyagah Advocate for the Client/Applicant.



c. Mr. Kinyua Kamundia Advocate for 1st & 2nd Advocates/Respondents.

