



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kibango v Skyline Sacco Ltd (Civil Appeal E261 of 2021)  
[2025] KEHC 3379 (KLR) (19 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3379 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E261 OF 2021  
SM MOHOCHI, J  
MARCH 19, 2025**

**BETWEEN**

**PHONECE C. M. KIBANGO ..... APPLICANT**

**AND**

**SKYLINE SACCO LTD ..... RESPONDENT**

**RULING**

1. The Applicant in the Notice of Motion Application dated 23<sup>rd</sup> August, 2024 brought under Order 42 Rule 6 (1), and Order 51 Rule 1 & 10 of the Civil Procedure Rules, Sections 1A, 1B and 3A, of the Civil Procedure Act and Article 159 (2) (d) of the Constitution seeks:
  - i. Spent
  - ii. Spent
  - iii. That the Honourable Court be pleased to issue an interim stay of proceedings and/or execution of the Ruling and or decree of the Honourable Court dated 8<sup>th</sup> September, 2023 in Nakuru CMCC No. E781 of 2022 Phonece C. M. Kibango versus Skyline Sacco Ltd, and all consequential orders pending the hearing and determination of the Appeal herein.
  - iv. That the costs of the Appeal be borne by the Respondent.
2. The Application is premised on the grounds on its face and the annexed supporting affidavit sworn by the Applicant on the same date.

**Applicant's Case**

3. The Applicant averred that, she filed a suit against the Respondent and the Court on 8<sup>th</sup> September, 2023 delivered a Ruling in favour of Respondent. That she was aggrieved by the said Ruling and appealed against it. That the appeal raises substantial issues of law and fact and they are apprehensive



that the Respondent may start the process of execution of the erroneous ruling at any time as communication in their letter of intent dated 12<sup>th</sup> August, 2024.

4. That unless stay of proceedings is issued, the Respondent may proceed with execution rendering the appeal nugatory and causing the her to suffer irreparable harm. She is apprehensive that, if execution proceeds, she will not be able to recover the subject-matter of the ruling even if the appeal succeeds. That she is ready and willing to provide such security as the Court may deem fit. That the Application has been made without unreasonable delay.

### **Respondent's Case**

5. The Application was opposed by the Respondent's Replying Affidavit sworn on 2<sup>nd</sup> October, 2024 by one Allan Mitei the Chief Executive Officer of the Respondent. He averred that the application is misguided and an abuse of the Court process.
6. He argued that, the Applicant has not demonstrated that she stands to suffer any substantial loss as a result of a lawful execution process. That the Application was filed after an inordinate delay of which the huge period demonstrates that the Application is an afterthought aimed at preventing the Respondent from enjoying fruits of judgement
7. He argued that the Applicant should have proposed to deposit the decretal amount of Kshs. 130,950 as security to demonstrate willingness to put up security.

### **Applicant's Submissions**

8. As whether the Applicant has met the threshold discussed under the principles enshrined under Order 42 Rule 6 of the Civil Procedure Rule, on the purpose of stay of execution reliance was placed in Consolidated Marine vs Nampijja & Another Civil Appeal No. 93 of 1989.
9. Pertaining substantial loss, the Applicant relied in Kenya Shell Limited v Kibiru & Another [1986] KLR 410 to submit that if stay is not granted the Respondent may proceed with execution, the appeal will be rendered nugatory and cause irreparable harm. But if the appeal is upheld it would reverse the lower court's ruling thereby rendering enforcement of the judgment inequitable. That she moved to Court to secure release of her cows that were seized by the Respondent which was her only source of income.
10. On undue delay, it was submitted that the appeal was filed within the statutory period and the Application was filed upon filing the record of appeal promptly demonstrating genuine desire to challenge the judgment of the Court.
11. As regards security, the Applicant relied on the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR) to submit willingness to abide by any such order that the Court gives is proof of good faith and commitment
12. That the Appeal discloses chances of success based on the grounds of appeal and enforcement action prior to judgement would not be in the interest of Justice thereby negating the overriding objectives in such decisions.

### **Respondent's Submissions**

13. The Respondent relied on the case of Tabro Transporters Ltd vs Absalom Dova Lumbasi [2012] eKLR to submit that, all the conditions under Order 42 Rule 6 of the Civil Procedure Rules must be present to satisfy the Court that the applicant is deserving of the orders sought.



14. It was argued that the Applicant has not demonstrated that she stands to suffer substantial loss but actively avoiding a lawful process of a legally binding order. That the Respondent is a strong institution with strong reserves and therefore has the ability to refund the Appellant should the appeal succeed.
15. On the issue of unreasonable delay, the Applicant relied on the case of *M’Ndaka Mbiuki v James Mbaaba Mugwiria* [2010] eKLR to submit that the Applicant’s delay was for over 300 days after ruling was delivered which was undue and unreasonable. That the Applicant was engaging in delaying tactics and allowing the same would be a travesty of justice as no justification has been given.
16. On security, the Respondent prayed that the Court is persuaded by the finding in *Gianfranco Manenthi & Another v Africa Merchant Assurance Company* [2019] eKLR that the issue of deposit of security is not a matter of willingness by the applicant but for the Court to decide. It was argued that the Applicant merely alluded to but did not concretely demonstrate any willingness to put up any such security.
17. The Respondent also submitted that the conduct of the Applicant does not entitle her to the prayers sought and that litigation must come to an end.

### **Analysis and Determination**

18. Having considered that Application, the affidavits and arguments for and against the same.
19. Prayer No. 3 seeks which is the substratum of this appeal “an interim stay of proceedings and/or execution of the Ruling”. It is not clear which proceeding are being stayed since the matter in the lower Court was concluded.
20. The other issue that arises from this prayer is that the Applicant seeks “...an interim stay of execution of the Ruling and all consequential orders...” The Ruling dismissed the Applicant’s suit and therefore, the only issue which arise for determination is whether this Court should grant stay of execution of the consequential orders arising from the Ruling of the Court delivered on 8<sup>th</sup> September, 2023.
21. The background of this Application is that, the Applicant filed CMCC No E781 of 2022 against the Respondent. the Respondent filed a Preliminary Objection citing the Court lacked jurisdiction to entertain the matter and sought that, it be struck-out for the reason that is surrounded issues relating to Sacco business. The Court on 8<sup>th</sup> September, 2023 upheld the Preliminary objection. The Respondent initiated execution proceedings prompting the Applicant to file the instant application for stay.
22. The rationale for grant of Stay of Execution is provided under Order 42 Rule 6 (2) of the Civil Procedure Rules as follows;
  - “(2) No order for stay of execution shall be made under subrule (1) unless-
    - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
    - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
23. The above provision requires the Applicant to establish that she, has brought the application within reasonable time and without undue delay, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree.



## Undue Delay

24. As to whether the Application has been filed without undue delay, the Ruling was delivered on 8<sup>th</sup> September, 2023. The Memorandum of Appeal was filed on 21<sup>st</sup> September, 2023, well within a month. The Application was however filed on 23<sup>rd</sup> August, 2024 after the Record of Appeal which was filed on 19<sup>th</sup> August, 2024. The Application for stay was filed 11 months later. The reason for the delay has not been explained. This Court thus finds that the appeal was filed without undue delay but the application for stay of execution has been filed with undue and unreasonable delay.

## Substantial Loss

25. The Applicant claims that is likely to suffer irreparable harm as the Respondent will commence execution thus rendering the appeal nugatory. On whether the Applicant has demonstrated the substantial loss she is likely to suffer, in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR) the Court expressed itself as hereunder:-

“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 nugatory.”

26. Similarly, in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR) the Court held that:

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

27. Guided by the above decision and looking at the Ruling the Court, the Court agreed with the Respondent and downed its tools for want of jurisdiction. The stay is basically to restrain the Respondent from executing costs of the suit as evidenced in the certificate of costs dated 5<sup>th</sup> October, 2023. The general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement unless where exceptional circumstances have been aptly demonstrated.
28. If the Applicant had not stated its intention to institute execution proceedings in its letter dated 12<sup>th</sup> August, 2024 the Applicant would not have sought stay of execution. The threat of instituting a legal process does not in itself count as substantial loss. Execution is a legal process and the Applicant has also not demonstrated how the proceeding with execution will render the appeal nugatory. The substratum of the appeal is not on the costs being sought by the Respondent. The Applicant has also not explained what loss, if any, she stands to suffer if the stay is not granted.



29. The Respondent has submitted that it is an institution of means with capacity to refund the decretal amount should the Appeal succeed. Proceeding with execution is exercising a right and such an exercise cannot be stayed unless good reasons are given by the Applicant. In my considered view the Applicant has failed to demonstrate the loss likely to be suffered should the Court fail to grant stay of execution.

### Security of Costs

30. The Applicant stated and submitted that she was ready to abide by any conditions that may be imposed by Court. The Respondent on the other hand submitted that the merely alluding does not concretely show willing to put up security. The Respondent also averred that it was in a position to refund the amount sought should the appeal be successful.

31. Court in the case of *Matata & another v Rono & another (Civil Appeal E034 of 2024)* [2024] KEHC 2799 (KLR) observed that: -

“The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he were eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.

32. In the exercise of discretion, the Court in weighing the consequences of granting or not granting the stay the Court should place the parties on an equal footing in order to ensure that the Appeal is not rendered nugatory and further which risk is higher than the other in making a determination on which party stand at a higher risk.

33. In the case of *Arun C, Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates* [2014] KEHC 2430 (KLR) the Court stated: -

“...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. The alternative security being offered presents several problems. The first one-the security is owned by another person. This is a civil suit where the Applicants are judgment-debtors. But, the Applicants seem to have borrowed from the criminal procedures where a person stands surety for the attendance of another in court. Civil process is quite different because, in a 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 the 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...”

34. As the issue of security is discretionary and having considered the arguments by the Applicant and proposal I note that the Applicant has not offered any terms of security but has proposed to abide by the directions of the Court regarding security. Although it is better if a party offers security, it being a matter of discretion, the Court can still decline to accept the terms offered.

35. It is however sufficient to state willingness to abide by the Court’s decision regarding conditions of security to be given by which demonstrates that the Applicant is ready to provide security when called upon to as an act of good faith.



36. Having stated the foregoing, it is my considered view that the Applicant has failed to satisfy the conditions to warrant issuing a stay of execution pending appeal as set out in Order 42 Rule 6 of the Civil Procedure Rules.

37. I therefore find no merit in this application which I hereby dismiss with costs to the Respondent.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 19<sup>TH</sup> DAY OF MARCH 2025.**

**MOHOCHI S. M.**

**JUDGE**

