



Vipingo Ridge Limited v Agro Processors International Limited (Civil Appeal E333 of 2024) [2025] KEHC 3576 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E333 OF 2024**

**J NGAAH, J
MARCH 21, 2025**

BETWEEN

VIPINGO RIDGE LIMITED APPELLANT

AND

AGRO PROCESSORS INTERNATIONAL LIMITED RESPONDENT

RULING

1. The application before court is a motion dated 4 October 2024 expressed to be filed under order 42 Rule 6; order 51 of the Civil Procedure Rules, 2010; sections 1A, 18, 3, 3A, 63 (e) of the [Civil Procedure Act](#), cap.21. Besides the prayers for certification of the application as urgent and for the order on costs, the only other substantive prayers in the application are as follows:
 2. The Honourable Court be pleased to order stay of execution of the Judgment and Decree in Mombasa CMCC E2045 OF 2021 pending the hearing and determination of this Application, inter partes.
 3. The Honourable Court be pleased to order a further stay of execution of the Judgment and Decree in Mombasa CMCC E2045 OF 2021 pending the hearing and determination of this Appeal already lodged and pending between the parties.”
2. The application is supported by the affidavit of Geoffrey Kilonzo who has sworn that he is the learned counsel for the applicant. In his affidavit Mr. Kilonzo has sworn that the judgment appealed against was delivered on 5 September 2024. The applicant, being aggrieved by the said judgment and decree, filed an appeal which, in the applicant’s view, has high chances of success.
3. The applicant fears that the respondent may execute the judgment and, unless execution is stayed, the appeal will be rendered nugatory. In particular, if the decretal sum of Kshs. 6,237,910 which the applicant considers substantial, was to be paid to the respondent, the applicant shall suffer substantial



loss, assuming the appeal succeeds and the applicant is unable to recover the amount from the respondent.

4. As long as stay of execution is granted, Mr. Kilonzo has sworn that the applicant is willing to abide by any court orders with respect to security, apparently, for the performance of the decree. Further, the application has been made without delay.
5. Ms. Mary Karimi, the learned counsel for the respondent, swore a replying affidavit opposing the application. According to counsel, on 5 September, 2024, the trial court delivered a judgment in which the applicant was held to have been solely liable for the road traffic accident out of which the claim arose, and according to which an award of Kshs. 6,237,360.00/= as special damages, was made. So far, no decree has been extracted for execution.
6. Ms. Karimi has opposed grant of stay of execution for the reason that the applicant has not satisfied the conditions for such a stay. Nonetheless, should the court allow the stay of execution, the applicant ought to deposit the security for the performance of the decree in a joint account, no doubt, of the respective parties' representatives.
7. The submissions filed by the respective parties in support of and in opposition to the application are consistent with the depositions made in their respective affidavits. I gather from these affidavits that the parties appear to agree that stay of execution could be granted on condition that the applicant provides security for the performance of the decree.
8. Provision of security is, of course, only one of the conditions the court will consider, in exercising its discretion to stay execution of a decree or order pending appeal. As the court of appeal held in *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR), the ultimate goal is to ensure that if the appeal is not frivolous, it is not rendered nugatory. A passage from the leading judgment of Madan, J.A. is instructive in this regard. The learned judge held as follows:

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

Megarry J, as he then was, followed *Wilson* (supra) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in *the Attorney General v Emerson and Others* 24 QBD (1889) 56 at p 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal.



Proceeding on this narrow basis, that is to prevent the appeal, if successful, from being nugatory, I would grant the stay asked for pending determination of the appeal by this court against the decision dated January 9, 1979 but upon terms, as authorised by the provisions of Order XLI rule 4(2)(b), that the applicant will deposit in court within thirty days the sum of Kshs 60,000 as security for the due performance of such decree or order as may ultimately be binding upon him, failing which the stay shall lapse without a further order of this court being necessary. I would order the costs of this application to be costs in the appeal.”

9. While highlighting the applicant’s submissions, its learned counsel urged that the appeal is not frivolous and it is, instead, arguable because while the applicant was held to be solely responsible for the road traffic accident out of which the claim arose, the respondent had admitted liability in a separate case, in particular, Kilifi Chief Magistrates Civil Case No. E521 of 2019, arising from the same accident.
10. A copy of the judgment in the case appealed against or in the case in Kilifi court has not been exhibited to the affidavit in support of the application. Accordingly, it is difficult to tell from the material before court the circumstances under which there could have been inconsistency in apportionment of liability in two different cases arising from the same accident.
11. If, the apportionment of liability was between, say, passengers and the owners of the respective vehicles involved in a collision, it is possible that, in those circumstances, the owners of the vehicles involved would be held 100% liable. If, on the other hand, the apportionment of liability was on which, of the vehicles involved in the accident, was responsible for the accident, there is a strong case for consistency in apportionment of liability in all the claims arising from the traffic accident.
12. As noted, I have not had the benefit of reading the judgment in any of the claims arising out of the accident in issue, including the impugned judgment in this appeal; however, assuming the applicant’s case falls in the latter category of circumstances, I would agree that its appeal is not frivolous.
13. For this reason and, taking cue from Madan JA, in *Butt v Rent Restriction Tribunal* (supra), I will allow the applicant’s application only to the extent that stay of execution is granted on condition that the decretal sum is deposited in an interest earning bank account in the joint names of the advocates for the appellant/applicant and the respondent within thirty days of the date of this order in default, execution to proceed. Costs of the application shall abide the outcome of the appeal. Orders accordingly.

SIGNED, DATED AND DELIVERED ON 21 MARCH 2025

NGAAH JAIRUS

JUDGE

