



**Bhatti Panel Beaters Limited v Ngingo (Civil Appeal 584 of 2018)
[2025] KEHC 6192 (KLR) (Civ) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 6192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 584 OF 2018

TW CHERERE, J

APRIL 8, 2025

BETWEEN

BHATTI PANEL BEATERS LIMITED APPELLANT

AND

MUCHANGI NDUATI NGINGO RESPONDENT

RULING

Introduction

1. By a judgment dated 13th November 2018, in Milimani CMCC No. 1352 of 2016, the trial court dismissed both the Appellant's claim and the Respondents' counterclaim with costs.
2. Aggrieved by the decision, the Appellant filed this appeal, which was allowed by this Court in a judgment delivered on 20th December 2019, with costs awarded to the Appellant at both the trial and appellate courts.
3. Several years passed during which the Respondents failed to satisfy the judgment, and the Appellant was unable to execute the decree.
4. By a Notice of Motion dated 27th February 2025, brought under Article 50 of *the Constitution*, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, and Order 42 Rule 6 of the Civil Procedure Rules, the 2nd Respondent seeks:
 1. A stay of execution of the judgment and decree dated 15th May 2024, which gave effect to the appellate judgment of 20th December 2019;
 2. Setting aside of warrants of attachment issued on 15th May 2024.



5. The 2nd Respondent's affidavit sworn on 25th February 2025 and the grounds on the face of the motion assert that:
 1. He is dissatisfied with the appellate judgment;
 2. He intends to appeal;
 3. Delay in filing the appeal was occasioned by the COVID-19 pandemic;
 4. He has been unable to obtain proceedings and the judgment.
6. In support, the 2nd Respondent annexed four letters dated 07th January 2020, 11th November 2022, 22nd June 2023, and 27th June 2024 seeking certified copies of proceedings and the judgment. Also annexed is a Notice of Appeal filed on 16th January 2020.
7. The 2nd Respondent submitted that the appeal would be rendered nugatory in the absence of stay, citing *Halai & Another v Thornton & Turpin (1963) Ltd [1990] eKLR*. To establish that substantial loss would result if the stay is not granted, the 2nd Respondent relied on *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR*. In support of the contention that the intended appeal is arguable, reference was made to *Commissioner of Customs & 2 Others v Amit Ashok Doshi & 2 Others [2007] KECA 34 (KLR)*. Regarding the offer to furnish security, reliance was placed on *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd [2019] KEHC 7586 (KLR)*.
8. The Appellant opposed the application by Grounds of Opposition dated 25th March 2025, arguing:
 1. The application is an abuse of court process;
 2. Execution of a lawful judgment cannot violate constitutional rights;
 3. The application is designed to deny the Appellant the fruits of its judgment;
 4. There is no pending appeal;
 5. The application was filed after inordinate and unexplained delay;
 6. Litigation must come to an end.

Issues for Determination

9. The main issues are:
 1. Whether the 2nd Respondent has met the threshold for stay under Order 42 Rule 6(2);
 2. Whether the delay in pursuing the intended appeal affects the viability of the stay application

Analysis and determination

Whether the 2nd Respondent has met the threshold for stay under Order 42 Rule 6 of the Civil Procedure Rules

10. Under Order 42 Rule 6(2), an applicant must demonstrate:
 1. That the application was made without unreasonable delay;
 2. That substantial loss may result unless the order is made;



3. That such security as the court orders has been given.
11. The impugned judgment was delivered on 20th December 2019, yet the application for stay was filed over five years later, on 27th February 2025.
12. The 2nd Respondent attributes the delay to the onset of the COVID-19 pandemic and difficulty in obtaining proceedings. However, this explanation is unpersuasive for the reasons that following the onset of the pandemic, courts transitioned to virtual hearings and electronic filing systems, enabling parties to file and prosecute matters remotely. There is no doubt that numerous filings, applications, and appeals were actively prosecuted during this period.
13. The Court in *Kenya Power & Lighting Co. Ltd v Benzene Holdings Ltd (t/a Wyco Paints)* [2016] eKLR held that:

“An unexplained or inordinate delay in seeking relief will render an application for stay of execution incompetent even where other requirements have been met.”
14. Similarly, in *Portreitz Maternity v James Karanga Kabia* [1991] KLR 361, the Court of Appeal emphasized that:

“Delay defeats equity and a party who seeks the court’s discretion must act timeously and with candour.”
15. Consequently, I find that the 2nd Respondent has not provided a credible explanation as to why he failed to take any steps, including follow-ups, filing for extension of time, or seeking directions, in the intervening years.
16. In addressing the requirement to demonstrate substantial loss when seeking a stay of execution, the Court of Appeal has consistently emphasized that mere assertions are insufficient and concrete evidence is necessary. In *Kenya Power & Lighting Company Limited v. Ganjoni Towers Limited* [2024] eKLR, the court reinforced the position that to justify a stay of execution, an applicant must provide tangible and specific evidence of substantial loss, rather than relying on general or unsubstantiated claims.
17. The 2nd Respondent submitted that the intended appeal would be rendered nugatory if stay is not granted, citing *Halai & Another v Thornton & Turpin (1963) Ltd* [1990] eKLR. He further relied on *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR to demonstrate the requirement of substantial loss. However, no specific prejudice or hardship has been identified, nor has 2nd Respondent explained how the execution of a lawful decree, arising from a judgment delivered over five years ago, would occasion such loss. As emphasized by courts, substantial loss must be demonstrated with concrete and evidentiary backing, not mere apprehension or dissatisfaction with the outcome of litigation.
18. Notwithstanding the 2nd Respondent’s stated willingness to furnish security, no formal security has been offered or deposited. An undertaking, without more, does not meet the requirement under Order 42 Rule 6(2)(b).



19. The Court of Appeal in *Nduhiu Gitahi & Another v Anna Wambui Warugongo* [1988] eKLR held:

“The process of giving security is one which arises constantly... The security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant.”
20. Similarly, in *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] KEHC 7586 (KLR), the Court emphasized that:

“The applicant must demonstrate willingness and capacity to furnish security. The court cannot act in a vacuum.”
21. The Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (*supra*) emphasized:

“The discretionary relief of stay pending appeal will only be granted when the applicant brings himself within the ambit of the conditions set out in Order 42 Rule 6.”
22. In the Court’s view, a mere undertaking, without any corresponding provision of actual security, falls short of satisfying the requirement under Order 42 Rule 6(2)(b). The obligation is not discharged by a general promise to pay but requires concrete and enforceable measures to secure the due performance of the decree.

Whether the delay in pursuing the intended appeal affects the viability of the stay application

23. On whether the intended appeal is arguable, the 2nd Respondent cited *Commissioner of Customs & 2 Others v Amit Ashok Doshi & 2 Others* [2007] KECA 34 (KLR), where the Court of Appeal stated that an arguable appeal is not necessarily one that must succeed but one worth consideration. That may well be true, but without any indication that the appeal has been filed or pursued, that argument is largely academic.
24. Under Rule 84 of the Court of Appeal Rules (formerly Rule 82), an appeal must be instituted within 60 days of filing the notice of appeal. The Court of Appeal in *Equity Bank Ltd v West Link MBO Ltd* [2013] eKLR stated:

“It is not enough for a party to simply file a notice of appeal and then do nothing. He must demonstrate that he has taken active steps to pursue the appeal.”
25. Without delving into the merits of the intended appeal, this Court observes that a Notice of Appeal was filed on 16th January 2020. There is, however, no evidence that a record of appeal has ever been filed. Over five years have passed since the notice was filed, and there has been no application for extension of time or directions from the Court of Appeal to progress the appeal.
26. It is evident that execution proceedings have since been set in motion, and the 2nd Respondent’s application appears to have been triggered by this Court’s ruling of 20th February 2025, which allowed the execution to proceed before the trial court.
27. From the foregoing analysis, I find that the 2nd Respondent has not satisfied the threshold under Order 42 Rule 6(2) of the Civil Procedure Rules and it is hereby ordered:
 1. The Notice of Motion dated February 27, 2025 is dismissed for lack of merit



2. The 2nd Respondent shall bear the Appellant's costs of this application

DELIVERED AT NAIROBI THIS 08th DAY OF April 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Applicant - Mr. Nduati for Muchangi Nduati & Co. Advocates

For Respondent - Mr. Olonde for Odero-Olonde & Co. Advocates

