



REPUBLIC OF KENYA



**KENYA LAW**  
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**Pizrada Motors Limited v Adisa & another (Civil Appeal  
E223 of 2024) [2025] KEHC 4437 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4437 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E223 OF 2024**

**E OMINDE, J**

**APRIL 8, 2025**

**BETWEEN**

**PIZRADA MOTORS LIMITED ..... APPLICANT**

**AND**

**ESTHER ADISA ..... 1<sup>ST</sup> RESPONDENT**

**EPHRAHIM ONYIEGO JUMA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 22/10/2024, the Appellant/Applicant seeks the following orders:
  1. Spent.
  2. Spent.
  3. That this Honourable Court be pleased to stay proceedings of the Small Claims Court in Case No. E1150 of 2023 and subsequently the judgment delivered on 20/09/2024 together with all consequential orders pending the hearing and determination of this Appeal.
  4. That this Honourable Court be pleased to vary and set aside orders of the judgment dated 20/09/2024 pending the hearing of this Appeal.
  5. That this Honourable Court be pleased to make such other orders as the interest of justice may demand in the circumstances.
  6. That costs of this Application be provided for.
2. The Application is anchored on the grounds therein and it is further supported by the Affidavit sworn by Waseem Shakir, the Manager of the Applicant on the same date.



3. He deposed that the Plaintiffs/ Respondents filed suit against the Appellant/Applicant and prayed for general and special damages for injuries which were allegedly caused by the Appellant/Applicant's motor vehicle KDB 724N. The Appellant/Applicant adduced evidence that at the time of the alleged accident, he had already sold and transferred the said motor vehicle to the 3<sup>rd</sup> Party/Respondent herein. He furnished the court with a sale agreement dated 20/01/2021. It is therefore his contention that at the time of the accident the 1<sup>st</sup> Appellant/Applicant was neither the owner nor in physical possession of the subject motor vehicle registration number KDB 724N. That pursuant to the purchase, the Appellant/Applicant handed over the said motor vehicle to the 3<sup>rd</sup> party/ Respondent who was to take control, possession and liability thereof.
4. He further deposed that the Appellant/Applicant's advocate pursuant to the orders of the court issued on 9/06/2023 filed a third-party notice which was allowed. That the same was to join the buyer of the motor vehicle who had actually caused the accident to the suit so as to bear the liability of causing the accident. That on 17/06/2024, the Honourable entered judgment against the third-party. That the Appellant/Applicant was therefore perplexed when on 20/09/2024 judgment was entered against the Appellant/Applicant by the Learned Magistrate. That this judgement contradicted her initial judgment entered as against the 3<sup>rd</sup> party. That being dissatisfied with the decision of the Honourable Magistrate, the Appellant/Applicant intends to file an appeal against the said decision. He contended that execution is imminent unless orders of stay of execution sought herein are granted by this Honourable Court and that the Appeal is arguable and raises a prima facie case for determination by the High Court as evinced by the grounds in the Memorandum of Appeal attached herewith.
5. He deposed that the Judgment delivered by the Magistrate is unfair as it contradicts her previous judgment which vests liability upon the third party and not their company and that it is trite law that an arguable Appeal is one that raises issues worthy of ventilation before the Honourable Court. He states that he stands to suffer great prejudice and irreparable harm should this Application not be granted and further that if the stay sought is not granted, the appeal will be rendered nugatory and the exercise futile. That he has demonstrated that he has a prima facie case; that the Application was filed expeditiously and that the Application has established sufficient cause to the satisfaction of the court that it is in the interested of justice to grant the orders sought and that he is willing to abide by any conditions that will be issued by this Honourable Court.

### **The Response**

6. The Application is opposed by the 1<sup>st</sup> Respondent who swore a Replying Affidavit dated on 28/10/2024. In the said Affidavit, the 1<sup>st</sup> Respondent deposes that the Application for stay of execution pending appeal is incompetent, improper and has not been brought in good faith and the same is fatally defective, lacks merit and substratum and is merely an academic exercise. The 1<sup>st</sup> Respondent contended that the Applicant had not demonstrated evidence of substantial loss in the event that the stay was not granted and as such it was unfair to deny the respondents the fruits of the judgment. That is not enough to merely state that a sum of Kshs. 209,550.00/= is colossal. That stay of execution pending appeal is a discretionary relief and that both parties have rights that need to be considered and/or protected.
7. The 1<sup>st</sup> Respondent maintained that when an issue of money decrees is involved, the court should balance the interest of both parties and not to shut down a successful litigant from enjoying the fruits of its rightfully obtained judgment. The 1<sup>st</sup> Respondent further deposed that the Appellant/Applicant, is the registered owner of the motor vehicle registration KDB 724N and was therefore properly enjoined in the suit. That this application as an afterthought and the conduct of the Defendants/Applicants is



that of parties who do not deserve the orders herein sought. That if the court is inclined to grant orders however, it should give reasonable conditions and order that the half decretal amount be paid to the 1<sup>st</sup> Respondent and the other half of the decretal amount be deposited in a joint interest earning account of both advocates for the parties pending hearing and determination of the appeal.

8. That further, the Applicants should process, file and serve the record of appeal within forty five (45) from the date of the ruling in order to expedite the intended appeal. That this is because the orders sought are only aimed at aiding the Applicant's selfish and personal interest as opposed to the interest of justice and fairness and have been tainted with malice and unclean hands. That the prayers sought are outrageous, illegal, unlawful, fatally defective, and unfair and will amount to injustice, prejudice and a miscarriage of justice to the respondents if granted. That the said Application which has been made as an afterthought.

### **The Submissions**

9. The Application was canvassed vide written submissions. The Applicant filed submissions on 17/12/2024 while the 1<sup>st</sup> Respondent filed on 29/01/2025.

### **The Applicant's submissions**

10. On whether the Court has jurisdiction to determine the Application, Counsel for the Applicant submitted that the Appellant/Applicant Submits that Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal.
11. On whether the Appellant/Applicant has proved its case to warrants the orders for stay of execution. Counsel submitted that Contrary to the allegations by the Respondent in their Replying Affidavit dated 28/10/2024, the Appellant/Applicant submits that the application is brought in good faith and without undue delay. Counsel placed reliance inter alia on the case of RWW v EKW(2019) eKLR, where the court stated the purpose of 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.”
12. Counsel submitted that the Applicant will suffer substantial loss if the order for stay are not granted. The Counsel relied on the case of Elena D. Koris vs Kenyatta University [2012] eKLR, where it was held that:

“The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely. -Sufficient cause, Substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay. In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in Hassan Guyo Mokalo vs Straman EA Lid (2013) eKLR and Hassan Guyo Wakalo vs Straman FA Lid [2013/eKLR in which it was held thus; "In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.”
13. Counsel contended that the Appellant should not be forced to deposit the decretal sum since the Appellant did not cause the accident. Additionally, Counsel submitted that judgment was initially



entered against the 3<sup>rd</sup> party Respondent and as such, the Appellant should not be compelled to pay the decretal sum.

14. Counsel maintained that if stay of execution of the decree is not granted will lead to an irreparable loss. Counsel relied on the decision of the court in Bungoma HCMISCA No. 42 of 2011-James Wangalwa & Another vs. Agnes Naliaka Cheseto where it was held that:

“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.”

15. Counsel further submitted that the application is brought without undue delay and that no prejudice will be suffered by the Respondent if the orders for stay is granted. Counsel relied on the decision of the court in Otieno James Ayuko v Paul Osoo Warega & 4 others (2022) eKLR where the court held that:

“The import of the provisions in Order 42 Rule (2) above is to clearly outline the three prerequisite conditions for the granting of an Order for Stay pending Appeal as follows:

- 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.”

16. According to Counsel, the conditions set out in Order 42 Rule 6(2) only serve as a guideline and that the court has discretion to grant orders depending on the circumstances of each case. Counsel relied on the statement made by the learned judge in the case of Kenya Power & Lightning Company Ltd vs Esther Wanjiru Wokabi [2014] eKLR, where the court held that;

“Order 46 Rule 6(2) lays down the conditions which an Applicant must satisfy in order to deserve the orders of stay of execution pending appeal. However, the court stated that it noted that the conditions set out in Order Rule 6 (2) only serve as guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case.”

17. With regard to whether the 3<sup>rd</sup> party proceedings were correctly initiated by the Appellant. This touches of the substantive appeal and thus cannot be dealt at this interim stage.

### **The 1<sup>st</sup> Respondent’s Submissions**

18. With regard to whether the Applicant ought to have sought for the prayers herein from the trial Court, Counsel submitted that the Applicant has raised very sensitive issues one of them being that the trial Court erred in finding him 100% liable when in real sense judgment was entered against 2<sup>nd</sup> Respondent (the third party). Counsel contended that this Application ought to have been brought to the attention of the trial Court first before exploring this Appellate avenue. Be that as it may, Counsel contended that owner and therefore bears liability for the accident. Counsel submitted that Order 42 Rule 6 is clear that the Appellate court can only grant the orders sought upon refusal by the trial court. Counsel therefore urged the court to either transfer this suit to the trial court for determination or to dismiss it forthwith.



19. With regard to orders of stay of execution, Counsel cited Order 42 Rule 6 of the Civil Procedure Rules and submitted that from the said section, the Applicant must satisfy 3 conditions; firstly, that he will suffer substantial loss should stay not be granted; secondly, that the application has been filed timeously and finally that he is willing to offer security for the due performance of the decree should the court direct him to do so.
20. Counsel urged that the duty of the court is, as far as possible, to balance the interests of the parties, this would require, in our view, not only safeguarding the interests of the decree holder to the decretal sum, but also ensuring that should the appeal succeed, it will not have been rendered nugatory by earlier payment to a party who is unable to repay the decretal sum upon the success of the appeal
21. On substantial loss, Counsel submitted that as to what amounts to substantial loss, this has been the subject of consideration by courts in *James Wangalwa & another v Agnes Naliaka Cheseto*[2012]eKLR (supra).
22. Counsel further submitted that the general rule is that the Court ought not to deny a successful litigant the fruits of his judgement save in exceptional circumstances where to decline to do so, may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. Counsel placed reliance on the case of *Machira T/A Machira & Co Advocates v East African Standard* (No 2[2002] 2 KLR 63, where the court observed that the Applicant is under a duty to do more than merely repeating words of the relevant statutory provision or rule or general words used in some judgment or ruling in a decided case cited as a judicial precedent for guidance. Counsel contended that the court emphasized that it is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory as that will not do.
23. Counsel maintained that the Applicant has failed to demonstrate to this court what substantial loss they will suffer if the application for stay is disallowed. Counsel submitted that if the decretal sum, costs and interest of the claim of Kshs.209,550/= is paid, they will be able to refund the amount should the Applicant's appeal succeed. Counsel contended that the Applicant has not shown that they have no means and therefore, they are in a position to refund the money should the appeal succeed. Counsel relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd*[2006] eKLR, the Court again stated that 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 proceeds or is carried out, in the event the appeal succeeds, the respondent would not be in a position to pay or reimburse because he has no means of doing so.
24. Additionally, Counsel maintained that where the allegation is that the Respondent will not be able to refund the decretal sum the burden is upon the Applicant to prove that the Respondent will not be able to refund to the Applicant any sums paid in satisfaction of the decree. Counsel relied on the case of *Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999*
25. Counsel urged that the Respondent has a decree in her favour that she wishes to execute, but she is also faced with the possibility that the appellant's appeal may succeed and she may be required to refund the decretal sum already paid and on the other hand, the Applicant has a statutory right of appeal that he seeks to exercise but faces the real possibility of execution and thereby paying the decretal sum, costs and interest of the claim of Kshs.209,550/= before his appeal is heard and determined. Counsel submitted that this therefore requires the balancing of these two rights. Counsel contended that the Applicant has not been clear what substantial loss he will suffer. Counsel maintained that he has a duty to satisfy the court that he will indeed suffer something special that cannot be undone should execution be allowed to proceed and that he did not state that the Respondent is an impecunious person who would not be able to refund the decretal sum if paid.



26. Regarding security for the due performance, Counsel submitted that the Respondent is the bona fide decree holder and therefore entitled as a matter of right to enjoy the fruits of his judgment. Under Order 42 rule 6, the Applicant is required to offer security for the due performance of the decree. Counsel urged the court to take into account the fact that no such security has been offered in deciding an application hereunder. Counsel relied on the holding in *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. The rule does not, therefore, envisage just any security. The words “ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

27. With regard to whether the judgment delivered on 20/09/2024 should be set aside, Counsel submitted that one of the orders being sought in this Application is an order seeking to set-aside the judgment delivered by the trial court on 20/09/2024. Counsel contended that this is not the proper procedure within which to challenge the decision of the trial court and that the Applicant should wait to argue issues of the Appeal once the Appeal is admitted.

### **Determination**

28. I have carefully considered the application, the supporting affidavit thereto, the Respondents’ Replying Affidavit and the parties’ respective submissions. The only issue for determination is

Whether the Appellant/Applicant has met the conditions necessary for the grant of stay of execution.

29. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

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

30. On the ground that the applicant should have made its Application in the lower court first, I am persuaded by the holding of the court case of *Patrick Kalaya Kulamba & Another vs Philip Kamosu and Roda Ndanu Philip (Deceased)* [2016] eKLR and *Equity Bank Limited vs. West Link Mbo Limited* [2013] eKLR that as long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6(1) of the Civil Procedure Rules can be entertained afresh in the High Court which in that capacity exercises what can be termed “original jurisdiction” and that the said jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof.



31. The factors to consider in stay pending appeal is set out in the Court of Appeal decision in *Butt v Rent Restriction Tribunal* [1982] KLR 417. The Court gave guidance on how a Court should exercise discretion in such an Application and held as follows: -
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.
32. In the instant case, all considered, I am satisfied that the applicant has an arguable case, has come to court timeously and that upon a prima facie consideration of his main ground of appeal I am also satisfied that he stands to suffer substantial loss if the stay sought is not granted. I have considered his submission that because it is the third party and not him that caused the accident, the court should not condemn him to provide security. On this ground, it is enough for the court to state that this assertion is precisely his main ground of appeal and so he cannot be a judge in his own cause for the simple reasons that his appeal is yet to be heard and determined. Further, as was held in the case *Arun C Sharma Vs. Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others* (2014) eKLR which decision I agree with entirely, the purpose of the security to be provided under Order 42 Rule 6(2) of the Civil Procedure Rules 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.
33. On the prayer seeking that the judgement of the Hon Magistrate be varied and or set aside, I agree with the submission by Counsel for the respondent that that is a determination that the court can only make after the hearing of the appeal filed by the applicant and cannot be granted at this stage of the stay proceedings. The above said, the appellant/applicant Application is now hereby allowed as follows:
- a. That the proceedings of the Small Claims Court in Case No. E1150 of 2023 and the judgment delivered on 20/09/2024 together with all consequential orders thereto be and is now hereby stayed pending the hearing and determination of this Appeal.
  - b. That the Applicant/Appellant is to file the record of Appeal within 60 days from the date of this Ruling.
  - c. That the Applicant/Appellant is to deposit the entire decretal sum in a joint interest earning account in the names of both Advocates for the parties within the next 45 days from the date of this Ruling failure to which the stay orders herein issued shall be deemed to have lapsed.
  - d. The Applicant/Appellant is to bear the cost of the Application.



**READ DATED AND SIGNED AT ELDORET ON 8<sup>TH</sup> APRIL 2025**

**E. OMINDE**

**JUDGE**

