



REPUBLIC OF KENYA



**Alginza Automobiles Limited v Mulei; Muisyo & another (Interested Parties)  
(Civil Appeal E077 of 2021) [2025] KEHC 6920 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6920 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E077 OF 2021**

**TM MATHEKA, J**

**MAY 23, 2025**

**BETWEEN**

**ALGINZA AUTOMOBILES LIMITED ..... APPELLANT**

**AND**

**SOLOMON YUMBYA MULEI ..... RESPONDENT**

**AND**

**CATHERINE MWIKALI MUISYO ..... INTERESTED PARTY**

**ROBERT NGANGA MUISYO ..... INTERESTED PARTY**

**RULING**

1. On 2/5/2024 this court delivered judgement in which it affirmed the judgement of the subordinate court in Makueni MCCC 55/2020 delivered on 29/8/2021.
2. The appellant, aggrieved filed Notice of Appeal against the judgment of this court dated 10/5/2024.
3. Thereafter the applicant filed the Notice of Motion dated 24/5/2024 seeking stay of execution of the judgment pending the hearing and determination of the appeal – this court granted stay pending the hearing and determination of this application inter-partes.
4. Parties proceeded to canvass the application by way of written submissions.
5. The application was supported by the affidavit of Hannif Muhammed, and opposed vide the replying affidavit of Solomon Yumbya Mulei - the respondent.
6. I have carefully considered the application, the affidavit and the rival submissions dated 12/9/2024 and 20/12/2024 respectively.
7. The issue is whether the application for stay pending appeal in the court of appeal has merit.



8. The application is brought under order 42 Rule 6 of the Civil Procedure Rules, and Section 3 A of the Civil Procedure Act which state;
  - (1) 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 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.
  - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
  - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
9. The applicant will be required in this application to demonstrated compliance with the conditions set out herein above.
10. Section 3A of the CPA saves the inherent powers of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
11. Has the applicant complied with the pre-requisites set out under order 42 r 6(2)?
12. The application was filed in good time – within 7 days of the judgement.
13. The applicant must demonstrate that it will suffer substantial loss. The applicant submits – supported by a case without citation where he cites the words of Ringera J in Lajji Bhimji (This is not acceptable). However, the argument is that the respondent has not demonstrated that he can repay the decretal sum should the appeal succeed when the decretal sum has been paid to him.
14. That in that event the appeal will be rendered nugatory.
15. On his part the respondent deponed that though he was unemployed and the time of the hearing in the subordinate court, he was now a businessman at Wote with the capacity to refund the money should the appeal succeed.
16. It is argued against him that he has not provided any evidence to demonstrate the alleged fact and the appellants’ fear that he would not be able to refund the money is not in vain.
17. I have considered this issue – the respondent has a duty to establish that he would have the means to refund the money if any is paid to him



18. In this case the issue of liability is what is in contest. Should this and the lower court's holding on liability be overturned on appeal, then that would mean any monies paid out to the respondent would become refundable with interest.
19. In the circumstances of this case, the fact that it is liability that is contested, and the respondent has not shown his capacity to refund the decretal sum if paid to him pending the hearing and determination of the appeal, - I am persuaded that paying out the money to the respondent could render the appeal nugatory should the appeal succeed – and the applicant would suffer substantial loss due to the inability to recover the sum.
20. On whether the applicant should deposit security the applicant has proposed the deposit of a log book of one of its motor vehicles. Is this sufficient for the performance of the decree should the appeal fail? The applicant relied on *Arun C Sharma v Ashana Raikundalia t/aA Raikundalia & Co Advocates & 2 others* [2014] KEHC 2430 (KLR) for the proposition that the security envisaged here is the guarantee for the due performance of the decree/order that may ultimately be binding upon the applicant at the end of the appeal.
21. The respondent objects to deposits of – log book as security because the value of the motor vehicle will depreciate - and in any event that the applicant has been in business for more than 6 years and can provide proper security.
22. In *Arun C Sharma* the applicant proposed the deposit of a title deed as security. I agree with the observations of the Judge:

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. When one imagines, if it becomes necessary, the steps required to be taken for such security being offered to be realized by the decree-holder, it becomes absolutely clear that mere affidavit by the owner does not convert the said property into any legally binding security for the due performance of such decree or order as may ultimately be binding on the Applicant. I, therefore, hold that the security offered is not suitable for purposes of Order 42 rule 6 of the CPR. The Court should always remember that both the Applicants and the Respondent have rights. The Applicant has a right to his appeal and the prospects that it shall not be reduced to pious aspiration or a barren result if they pay out the decretal sum to a person who may not make a refund. The Respondent, on the other hand, has a right to the fruits of its judgment which should not be taken away; and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the Applicant. There is no legally binding assignment of the proprietary rights in the proposed security which the court may consider adequate to secure the due performance of such decree or order as may ultimately be binding on the Applicant.

23. I cannot put it better than Justice Gikonyo, there is the duty of the court to balance the rights of the parties in an appeal; the appellant's right to an appeal, and the respondent's right to enjoy the fruits of his judgment.
24. In this event, the respondent's right is being postponed and the only thing the court can do, in the circumstances, is to secure the same to ensure that the same will be ripe - and not sour, should the appeal fail. That is to say, the kind of security deposited by the appellant will be such that the respondent will not have to struggle afresh to get the same.



25. Hence - the following orders will issue;

- i. An order for stay of execution of the judgment of this court be and is hereby issued pending the hearing and determination of the intended appeal.
- ii. The applicant to deposit the entire decretal sum – as the time of the judgment of this court in a joint interest earning account in the names of counsel for the parties.
- iii. The deposit be made within 45 days hereof.
- iv. In default, the stay will lapse, the application will stand dismissed which costs to the respondent, and the respondent will be at liberty to execute.
- v. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> MAY 2025**

**MUMBUA T MATHEKA**

**JUDGE**

