



**Maim Spares Transporters Limited v Ndale (Civil Appeal
E213 of 2024) [2025] KEHC 6157 (KLR) (12 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E213 OF 2024**

**JM NANG'EA, J
MAY 12, 2025**

BETWEEN

MAIM SPARES TRANSPORTERS LIMITED APPELLANT

AND

SARAH NDALE RESPONDENT

RULING

1. Vide Notice of Motion dated 27th September 2024 the Appellant craves the following reliefs;-
 - i. Spent
 - ii. Spent
 - iii. That there be stay of execution of the judgement and all consequential orders made in Molo CMCC No. E473 of 2023 (Hon. Bernard Kipyegon) on 29th August 2024 pending the hearing and determination of this appeal therefrom.
 - iv. That the costs of this Application be provided for.
2. The application arises from judgement of the lower court (Hon. Bernard Kipyegon Magistrate) in which the Respondent was granted Kshs. 3,350,000/= in damages together with costs and interest against the Appellant in the said Molo CMCC No. E473 of 2023. Aggrieved by the decision, the Appellant lodged this appeal relying on a number of grounds of appeal as per Memorandum of Appeal also dated 27th September 2024.
3. By Affidavit in Support of the Motion, the Appellant's advocate (Diana Nyareso) inter alia avers that the trial court erroneously noted in the impugned judgement that they had not filed submissions when in fact written submissions dated 19th August 2024 were lodged on 23rd August 2024. The submissions are further said to have been served upon the Respondent's advocates by e-mail on 27th August 2024.



4. Moreover, the Appellant avers that the appeal would be rendered nugatory if stay of execution is not granted and they later succeed as the financial means of the Respondent are unknown.
5. Through affidavit evidence in reply, the Respondent opposes the Motion contending that is misconceived, incompetent, lacks in merit and only intended to delay her enjoyment of the fruits of litigation. The Respondent further avers that on advice by her lawyers, the Appellant has not satisfied the threshold stipulated in Order 42 Rule 6 of the Civil Procedure Rules 2010 for grant of the relief of stay of execution pending appeal. She fully backs the trial court's decision.
6. The Respondent urges in the alternative that if the court is inclined to grant the application, the Appellant should be ordered to pay out half of the decretal sum to her and deposit the other half into a joint interest – earning bank account in the names of the advocates for the parties considering that the appeal is only on the quantum of damages awarded, the parties having entered consent judgement on liability in the ratio of 90% to 10% in her favour. She laments that she has not yet healed from injuries she suffered and therefore unable to work to earn a living and needs payment to meet her medical costs.
7. Only learned Counsel for the Appellant filed Submissions which the court has perused against the application, the Respondent's reply and all annexures to the parties' rival affidavits. Counsel for the Appellant maintain that stay of execution pending appeal is warranted. It is argued that the Appellant's delay of about a month to bring this application is not inordinate in the circumstances. The court is referred to case law in *Mohsen Ali & Another vs Priscillah Boit & Another*, E& LC Case No. 2000 of 2012 (2014) eKLR where the court explained "unreasonable delay" as dependent on the surrounding circumstances of each case.
8. The court was also impressed upon the need to consider the competing interests of the parties to such an application with an eye to ensuring that the appeal is not rendered nugatory and the Respondent also gets consideration having a valid judgement in his favour (see case law in *Muinde Mulatya & Another (2021) eKLR* and *Kenya Commercial Bank Limited vs Sun City Properties Limited 7 & 5 Others (2012) eKLR* inter alia cited and relied upon by the Appellant.)
9. It is further submitted that the question of "substantial loss" is the cornerstone of the court's jurisdiction and discretion to grant an order for stay of execution pending appeal (see case law in *Rhoda Mukuma vs John Abuoga (1988) KLR* also alluded to by the Appellant's advocates).
10. Regarding security for costs to be deposited, the Appellant's Counsel submit that the same is unnecessary since the Respondent has also filed a separate Appeal No. 210 of 2024 against the same judgement.
11. Order 42 rule 6(1) (2) of the Civil Procedure Rules 2010 governs disposal of an application such as before me for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-
 - a. unless 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."
12. The Appellant contends that he has brought the Motion without unreasonable delay given that the application is brought about one month after delivery of the impugned judgement. It is should,



however, be noted that even delay of one day, if unexplained, is bad enough. The Appellant has not explained the long delay of one month to bring this application.

13. In the circumstances, the delay is found to be unreasonable and therefore this legal condition has not been satisfied.
14. Based on its affidavit evidence, the Appellant has not offered the necessary security for costs or expressed willingness and readiness to deposit such security. This crucial condition precedent to grant of an order of stay of execution pending appeal has not therefore been satisfied as well. This is a mandatory legal requirement that has not been complied with. The court has power to determine the appropriate security for costs but the applicant must first express willingness and readiness to offer security.
15. In *John Odungo vs Joyce Irungu Muhatia* [2014] eKLR the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows “preparedness as well as readiness to provide security should one be called upon to do so”.
16. The Appellant’s explanation that it was not necessary to offer security because of the existence of a related appeal preferred by the Respondent is not satisfactory. Firstly, this is a statement from the bar, the Appellant’s affidavit not having alluded to this excuse for not offering security. Secondly, the said Civil Appeal No. 210 of 2024 is admittedly a different file that cannot influence the proceedings herein.
17. The Appellant has not therefore satisfied the requirement for offer and/or deposit of security for costs to merit the discretionary order of stay of execution pending appeal.
18. Determination of the application turns on the question of substantial loss, if any, the Appellant might suffer if stay of execution is not ordered. The case of *Nyatera vs Nyakundi (Civil Appeal E033 of 2022)* [2023]KEHC 3086 KLR) (16 March 2023) (Ruling) is relevant for the proposition that the Applicant ought to show the manner in which his appeal would be rendered nugatory if stay of execution is not ordered.. The court opined in the case that it is not enough to say that because the Respondent intends to proceed with execution, he should be stopped because of the appeal. The court is therefore required to tread a delicate balance of the parties’ interests. As it is now trite, this is the cornerstone of the court’s discretion to grant or refuse stay of execution pending appeal. The onus is on the Appellant to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds. In *Tropical Commodities Ltd. International (in liquidation)* (2004) 2 EA 331 my senior brother (Ogolla J) explained that substantial loss is a qualitative concept. It refers to:-

“any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

19. In *RWW vs EKW* [2019] eKLR and *Re Global Tours & Travel Ltd HCWC No. 43 of 2000 In Milimani HCMCA No. 1561 of 2007, Century Oil Trading Company Ltd vs Kenya Shell Ltd*, this court again explained that:-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes when, it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not



rendered nugatory, and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

20. In *Shell Ltd vs Kibiru & Another* (1986) KLR 410 it was famously postulated that;

“substantial loss in its various forms is the cornerstone of the court’s jurisdiction to grant stay pending appeal. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”
21. Regarding the burden of proof, the Court of Appeal held in *National Industry Credit Limited vs Aquinas Francis Wasike & Another* [2006] eKLR that;-

“once an applicant expresses a reasonable fact that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”
22. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including *Matata & Another vs Rono & Another* (Civil Appeal No. E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling).
23. Based on the affidavit evidence of the parties neither of them has stated their financial position. The Appellant who shoulders the burden of proof has in particular not made out a prima facie case of the respondent’s inability to pay back any decretal sum to warrant the Respondent to debunk the claim.
24. In the particular circumstances of this case, therefore, the Appellant has not complied with all the legal conditions for stay of execution pending hearing and determination of the appeal. The onus was on the Appellant to meet all the conditions stipulated hereinabove.
25. The application is accordingly dismissed in its entirety save that the costs thereof shall abide the appeal.
26. As agreed by Counsel this ruling applies to this Court’s Civil Appeal No. 215 of 2024 involving another Claimant in the suit before the lower court.

J. M. NANG’EA, JUDGE.

RULING DELIVERED VIRTUALLY THIS 12TH DAY OF MAY, 2025 IN THE PRESENCE OF:

The Advocate for the Appellant, Ms Kemunto.

The Advocate for the Respondent, Ms Chelang’at

Court Assistant, Jeniffer

J. M. NANG’EA, JUDGE.

