



**Maim Spare Parts Transporters Ltd & another v Langat & another (Suing as the
Legal Administrators of the Estate of the Late Samwel Kinyanjui Wanjiku Deceased)
(Civil Appeal E216 of 2024) [2025] KEHC 5575 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E216 OF 2024
SM MOHOCHI, J
MAY 6, 2025**

BETWEEN

MAIM SPARE PARTS TRANSPORTERS LTD 1ST APPELLANT

PHILBERT MUTUYEMUGU 2ND APPELLANT

AND

SAMUEL KIPKURUI A. LANGAT 1ST RESPONDENT

MARGARET WANJIRU KARIUKI 2ND RESPONDENT

**SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE
SAMWEL KINYANJUI WANJIKU DECEASED**

RULING

1. Before me is a Notice of Motion Application dated 27th September 2024, filed pursuant to Order 42 Rule 6 of the Civil Procedure Rules for the following relief(s);
 - a. Spent;
 - b. Spent;
 - c. That, there be a stay of execution and all consequential orders made in Molo CMCC No. E 474 of 2023 (Hon. Bernard Kipyegon) on 29th August 2024 pending the hearing and determination of the appeal therefrom; and
 - d. That, the costs of this Application be provided for.
2. The Application is Supported by the Sworn affidavit of Diana Nyareso and is anchored on the following nine (9) grounds;



- i. The lower court in Molo CMCC No. E 474 of 2023(Hon, Bernard Kipyegon) on 29th August 2024 delivered Judgement in the suit in favour of the Respondent.
- ii. The Applicants being aggrieved by the said judgment intend to appeal against the same and have lodged a Memorandum of Appeal before this court.
- iii. Unless the orders of stay sought herein are granted as prayed the Respondent is likely to proceed with execution against the Applicants hence rendering the intended Appeal nugatory.
- iv. There is no subsisting stay of execution in the matter.
- v. The intended appeal by the Applicants is strong and stands a high chance of success inter alia because the Applicants were not granted a full opportunity to be heard as per the attached Memorandum of Appeal.
- vi. It is fair and just that stay be granted as prayed.
- vii. If the reliefs sought in the Application are granted the Respondent will not suffer any prejudice.
- viii. The Applicants are prepared to abide by any reasonable conditions that the court may direct.
- ix. The Applicants have demonstrated a prima facie case with a high chance of success.

Applicants Case

3. Order 42 Rule 6 provides that no appeal shall operate as a stay of execution or Order appealed from except in so far as the court appealed from may order. Further Order 42 Rule 6(2) sets conditions the Applicant has to meet which are that, the Applicant must file their application without unreasonable delay and secondly, the Applicant must illustrate to the court that they will suffer substantial loss if the orders.
4. Based on the above conditions the Appellants/Applicants have identified the following issues for determination:
 - i. Does the Applicant warrant grant of the reliefs sought?
 - ii. Who is to bear the costs of the Application?
5. The Applicant intends to Appeal against was delivered on 29th August 2024. The Applicants filed the Notice of Motion on 27th September 2024 together with a Memorandum of Appeal dated 27th September 2024. The Applicants contend that the instant Application was filed within the stipulated time and that there was no inordinate delay.
6. The issue of unreasonable delay was discussed in the case of Mohsen Ali & another vs Priscillah Boit & another E &L NO. 200 of 2012 [2014] EKR where the court stated that..... what is unreasonable delay is dependent on the surrounding circumstances of each case.
7. The Appellants/Applicants submit that, the Application has been brought timeously being less than 30 days from the date of delivery of the Judgement.
8. That, the second condition that the Appellants/Applicants ought to meet for the relief sought to be granted is to illustrate that they will suffer substantial loss if the stay is not granted.
9. That, the Respondent intends to execute the decree against the Appellants/Applicants. It is worth noting that the Respondent's financial means are unknown and her reply to the Application has not



demonstrated the contrary. Thus, if stay is denied and execution proceeds the Appellants/Applicants are unlikely to recover the decretal sum paid out in the event the intended Appeal succeeds.

10. Reliance is placed on the decision in *Muinde Mulatya & Another v Rosemary Mutethya Kyalo & Another* (2021) eKLR where Justice R.K Limo stated that:

“The competing interests are Interests of a party who wants to pursue an appeal and is therefore desirous of preservation of the subject matter of appeal so as not to render appeal nugatory”

11. Further the courts have discussed the essence of an order of stay pending Appeal to be the preservation of the substratum of the subject matter of the case pending Appeal.

12. In the case of *Kenya Commercial Bank Ltd -vs.- Sun City Properties Ltd & 5 Others* [2012] eKLR the Court held:

“In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of Appeal should be safeguarded from his Appeal being rendered nugatory.”

13. In the case of *Esther Wanjiru-vs- Jackline Arege* [2014] eKLR the Court asserted that an order of stay of Execution would be granted where the Court is satisfied that substantial loss may result to the Applicant.

14. The Appellants/Applicants are further guided by the case of *Rhoda Mukuma vs. John Abuoga* [1988] eKLR, where the Court termed substantial loss as being the cornerstone of the discretion of the High Court in the granting stay of Execution under Order 42 of the Civil Procedure Rules when it stated that;

”...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”

15. That, it is the Appellants/Applicants' humble submission that they will suffer substantial loss, grave injustice and render the intended appeal nugatory if the reliefs sought are not granted and the Respondent is allowed to execute the decree.

16. That, the Appellants/Applicants contend that, the issue of security is at the Court's discretion. In the instant case, the 1st Appellant/Applicant is a stable company and insured by a reputable company with a rich history of settling claims. Thus, the Appellants/Applicants submit that they possess the means to satisfy the decretal amount should the Appeal fail.

17. That, the intended appeal as per the grounds of the Memorandum of Appeal annexed in the instant application, has a high chance of success, is not frivolous but Indeed weighty, arguable and does raise triable issues.

18. That, in the circumstances, the Appellants/Applicants have an arguable appeal with a high probability of success. Thus, if denied the interim reliefs sought the said appeal will be rendered nugatory.

19. The Applicant take cognizance that matters should be determined expeditiously. In light of the same the Appellants/Applicants submit that this Honourable Court waive security as a condition for stay.



20. That, in line with the provision of section 27(1) of the *Civil Procedure Act* and relying on the precedence set in *Sagalla Lodge United v Samwuel Mazera Mwamunga & Anor* (Suing at the executors of Ellud Timothy Mwamungu-Deceased) [20221 eKLR to submit that the costs be in the course.
21. That in light of the foregoing submissions, the Appellants/Applicants submit that they have demonstrated sufficient cause to warrant granting stay of execution pending appeal. Further the Appellants/Applicants have met the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules for grant of stay of execution pending appeal.

Respondents Case

22. The Application is opposed by the Respondents replying affidavit dated 28th November 2024 and written submission dated 13th March 2025 contending that, Order 42 Rule 6(2) of the Civil Procedure Rules clearly stipulates the conditions that must be met before stay of execution can be granted, that these conditions form the issues for determination being:
 - i. If the appeal has chances of success
 - ii. If the Applicants will suffer loss if the orders are not granted
 - iii. Applicants to offer security
23. As to whether the appeal has chances of success the respondent submits that, the main heart of this appeal is on quantum as the Applicants are claiming that awards of Kshs. 75,000/= as general damages for pain and suffering, Kshs. 200,000/= for loss of expectation of life and Kshs. 2,432,264/= for loss of dependency were inordinately high in the circumstances and the appeal cannot succeed on this basis.
24. The deceased died as a result of multiple organ injuries due to a road traffic accident according to the death certificate and the post mortem report which were produced as exhibits in the trial court. According to the post mortem report, the deceased had an open skull with brain matter exteriorized and multiple lower limb fractures. From the foregoing it is clear that the deceased sustained severe injuries hence he suffered a lot of pain before he died hence an award of Kshs. 75,000/= for pain and suffering is not excessive.
25. The trial magistrate also awarded Kshs, 200,000/= for loss of expectation of life which amount is reasonable as the deceased was enjoying extremely good health and was aged 40 years old.
26. The award of Kshs. 2,432,264/= for loss of dependency is also not inordinately high as the deceased would have lived a healthy working life up to the age of 60 and beyond and he was survived by his parents and three children who he used to provide for from his earnings as a mason.
27. Considering the circumstances and nature of the case that, the awards made by the trial magistrate were not inordinately high to warrant interference in the appeal. The appeal therefore has no chances of success.
28. That, the corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What then constitutes substantial loss? *Gikonyo J* in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR) held inter alia that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the



case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process.

29. 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, a question that was aptly discussed in the case of *Silverstein vs. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* (1988) KLR 645. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in granting stay of execution under Order 42 of the CPR and Rule 5 (2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“.....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.

30. In the present application, the applicants have not demonstrated that they would suffer substantial loss as defined by Gikonyo J. in the above cited judgement. It has not been proved that the Respondents are persons of straw and that they may not be able to refund the decretal sum in the event of the appeal succeeding in *Equity Bank UG v Talga Adams Company Limited* [2006] KEHC 860 (KLR) the court stated as follows;

“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 is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as he/it is a person of no means.”

31. The Applicant in this case only alleged in the supporting affidavit that the financial means of the Respondents are not known but did not tender any evidence to the effect. In the case of *Nzioka Wamakai J in Elena Doudoladova Korir v Kenyatta University* [2014] KEELRC 413 (KLR) the court held that;

“The application must meet a criteria set out in precedents and the criterion is best captured in the case of *Halal & another vs Thornton & Turpin* (1963) Ud [1990] KLR 365 where the Court of Appeal (Gicheru JA. Chesoni & Cockar Ag JA) held that

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

Security

32. Apart from proof of substantial loss the Applicants are enjoined to provide security. The Applicants have not offered any security at all. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay, However, the offer for security must come from the



Applicants as a price for stay. It was held in the case of Equity Bank Ltd vs Taiga Adams Company United [2006] KEHC 860 (KLR) that: -

“..... of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought.....let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...”

33. The Respondent submits that, in light of the above and in consideration of the above-mentioned authorities, it is evident that the application before you lack merit as the Applicants have not fulfilled all the requirements for granting stay of execution.
34. However, if the court is inclined to allow the application, the Applicants should pay % of the decretal amount to the Respondents and the remaining ½ be deposited in court or a joint interest earning account since the appeal is only on quantum and not liability the parties having recorded a consent judgment on liability at the ratio of 90% 10% in favour of the Respondents against the Applicants jointly and severally.
35. The Respondent submit that the deceased left behind his parents and three young children who depended on him and his untimely death has robbed them of the provisions he used to provide to them. We therefore submit that the Respondents are entitled to the prompt payment of % the decretal amount as submitted above to enable them to meet their obligations to the children of the deceased who are entirely dependent on them.
36. It is for the above reasons that the Respondent pray that, the said application should be dismissed in its entirety with costs to the Respondent. Further reference is made to the case of Masisi Mwita v Damaris Wanjiku Njeri [2016] KEHC 7349 (KLR) where the Appellate court dismissed an application where the applicant had not proved the conditions in Order 42 Rule 6(2) of the Civil Procedure Rules.

Analysis and determination

37. I have considered the Application, Supporting Affidavit, the Respondent’s Replying Affidavit, the attachments and the submissions. This Court clothed with the jurisdiction to entertain the instant Application, the only issue for determination is whether the Application has merit.
38. The conditions that have to be met prior to the Court issuing stay orders pending appeal are set out under Order 42 Rule 6(2) of the Civil Procedure Rules which stipulates: -
No order for stay of execution shall be made under sub rule 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.
39. In essence the Applicant should satisfy the Court that: -
 - a. Substantial loss may result to it should the order not issue;
 - b. The application has been made without unreasonable delay; and
 - c. Such security for the due performance of such decree or order has been given as may ultimately be binding on it.



40. The conditions for granting stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules should be met simultaneously.
41. While I do consider the Applicant has satisfied the two conditions precedent the Applicant while indicating is willing to satisfy the condition of security for costs has not explicitly offered the same thus making the Application fall at this juncture.
42. The issue of costs is at the discretion of the Court. The kind of security for due performance of the decree to be provided by a party is to be considered on a case-to-case basis. The right of appeal of the Applicant must be weighed against the right of the Respondent to enjoy the fruits of the judgment delivered in her favour.
43. The Court in exercising its discretion can direct the Applicant regarding the security of costs to be offered and give conditions within which to do so.
44. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act* and *the Constitution*, the proper approach is to do justice to all with the interest of justice in mind.
45. If there is a chance that the Respondent risks harm that is irreparable then stay ought not to be issued. On the other hand, if there is a risk that the Applicant may suffer irreparable loss which would ideally not be redeemable if the appeal does succeed then stay ought to be granted. In balancing the rights of each party, the Court at this point cannot delve on the merit of the appeal. Nonetheless, in the event that there may be some merit in the appeal the Respondent is likely to suffer lower prejudice if stay of execution is allowed, the said prejudice can also be compensated by costs.
46. Accordingly, I hereby allow the Application dated 2nd September, 2023 and direct as follows: -
 - a. A conditional order of stay against execution of the judgment/Decree Molo CMCC No. E 474 of 2023 (Hon. Bernard Kipyegon) on 29th August 2024 is hereby issued pending hearing and determination of the appeal.
 - b. The Applicant shall pay the Respondent 50% of the entire decretal amount within thirty (30) days.
 - c. The Applicant shall deposit the balance of the decretal amount into an interest earning joint account in a bank, to be held by both advocates for the parties within thirty (30) days of this Ruling;
 - d. The Respondent's shall have costs of the Application assessed at Kshs. 20,000 to be paid within thirty (30) days of this Ruling;
 - e. In default of (d) and (e) above this Application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
 - f. The Appellant to file and serve a record of appeal within sixty (60) days of this Ruling;

It is so ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 6TH MAY, 2025

MOHOCHI S.M

JUDGE

