



**Treasure Industries Limited v Selsar Limited (Civil Appeal  
E255 of 2024) [2025] KEHC 7071 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7071 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E255 OF 2024  
FN MUCHEMI, J  
MAY 22, 2025**

**BETWEEN**

**TREASURE INDUSTRIES LIMITED ..... APPELLANT**

**AND**

**SELSAR LIMITED ..... RESPONDENT**

**RULING**

**Brief facts**

1. The application dated 3<sup>rd</sup> October 2024 seeks for orders of stay of execution against the judgment in Thika Small Claims Court SCCCOMM No. E860 of 2023 delivered on 8<sup>th</sup> November 2023 pending the hearing and determination of the appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 12<sup>th</sup> March 2025.

**Applicant's Case**

3. The applicant states that judgment in Thika SCCCOMM No. E860 of 2023 was delivered on 8<sup>th</sup> November 2023 where the trial court dismissed its claim and awarded costs to the respondent. Being aggrieved with the said judgment, the applicant filed an application seeking for orders of stay of execution of the judgment; a temporary injunction restraining the respondent from executing the decree dated 27<sup>th</sup> May 2024 and setting aside and review of the judgment dated 8<sup>th</sup> November 2023. The trial court dismissed the said application on 8<sup>th</sup> August 2024 due to it being functus officio. The appellant was given 30 days stay of execution of the ruling. Being aggrieved by the decision of the court, the appellant lodged an appeal vide Memorandum of Appeal and Notice of Appeal dated 26<sup>th</sup> September 2024.
4. The appellant avers that its appeal has high chances of success and that if the orders of stay of execution are not granted, it shall suffer substantial loss. The applicant further states that if its appeal is not heard,



it will be condemned unheard. The applicant argues that the respondent shall not suffer any prejudice if the orders sought are granted.

### **The Respondent's Case**

5. The respondent states that the trial court dismissed the appellant's suit on 8<sup>th</sup> November 2023 upon considering and evaluating all the evidence in court. The respondent states that the Notice of Appeal which seeks to challenge the said judgment was filed out of the statutory required timelines as provided in Section 79G of the [Civil Procedure Act](#).
6. The respondent argues that the applicant did not seek any leave to file the appeal out of time nor did it explain the delay in lodging the appeal. The respondent further states that although the Notice of Appeal indicates that it should be served in person, the applicant has not annexed any evidence to show that the Memorandum of Appeal or Notice of Appeal was indeed served upon it.
7. The respondent states that failure to serve the Notice of Appeal within seven days of lodging, means that the notice has since lapsed and thus the court ought to strike it from the court's record.
8. The respondent further states that the applicant's appeal is not arguable to warrant grant of the orders sought. Further, there being no competent appeal on record, the application for stay cannot stand.
9. The respondent states that the applicant intends to stay the payment of costs of Kshs. 33,800/- and not the judgment amount. Further, the respondent states that no order for stay of execution shall be granted unless the security of costs for due performance of the decree has been provided pursuant to Order 42 Rule 6(2) of the Civil Procedure Rules.
10. The respondent avers that should the application succeed without the applicant's security for costs, it shall suffer irreparable loss and there is no guarantee that the applicant shall pay costs in the lower court.
11. The respondent argues that the appeal will not be rendered nugatory if an order of stay of execution is not granted as the applicant has not averred that it is incapable of paying the amount ordered under the decree if the appeal succeeds.
12. The respondent states that it shall suffer substantial loss should stay of execution be granted as it is entitled to the fruits of the judgment delivered on 8<sup>th</sup> November 2023.
13. The applicant filed a Supplementary Affidavit dated 12<sup>th</sup> March 2025 and states that it filed its appeal within the statutory timelines as it was granted leave to file its Memorandum and notice of Appeal upon the delivery of the ruling dated 8<sup>th</sup> August 2024.
14. The applicant avers that it served the said memorandum and Notice of Appeal pursuant to Rule 13 of the Electronic Case Management Practice Directions, 2020; Order 5 Rule 22B of the Civil Procedure (Amendment) Rules, 2020.
15. Parties put in written submissions.

### **The Applicant's Submissions.**

16. The applicant relies on Order 43 Rule 1 of the Civil Procedure Rules and Sections 79G and 95 of the [Civil Procedure Act](#) and submits that it has a right of appeal and the court has jurisdiction to hear and determine an appeal from a subordinate court.
17. The applicant submits that it filed an application dated 19<sup>th</sup> June 2024 for review of judgment and stay of execution of judgment and decree delivered by the subordinate court. The applicant further



submits that the trial court rendered its ruling on 26<sup>th</sup> August 2024 and it sought further extension of interim orders of stay of execution and leave to appeal the decision at the present court.

18. The applicant submits that it duly filed its Memorandum and Notice of Appeal within the prescribed time frame and served the respondent pursuant to Order 5 Rule 22B of the Civil Procedure (Amendment) Rules.
19. The applicant relies on the case of *Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997* and argues that the court ought to weigh the likely consequences of granting stay or not doing so and lean towards a determination which is unlikely to lead an undesirable or absurd welcome.
20. The applicant further relies on the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR* and submits that it shall suffer substantial loss if the orders sought are not granted as execution shall handicap its activities while awaiting the decision on appeal. The applicant further submits that it is possible that the attached property might not be recovered in the event the appeal succeeds. The applicant argues that the respondent has not given any material to show its ability to repay the decretal sum in the event the appeal succeeds. The applicant submits that it is a company which is relied upon by a large number of employees and thus the failure to grant the orders sought will be hugely detrimental to their livelihoods.
21. The applicant refers to the case of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2014] eKLR* and prays for costs in its favour.

#### **The Respondent's Submissions**

22. The respondent refers to Order 42 Rule 6 of the Civil Procedure Rules and the case of *Antoine Ndiaye vs African Virtual University [2015] eKLR* and submits that the applicant has not shown sufficient cause why the orders of stay ought to be granted.
23. The respondent submits that the judgment of the trial court was delivered on 8<sup>th</sup> November 2023 and the Notice of Appeal and Draft memorandum of Appeal was filed on 20<sup>th</sup> September 2024 whilst the instant application was filed on 3<sup>rd</sup> October 2024. Thus the application was not filed in a timeously manner and the applicant is guilty of inordinate delay as it has taken the applicant 392 days between the date of judgment and the date the instant application was filed. The respondent submits that the delay is inordinate and inexcusable and no explanation nor sufficient cause has been made to the satisfaction of the court.
24. The respondent relies on the cases of *Andrew Kiplagat Chamaringo vs Paul Kipkorir Kibet [2018] eKLR* and *County Executive of Kisumu vs County Government of Kisumu & 8 Others [2017] KESC 16 (KLR)* and submits that the applicant has not sought for leave to file its appeal out of time.
25. The respondent submits that the applicant is silent in its affidavit as to how it stands to suffer substantial loss and only contends that that it stands to suffer irreparably if the respondent levies execution against it. The respondent submits that execution is a lawful process and the applicant is required to show the manner in which execution will irreparably alter the status quo to its detriment therefore rendering the appeal nugatory.
26. The respondent relies on the cases of *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR* and *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR* and argues that the judgment dated 8<sup>th</sup> November 2023 dismissed the applicant's suit and therefore the court cannot grant stay of the impugned judgment which in



essence is a negative order and incapable of execution. The respondent submits that the decree dated 27<sup>th</sup> May 2024 is for payment of costs and not the judgment sum.

27. The respondent further relies on the case of Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] eKLR and submits that the decree is a money decree and the same can be reimbursed by the respondent if the appeal is successful and thus releasing the decretal sum to it will not render the appeal nugatory.
28. The respondent relies on the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] and submits that the applicant has not offered any security for the performance of the decree. The applicant further submits that the court in granting stay has to carry out a balancing act between the rights of the parties. To support its contentions, the respondent relies on the cases of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR and Luxus Woods (K) Limited vs Patrick Amugune Kamadi [2016] eKLR.
29. The respondent relies on Section 27 of the *Civil Procedure Act* and the case of Republic vs Rosemary Wairimu Munene ex parte vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2024 and submits that costs are at the discretion of the court. the exercise of discretion on costs depends on the facts of each case and is guided by the principle that costs should follow the event unless the court orders otherwise. The respondent submits that the applicant's conduct has been an evasive one and is denying liability of payment of costs awarded in the trial court.

## The Law

30. Section 79G of the *Civil Procedure Act* states:-

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

31. From the record, the judgment in Thika Small Claims Court SCCCOMM No. E860 of 2023 was delivered on 8<sup>th</sup> November 2023 and the applicant lodged its appeal vide Notice and Memorandum of Appeal on 20<sup>th</sup> September 2024. Further the applicant filed the current application on 3<sup>rd</sup> October 2024. Thus the applicant filed its appeal approximately ten (10) months outside the time for filing an appeal. The applicant has further not offered any plausible explanation for the delay nor has it sought leave to file its appeal out of time. Accordingly, the delay of ten months is inordinate and inexcusable. Furthermore, the applicant has not sought leave to file the appeal out of time nor has it offered any plausible reasons for the delay. In the circumstances, the Notice and Memorandum of Appeal are incompetent and are hereby struck out.

## Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

32. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
  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 orders set aside.

2. 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 1<sup>st</sup> 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.
33. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
  1. Substantial loss may result to him/her unless the order is made;
  2. That the application has been made without unreasonable delay; and
  3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
34. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“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 CPR. This is so because execution is a lawful process. 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...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.
35. The applicant in its affidavit argues that it stands to suffer substantial loss as the respondent shall proceed to execute the decree.
36. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to demonstrate that it shall irreparably suffer irreparable loss if loss if execution is carried out and that the appeal will be rendered nugatory in the event that stay orders are not granted. The applicant has only mentioned that should the respondent proceed with the execution, the appeal shall be rendered nugatory and an exercise in futility. It is only in her submissions that the applicant has stated that the respondent will not be in a financial position to pay back the decretal sum if the appeal succeeds.
37. Additionally, the trial court dismissed the applicant’s case which is in effect a negative order. Notably, the court cannot grant stay of the impugned judgment as the claim of the applicant was in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in



Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

38. Similarly in Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on 18<sup>th</sup> December 2006. The order of 18<sup>th</sup> December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of Raymond M. Omboga vs Austine Pyan Maranga (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

39. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order. Accordingly, it is my considered view that the applicant has not demonstrated the substantial loss it stands to suffer.

**Has the application has been made without unreasonable delay.**

40. Judgment was delivered on 8<sup>th</sup> November 2023 and the applicant filed the instant application on 3<sup>rd</sup> October 2024. It has taken the applicant eleven months to file the current application. The applicant has not given any explanation why it took 11 months to file the present application. The lengthy and unexplained delay renders this application an afterthought that is most likely intended to delay execution for costs of the lower court claim.



## **Security of costs.**

41. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 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.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. 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.

42. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has not offered any form of security or even intimated that he will abide by any orders this court may give in regard to security.

43. Additionally, grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicant’s unfettered right to file an appeal to fully ventilate her grievances. This was well stated in the case of M/s Porteitiz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997 where the court held:-

That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.

44. Bearing the said balance in mind and considering the provisions of Order 42 Rule 6 of the Civil Procedure Rules, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.

45. Accordingly, the application dated 3<sup>rd</sup> October 2024 lacks merit and is hereby dismissed with costs to the respondent.

46. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22<sup>ND</sup> DAY OF MAY 2025.**

**F. MUCHEMI**

**JUDGE**

