



Elite Earthmovers Limited v Kennedy t/a Kenworld Holdings Ltd (Commercial Suit E381 of 2024) [2025] KEHC 8770 (KLR) (Commercial and Tax) (20 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E381 OF 2024**

FG MUGAMBI, J

JUNE 20, 2025

BETWEEN

ELITE EARTHMOVERS LIMITED APPLICANT

AND

OKETCH KENNEDY T/A KENWORLD HOLDINGS LTD RESPONDENT

RULING

1. This ruling determines the application dated 19th December 2024, brought under Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law.
2. The applicant, who is also the appellant before this Court, seeks two principal reliefs: first, a stay of execution of the judgment delivered on 11th December 2024; and second, the setting aside of the said judgment.
3. The appellant relies on the grounds set out on the face of the motion, the supporting affidavit sworn by Pravin Patel, and written submissions dated 14th April 2025. The appellant's case is that it has lodged an appeal against the impugned judgment, which it contends is arguable. It is urged that unless the orders sought are granted, the appeal will be rendered nugatory, and the appellant stands to suffer irreparable harm, particularly as its proprietary interests are at stake. The appellant further indicates its readiness and willingness to provide security as may be ordered by the Court.
4. The application is opposed through a replying affidavit sworn by the respondent, Oketch Kennedy, on 7th March 2025. The respondent argues that the appellant has not demonstrated any sufficient basis for the grant of stay and, in particular, has not shown that it will suffer substantial loss if the stay is denied. It is also contended that the appellant has failed to provide evidence of a security deposit equivalent to the decretal sum and costs. The respondent asserts that if a stay is to be granted, it should be conditional upon deposit of the entire decretal amount in a joint interest-earning account.



Analysis and Determination.

5. I have carefully considered the application, the affidavits on record, the submissions of counsel, and the authorities cited. The issue for determination is whether the appellant has satisfied the conditions for grant of stay of execution pending appeal.
6. Order 42 Rule 6 of the [Civil Procedure Rules](#), provides the legal framework under which a party may seek a stay of execution of a decree or judgment pending appeal. It states that filing an appeal does not in itself operate as a stay of execution. However, the court may grant a stay if it is satisfied that there is sufficient cause to do so.
7. For the court to exercise its discretion in favour of the applicant, three key conditions must be met. First, the applicant must demonstrate that they are likely to suffer substantial loss if the order for stay is not granted. Second, the application must be made without unreasonable delay. Third, the applicant must provide security for the due performance of the decree or order that may ultimately be binding upon them.
8. The rule seeks to strike a balance between safeguarding the right of the appellant to pursue an appeal without the risk of the judgment being executed prematurely, and protecting the right of the successful party to enjoy the fruits of their judgment. Ultimately, the court is called upon to weigh the competing interests and ensure that justice is served in the circumstances of each case.
9. The purpose of an order for stay of execution pending appeal was aptly stated in [RWW V EKW](#), [2019] eKLR as follows:

“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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment.”
10. The impugned judgment in this case was delivered on 11th December 2024, and the present application was filed on 19th December 2024. In my view, this constitutes prompt action and negates any claim of unreasonable delay.
11. On the question of substantial loss, the appellant contends that enforcement of the judgment would prejudice its proprietary interests and render the appeal nugatory. However, the appellant has not provided evidence to demonstrate that the respondent would be unable to refund the decretal sum should the appeal succeed.
12. In [Masisi Mwita V Damaris Wanjiku Njeri](#), [2016] eKLR, Mativo J, relying on [Equity Bank Ltd V Taiga Adams Company Ltd](#), [2006] eKLR, stated:

“The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent ... the respondent would not be in a position to pay – reimburse. ... Here, no such allegation is established by the appellant.”
13. In this case, while the appellant has not established the respondent’s financial incapacity, it is equally true that the respondent has not demonstrated his ability to refund the sum if the appeal were to succeed. In such circumstances, and given the proprietary nature of the interests involved, I am persuaded that the appeal may be rendered nugatory in the absence of a stay.



14. As regards security for due performance of the decree, the appellant has expressed a willingness to deposit the decretal sum in a joint interest-earning account. In *Focin Motorcycle Co. Limited V Ann Wambui Wangui & Another* [2018] eKLR, the Court held:

“Where the appellant proposes to provide security as the appellant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment.”

15. In my view, the appellant’s willingness to provide security, coupled with the absence of any evidence that the offer is made in bad faith, satisfies the requirements of Order 42 Rule 6. Balancing the interests of both parties, and in the interest of substantive justice, I find merit in the application.

Disposition.

16. Accordingly, I allow the application dated 19th December 2024 on the following terms:

- i. There shall be a stay of execution of the judgment delivered on 11th December 2024, in SCCCOMM E8240/2024 pending the hearing and determination of the intended appeal.
- ii. The stay order is conditional upon the appellant depositing the entire decretal sum in a joint interest-earning account in the names of counsel for the parties within thirty (30) days from the date hereof.
- iii. In default of compliance, the stay herein granted shall lapse automatically without further reference to the Court.
- iv. Costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF JUNE 2025.

F. MUGAMBI

JUDGE

