



**Chile Kenya Motors Limited v Itotia & 2 others (Civil Appeal  
E141 of 2024) [2025] KEHC 10374 (KLR) (11 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10374 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E141 OF 2024**

**M THANDE, J  
JULY 11, 2025**

**BETWEEN**

**CHILE KENYA MOTORS LIMITED ..... APPELLANT**

**AND**

**PETER NGARUIYA ITOTIA ..... 1<sup>ST</sup> RESPONDENT**

**JEREMIAH NGALA NGOJA ..... 2<sup>ND</sup> RESPONDENT**

**KARISA NGOWA CHEMBE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 18.12.24, the Appellant seeks the following orders:

1. Spent.

2. Spent.

3. Pending inter partes hearing and determination of the appeal filed herewith, this Honourable Court be and is hereby pleased to grant a stay of execution of the decree of the Principal Magistrate's Court at Kilifi in Kilifi MCCC No. E396 of 2022: *Peter Ngaruiya Itotia v Chile Kenya Motors Limited & 2 Others*.

4. In order to safeguard the substratum of the Appeal, this Honourable Court be pleased to issue and order of mandatory injunction directing Misa M. Auctioneers acting on instructions of the 1<sup>st</sup> Respondent to produce motor vehicle registration number KDQ 268E in court pending the hearing and determination of the Application and the Appeal.

5. The costs of this application be provided for.

2. The Appellant is aggrieved by the ruling of 17.12.24 by the trial court in Kilifi MCCC No. E396 of 2022: *Peter Ngaruiya Itotia v Chile Kenya Motors Limited & 2 Others*, and seeks stay thereof. It is



- averred that the Appellant has an arguable and meritorious appeal with a high likelihood of success. Further, that the Appellant will suffer substantial loss if stay of execution is not granted and motor vehicle KDQ 268E is sold. The appeal will be rendered nugatory. Additionally, that the Respondent will suffer no prejudice if the application is allowed. Further that in order The Appellant is further willing to deposit security and abide by any conditions set by the Court.
3. The 1<sup>st</sup> Respondent opposed the application through a replying affidavit sworn on 13.1.25 by his counsel, Geoffrey Kilonzo. It was averred that the Application is brought in bad faith and is meant to deny the Respondent the fruit of litigation, is bad in law, incompetent and is an abuse of the court process. Further that the Appellant has not met the test for the grant of stay of execution as set out in Order 42 Rule 6 of the *Civil Procedure Rules*.
  4. It was further averred that the Appellant does not have an arguable appeal. The Respondent's case is that the lower court properly applied the principles of law in dismissing the application seeking to set aside the judgment delivered on 27.11.23. Further that the lower court found that summons was duly served upon the Appellant and that setting aside the judgment would prejudice the Respondent who has already received part payment. Further, that in the said judgment the lower court found the Appellant together with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally liable and awarded the 1<sup>st</sup> Respondent Kshs. 3,043,722.17 plus costs and interest. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' stated that they do not wish to be dragged back into the matter as their insurer paid Kshs. 3,000,000/=. The remaining balance is Kshs. 43,722.17 plus costs and interest. It was thus argued that reopening the matter would be futile and an academic exercise. Further, that in any event the decree in question is a money decree of which stay cannot be granted.
  5. It was further averred that the prayer seeking the release of the motor vehicle is misguided as the vehicle was attached in execution of a decree that has not been set aside. Further that the 1<sup>st</sup> Respondent is not a man of straw and is capable of refunding the decretal sum, should the appeal succeed.
  6. The jurisdiction of the Court to grant stay of execution is set out in Order 42 Rule 6 of the *Civil Procedure Rules*. Sub-rule 2 provides:
    - (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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
  7. A party seeking stay of execution must demonstrate that substantial loss may result to the party unless the order is made, that the application has been made without unreasonable delay, and finally that the party has given such security as the court orders for the due performance of the decree in question.
  8. The general rule regarding an order for stay of execution is that first and foremost, it is discretionary. Where the Court is called upon, as it is in the present case, to exercise its discretion in any application, it must do so judicially, the overriding objective being to ensure that the ends of justice are met.
  9. The decision appealed against was made on 17.12.24 while the Application was filed on the following day on 18.12.24. The Application was thus filed timeously and the requirement that an application for stay of execution be filed without unreasonable delay has been duly met.
  10. The Court of Appeal set out the factors to be considered in an application for stay of execution pending appeal in the *Butt v Rent Restriction Tribunal* [1982] KLR 417, as follows:



1. . The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.
11. Flowing from the cited decision, it can be discerned that while considering an application for stay, the discretion of the Court must be exercised in a manner that will not prevent an appeal or render an appeal nugatory. The Court will consider whether there is any overwhelming hindrance for the grant of stay; whether good grounds have been advanced; existence of any special circumstances and unique requirements. Lastly the Court may order security for costs.
  12. The Appellant claims that it has an arguable appeal with high chances of success. In [\*National Bank of Kenya Limited & another v Geoffrey Wabome Muotia\*](#) [2017] eKLR, the Court of Appeal stated:
 

An arguable appeal is any appeal that raises at least one bona fide issue that deserves the consideration of this Court. This was the holding of the Court in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR (Civil Application 31 of 2012) where it rendered itself in the following manner:

    - “vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...;
    - vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...;”
  13. The Appellant's contention is that it was not served with summons, which is the gravamen of its appeal. The question whether the Appellant was duly served with summons is in my view arguable.
  14. The Appellant has stated that it will suffer substantial loss if the stay of execution sought is not granted. The Appellant contends that the auctioneer has on instructions of the 1<sup>st</sup> Respondent, unlawfully seized its motor vehicle in execution of the decree, and the Appellant will suffer significant loss if the same is sold. The Respondent's position however is it is trite law that stay of execution cannot be granted in respect of a money decree such as the decree in question herein.



15. In *Maasai Mara Wilderness Lodge Limited v Soni* (Civil Application E402 of 2023) [2024] KECA 84 (KLR) (9 February 2024) (Ruling), the Court of Appeal stated as follows regarding stay of execution of a money decree:

This Court in the case of *Kenya Hotel Properties Limited vs. Willesden Properties Limited* Civil Application Nai. No. 322 of 2006 (UR 178/06) stated thus: -

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.

16. I have considered that if stay is not granted, the Appellant’s motor vehicle will be sold in execution of the decree. This will no doubt cause the Appellant undue hardship.
17. It is trite law that the purpose of stay of execution is to preserve the substratum of the matter in dispute. After considering the foregoing, I am persuaded that there is sufficient basis to preserve the substratum of the appeal.
18. Access to justice is a right enshrined in Article 48 of the *Constitution* and extends to the right to appeal. As such, a party’s right to appeal should be protected by ensuring that such party’s appeal is not rendered nugatory. In exercising its discretion, the court must weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
19. The Court has formed the opinion that there is no overwhelming hinderance to grant the stay sought herein. The Court further notes that the Appellant has filed its memorandum of appeal and will suffer prejudice if the orders sought are not granted.
20. In the end, I allow the Application on terms that the unsettled decretal sum shall be deposited in Court by 25.7.25. In default, the stay so granted shall lapse. The costs of this application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 11<sup>TH</sup> DAY OF JULY 2025**

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**M. THANDE**

**JUDGE**

