



**Kenya National Highways Authority v Ger (Civil Appeal
E327 of 2024) [2025] KEHC 11428 (KLR) (28 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E327 OF 2024**

**G MUTAI, J
JULY 28, 2025**

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY APPELLANT

AND

ROZALIA AKOTH GER RESPONDENT

RULING

1. In a judgment delivered on the 6th day of September 2024, the trial Court, the Hon JB Kalo, CM, found the appellant/applicant liable to pay the respondent Kes.960,000/- for having illegally detained motor vehicle registration number KBY 839F Mitsubishi Fuso, on account of alleged ticket infractions, for 75 days. The learned magistrate awarded compensation to the respondent at the rate of Kes.16,000/- per day for 60 days, for loss of use, reasoning that the motor vehicle would not have worked for 7 days a week.
2. The appellant/applicant was aggrieved by the said decision and appealed to this Court. The Memorandum of Appeal raises four grounds, to wit:-
 1. That the learned magistrate erred in law and in fact in failing to find that the Appellant had grounds and legal authority to detain the Respondent's car;
 2. That the learned magistrate erred in law and in fact in failing to find that the Appellants' virtual tickets had been electronically generated and that they were the basis of detaining the Respondents' car.
 3. That the learned magistrate erred in law and in fact in finding that the Appellant was liable to pay the sum of Kes.960,000 for the detention of the Respondent's vehicle while the said action was done in accordance with the *East African Community Vehicle Load Control Act* 2016.



4. That the learned magistrate erred in law and fact in failing to find any liability on the part of the Respondent.
3. It sought to have the judgment set aside, a judgment entered in its favour for Kes.3,988,547/-, being the sum payable under the impugned weigh bridge tickets and costs.
4. The appellant/appellant also filed the instant application under a certificate of urgency seeking a stay of execution of the said judgment pending the hearing and determination of the appeal, upon such conditions as the court may deem fit. The grounds upon which the appeal is based are that the appellant/applicant has an arguable appeal with a high chance of success. It was urged that the trial Court failed to consider that the detention was a result of virtual tickets that placed the respondent's car in violation of the *East African Community Load Control Act*, 2016.
5. It was further contended that the said motor vehicle was detained in accordance with the provisions of the law, and therefore, the finding of the Court was unwarranted and a contravention of the execution of the provisions of the *East African Community Load Control Act* 2016 and the *Traffic Act*.
6. The appellant/applicant contended that allowing the execution to proceed would occasion substantial loss to it, as the means or ability to repay on the part of the respondent are unknown.
7. The application is opposed. The respondent filed grounds of opposition dated 28th October 2025 in which her counsel, Ngonze & Ngonze Advocates, averred that the application was belated, ill conceived, misinformed and trained with mala fides as it sought orders that were untenable in the circumstances, was vexatious and does not meet the threshold for grant of the orders sought, otiose, bad in law and an abuse of the process of Court and was also fatally defective.
8. The respondent further stated in the said grounds that it would be in the interest of justice to deny the prayers sought and to dismiss the application with costs to it.
9. The application was canvassed by way of submissions. Although the respondent's counsel mentioned in open Court on 27th May 2025 that he had filed written submissions, the Court did not see the said submissions as none were in the Court file, nor were they available online in the Court Tracking System (CTS).
10. The appellant/applicant, on the other hand, through its counsel, Miller & Co. Advocates, filed written submissions dated 3rd December 2024. In the said submissions, it identified the sole issue as being whether this court should issue an order for stay of execution of the judgment of the Court below pending appeal.
11. It was urged that the purpose of the application for stay of execution is to preserve the substratum of the appeal so that if the appellant were to emerge the victor, the subject of the appeal would not have been lost.
12. In support of the application, counsel relied on the case of *RWW v EKW* [2019]eKLR and also on *Butt v Rent Restriction Tribunal* [1982]KLR.
13. Counsel for the appellant/applicant submitted that the application was filed without undue delay. She urged that their client would likely suffer substantial loss, as the respondent's means were unknown. Reliance was placed on the case of *Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation)* (2004) 2 EA 331 and also that of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR).



14. It was submitted that once the applicant alleged that the respondent had no means of paying back the decretal sum, if it was paid to her in execution of a judgment, against which there is an appeal, it was up to her to rebut the said allegation. The Court was asked to consider the holding in the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] KEHC 7586 (KLR).
15. The appellant/application offered to abide by any condition that the court may give in consideration of the issuance of the orders sought.
16. As earlier stated, the court did not see the submissions of the respondent as they were neither in the CTS nor in the Court file. That notwithstanding, due weight will be given to the grounds of opposition filed herein.
17. Grant of orders of stay of execution is an exercise of discretionary power by the Court. As a discretionary power, Courts grant or decline to issue such orders based on sound, judicious considerations and not whimsically or capriciously.
18. In *Butt v Rent Restriction Tribunal* (1982) KLR the Court held that –
 - “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.”
19. In the case of a stay of execution, the principles are laid out in order 42 Rule 6(2) of the *Civil Procedure Rules*, which states that:-
 - “(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 orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

20. For emphasis, I will distil the necessary test as being: -

1. Whether the applicant would suffer substantial loss unless the orders sought are granted;
2. Whether the application was filed without undue delay; and
3. If security for due performance of any order that may ultimately be found to be binding has been given.

21. I must state that a stay of execution of a judgment or an order of the court should only be granted where sufficient cause is shown. In the case of [Antoine Ndiaye v African Virtual University](#) (2015) eKLR Gikonyo, J stated that:-

“...stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three prerequisites provided under order 42 rule 6 of the [Civil Procedure Rules...](#)”

22. The three requirements are conjunctive, and not disjunctive; they must all be present for the court to exercise its discretion.

23. Has the test stated above been satisfied? What orders, if any, should be issued in this matter? I will look at each of the three conditions below in sequence.

24. What then is substantial loss? In [Century Oil Trading Company Ltd v Kenya Shell Limited](#) Nairobi (Milimani) HCMCA No. 1561 of 2007 Kimaru, J, as he then was, in defining what substantial loss is, stated as follows:-

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from 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 where 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.”

25. Similarly in [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR the court expressed itself as follows:

“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.”

26. It has been averred that the means of the respondent are unknown. It is possible that if she receives the money, the appellant/applicant states, then she may not be able to refund it if the appeal is successful. It is adverted that the loss of the substratum in such an event is a substantial loss within the meaning of Order 42 Rule 6(2) of the *Civil Procedure Rules*.
27. In my view, once it was alleged that she may not repay the decretal sum, if execution proceeded, it was incumbent on the respondent to show that she was not a woman of straw and that she would pay up if the judgment on appeal were not favourable to her; she did not discharge this burden. That being the case, I find and hold that the appellant/applicant would suffer substantial loss if the execution were not stayed. Thus, the first test is satisfied
28. In arriving at the foregoing finding, I am guided by the decision of the Court in the *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] KECA 333 (KLR), where the Court of Appeal stated as follows:-

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has, since that is a matter which is peculiarly within his knowledge — see, for example, section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”
29. I note that the application for stay was made when the 30-day stay of execution granted by the Court below was subsisting. In my view, the application was filed without undue delay. The second test was therefore met.
30. The last test is that of the provision of security. In the affidavit in support of the application, the applicant has expressed a willingness to meet any conditions given by the Court. This readiness is, in my view, sufficient; it meets the requirement.
31. I note that the appeal filed by the appellant/applicant isn't idle. It is arguable and raises serious issues which call for interrogation by the appellate Court.
32. It will also be better to preserve the substratum of the case. The speedy conclusion of the appeal will assuage the inconvenience that any party may suffer.
33. I find and hold that the applicant has satisfied the test for stay pending appeal. Consequently I hereby order that there be a stay of execution of the judgment delivered by the Court below in MCC No 1729 of 2019 between the parties hereto on 6th day of September 2024 on condition that the judgment sum of Kes.960,000/- be deposited in a joint interest earning account in the name of both parties' counsel within 30 days of the date hereof. I order that, in the event of default, execution to issue.
34. On costs, I order that they abide the outcome of the appeal.
35. It is so ordered.



DATED AND SIGNED AT MOMBASA, THIS 28TH DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Vuchocho, for the Appellant/Applicant;

Mr Ngonze, for the Respondent; and

Arthur - Court Assistant.

