



REPUBLIC OF KENYA



KENYA LAW
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Saalyha General & Auto Supplies Limited v Lake Lubes Limited (Succession Appeal E001 of 2025) [2025] KEHC 10862 (KLR) (25 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION APPEAL E001 OF 2025**

A MABEYA, J

JULY 25, 2025

BETWEEN

SAALYHA GENERAL & AUTO SUPPLIES LIMITED APPELLANT

AND

LAKE LUBES LIMITED RESPONDENT

RULING

1. Before me is a Motion on Notice dated 22/4/2025 by the appellant. The same was brought without citing any provisions of the Law under which it was made. However, it sought a stay of execution pending the hearing of the present appeal. It was therefore a proper Motion under Order 42 Rule 6 of the *Civil Procedure Rules*.
2. The grounds upon which the same was brought were set out in the body thereof and in the Supporting affidavit of Mohamed Arshad Chaudhry sworn on 24/4/2025. These were that if the stay was not granted, the respondent would execute the decree of the Small Claims Court thereby occasioning the applicant loss to his prejudice as the appeal will be rendered nugatory.
3. It was further contended that the appeal has good chances of success. Indeed, about 6 grounds to prove that fact were set out by the applicant. That the balance of convenience was in favour of the applicant owing to the substantial amount involved.
4. The respondent did not file any replying affidavit in response thereto. It only filed submissions. It submitted that the appeal was filed 32 days after the date the judgment was delivered. That no leave had been sought to file the appeal out of time. That in the premises, the appeal was incompetent by dint of section 79G of the *Civil Procedure Act*. That the appeal being incompetent, there was no basis of considering the Motion predicated thereon. The decision of *Foods v Shamsber Ltd* [2024] KEHC 9762 (KLR) was cited as an authority in support of that proposition.



5. The applicant filed its submissions dated 20/6/2025. It was submitted that the application had been filed timeously. That the 30th day for filing the appeal fell on Easter Sunday 20/4/2025 and the earliest day for filing the appeal was 22/4/2025 due to Easter Monday of 21/4/2025. That the present Motion was filed 3 days later and therefore timeously. That Order 50 Rule 3 of the [Civil Procedure Rules](#) excluded holidays and weekends in computing time.
6. That since the respondent had not filed any replying affidavit, it has not rebutted the matters sworn to in the Supporting affidavit. The in any event, the applicant was willing to offer such security that the Court may order.
7. This is an application for stay of execution pending appeal. Under Order 42 Rule 6 of the [Civil Procedure Rules](#), the principles are well settled. The application must be made timeously, the applicant must establish that he/she/it will suffer substantial loss if a stay is not granted and must offer security for the due performance of the decree or order that may ultimately be found to be binding on the applicant.
8. Before considering the three principles, there was a preliminary objection that was raised by the respondent in its submissions. It was contended that the application was incompetent as there was no competent appeal in force. That the appeal was filed on 22/4/2025 on the 32nd day, being out of time and there was no leave granted to extend the time for filing. The answer by the applicant was that under Order 50 Rule 3 of the [Civil Procedure Rules](#), the Sundays and holidays do not count. That the appeal was filed within time, the filing of the appeal on 22/4/2025 was therefore proper.
9. There is no dispute that under section 79G of the [Civil Procedure Act](#), an appeal from the Subordinate Court to this Court must be lodged within 30 days of the decision. It is not in dispute that the impugned judgment was delivered on 20/3/2025 and the Memorandum of Appeal was lodged on 22/4/2025. The contention by the appellant is that under Order 50 Rule 3 of the [Civil Procedure Rules](#), the last day for lodging the appeal was 20/4/2025 as the Sundays and holidays do not apply while computing time.
10. I have considered the record and the parties' respective contestations. Order 50 Rule 3 of the [Civil Procedure Rules](#) provides that: -

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”
11. It is clear from the foregoing that the provision applies where the last day is on a Sunday or a holiday. In the present case, time started to run on 21/3/2025. 30 days ended on 19/4/2025 which was a Saturday. That was a day when the offices were closed. Accordingly, by virtue of Order 50 Rule 3 of the [Civil Procedure Rules](#), that is a date when the offices are closed and the last day would be the next working day which is 22/4/2025.
12. In view of the foregoing, I hold that the filing of the appeal on 22/4/2025 was within time. The application was therefore filed within a competent appeal. The objection is therefore without basis and is hereby rejected. Let me now proceed to consider the Motion on merit.



13. As to delay, the Judgment was delivered on 20/3/2025 and the application was lodged on 24/4/2025. To my mind since that was approximately 2 days after lodging of the appeal, the same was well within time and therefore timeous. The first principle is therefore met.
14. The second principle is that an applicant must demonstrate that he/she/it will suffer substantial loss if the stay is not granted. In the present case, the applicant swore that it will suffer substantial loss in that, if that execution takes place and the money is paid over, the respondent will not be able to refund the same if the appeal succeeds.
15. Substantial loss is the cornerstone of the jurisdiction of this Court under Order 42 Rule 6 of the *Civil Procedure Rules*. The Court must ensure that an appeal before it is not rendered an academic exercise. That is what the Court must guard against while protecting a successful party's right to enjoy the fruits of his/her judgment.
16. The general rule is that once an applicant contends that it will suffer substantial loss if a stay is not granted, the evidentiary burden of proof ordinarily shifts to the decree holder to show that he/it is not a man or a Company of straw. He/it is of means and will be able to repay the amount if the appeal succeeds. See *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Anor* [2006] eKLR.
17. In the present case, although the averment by the applicant was to the effect that the respondent was a company of straw, that it would not be able to repay the Kshs.1 million ordered if it is paid over and the appeal succeeds, there was no denial of that fact or rebuttal that the respondent would be capable of repaying the same.
18. In an application under Order 42 of the *Civil Procedure Rules*, once an applicant alleges that it/he will suffer substantial loss if the stay is not granted and the money is paid over, it is incumbent upon a respondent to show that he/it is of means. An affidavit of means needs to be filed to satisfy the Court that a respondent will be capable of refunding the same if an appeal succeed.
19. In the present case, there was no such averment. Accordingly, the Court holds that the applicant will suffer substantial loss if the stay is not granted.
20. The last point is security. The applicant offered to give such security as the Court may order for the due performance of the decree if the appeal is against it.
21. Accordingly, I allow the application. Stay of execution is hereby granted on condition that the applicant deposits a sum of Kshs.500,000/- in an interest bearing account in the joint names of the Advocates for the applicant and respondent within 45 days of the date hereof. The costs shall be in the cause.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE

