



**Seahorse Energy Limited v Lemarpe & another (Suing as the Administrators of the Estate of Victor Langai (Deceased)) (Civil Appeal E416 of 2024) [2025] KEHC 10149 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10149 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E416 OF 2024**

**G MUTAI, J**

**JULY 2, 2025**

**BETWEEN**

**SEAHORSE ENERGY LIMITED ..... APPELLANT**

**AND**

**GRACE MAMIYIAI LEMARPE ..... 1<sup>ST</sup> RESPONDENT**

**LAMARPE LENTIONKA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF VICTOR LANGAI  
(DECEASED)**

**RULING**

1. On 8<sup>th</sup> November 2024, the Court below (per Gathogo Sogomo, PM) delivered a decision vide which the respondent was awarded Kes.2,637,244.20 together with costs. Being aggrieved by the said decision, the appellant filed an appeal to this Court. The Memorandum of Appeal is dated 29<sup>th</sup> November 2024. It seeks to set aside the judgment delivered on 8<sup>th</sup> November 2024, for the respondents' suit to be dismissed with costs, or in the alternative, for this Court to re-evaluate the evidence on record, the submission of the parties, and to pronounce itself accordingly.
2. The appellant filed a Notice of Motion application dated 13<sup>th</sup> December 2024, vide which it sought a stay of execution of the judgment. It appears that the lower Court file could not be traced for the purpose of fixing a hearing date for the application. In the meantime, the Respondent commenced execution, forcing the applicant to file an application for a stay of execution before this Court. The application in question is dated 24<sup>th</sup> February 2025.
3. The application was opposed. Ms Grace Mamiyiai Lemarpe, the 1<sup>st</sup> respondent, for herself and the 2<sup>nd</sup> respondent deposed to a replying affidavit sworn on 28<sup>th</sup> February 2025 in which she accused the applicant of forum shopping, having filed a similar application before the Court below and of not



taking steps to prosecute it only to awaken once the execution was commenced. She averred solemnly that equity aids the vigilant, not the indolent, and that the applicant was guilty of laches. The applicant was further accused of trying to delay the trial of this matter.

4. The respondents thus urged that the application be dismissed with costs to them as the applicant was undeserving of the orders sought.
5. The appellant/applicant, through its advocate, filed a supplementary affidavit sworn on 12<sup>th</sup> March 2025, in which it reiterated that the file had been missing. The counsel for the applicant, who is the deponent of the affidavit, deposed that the application was meritorious and should be allowed.
6. The application was canvassed through written submissions as per the directions of Ngaah, J, of 6 March 2025.
7. The applicant's submissions are dated 17<sup>th</sup> March 2025. The firm of Okello Kinyanjui & Co LLP filed them. Counsel submitted that the purpose of the stay of execution was to preserve the subject matter so that the appeal would not be rendered nugatory. Counsel relied on the case of Nicholas Stephen Okaka & another v Alfred Waga Wesonga [2022]eKLR, and Tabro Transporters Ltd v Absolom Dova Lumbasi [2012]eKLR.
8. It was urged that applications for stay of execution are premised on Order 42 Rule 6(2) of the Civil Procedure Rules and that an applicant had to show that there would be substantial loss unless a stay was granted, that the application was filed without unreasonable delay, and to provide security or undertake to provide one.
9. On whether there would be a substantial loss, it was urged based on the decision of the Court in National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR and Caneland Ltd Malkit Singhpandhal & another v Delphis Bank Ltd [2000] eKLR that once the applicant stated that the respondent was not a man of means the burden shifted to the Respondent to deny that he was. Counsel urged that in this case, the Respondent hadn't discharged his evidentiary burden as he didn't file an affidavit of means so that his financial standing could be established.
10. On security counsel urged that the purpose of security was to guarantee the due performance of the decree and wasn't meant to punish the judgment debtor. The applicant urged, relying on the case of Nduhiu Gitahi vs Warugongo [1988] KLR 621, that the security, however, had to be reasonable and shouldn't be used to compel an applicant to settle the appeal.
11. The counsel for the applicant submitted that the application was filed without undue delay as the application before the lower Court was filed 5 days after the lapse of stay, and that this instant application was lodged after the lower Court file couldn't be traced.
12. Counsel submitted that warrants of attachment of movable property should be set aside for being a nullity, as they contained a sum not awarded in the judgment. In support of the said contention, counsel relied on the case Duncan Nderitu Ndegwa vs Kenya Pipeline Co Ltd & another [2018]KEELC 36003(KLR).
13. It was thus urged that the application be allowed.
14. The submissions of the respondent were filed on 27<sup>th</sup> March 2025. Through the said submissions, Mr Ngure, learned counsel for the Respondent, urged that the appellant/applicant hadn't come to Court with clean hands as there was a similar unprosecuted application before the Court below which hadn't been set for hearing.



15. Counsel urged that it was after not getting a response to their letter seeking prosecution of the matter in the Court below that they sought to execute the judgment, which caused the applicant to rush to this Court with the instant application dated 24<sup>th</sup> February 2025.
16. Counsel submitted that the applicant was guilty of laches and did not therefore deserve the orders sought.
17. Counsel referred to the principles for the grant of injunctions in the various decided cases, to wit, *Giella v Cassman Brown & Co Ltd* [1973] EA 358, *Nguruman Ltd vs Jan Bonde Nielsen & 2 others* [2014]KCCA 606 (KLR), and the definition of what amounts to a prima facie case in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) KLR 125. Mr. Ngure submitted that the application was mischievous and ought not to be allowed.
18. Mr Ngure submitted, based on the decision of the court in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018]KEELC 244 (KLR), that the balance of convenience tilted against the grant of the orders sought.
19. Counsel submitted that the applicant has a history of abusing the Court process. For that reason, as well as for the foregoing reasons, counsel prayed that the orders sought be denied.
20. I have considered the application, the responses thereto, and submissions of the parties. I note that what is before me is a motion seeking a stay of execution of the judgment of the Court below. Order 42 Rule 6(2) of the Civil Procedure Rules provides 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.”

21. I will look at each of the grounds in turn, noting that the requirements are conjunctive and not disjunctive; all the elements have to be present for the orders to issue.
22. What amounts to a substantial loss has been defined in a number of cases. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR) , Gikonyo, J stated as follows:-

- “ 11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion



by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

23. In *Century Oil Trading Company Ltd vs. Kenya Shell Limited, Nairobi (Milimani) HCMCA No. 1561 of 2007* held 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 judgment.”

24. The applicant has averred that the respondents are people of modest means and that if they receive the decretal sums, they may not be able to pay back. Thus execution may occasion them a substantial loss. I note that the respondent did not rebut the allegation that he wouldn't be able to repay the decretal sums. I am guided by the decision of the Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR* wherein they held that:-

“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.”

25. I am therefore persuaded that the first condition has been met.
26. The applicant filed an application for stay in the court below within 5 days of the lapse of the stay granted at the time the judgment was delivered. I am persuaded that the applicant was unable to prosecute the application as the court file was missing. Filing the application before this Court was therefore an act of prudence. In my view, a 5-day delay is not inordinate. Based on the foregoing, the second condition has been met.
27. In its application, the applicant expressed a willingness to meet any condition that this Court could impose. This willingness meets the third condition.



28. I have found that the application for stay of execution has merit. There is a clear and present risk that the Appellant/Applicant will suffer substantial loss unless a stay of execution is granted. The application was filed without undue delay. The applicant has expressed a willingness to provide security.
29. As the application for stay has merit and is allowed, there is no need for me to consider whether the court should grant an injunction pending appeal.
30. I therefore allow the application dated 24<sup>th</sup> February 2025 on condition that the entire judgment sum of Kes.2,637,244.20 is deposited in a joint interest-earning account in the names of the appellant's and the Respondents' counsels within 30 days of the date hereof. In default execution to issue forthwith.
31. In the interest of justice, the appeal will be heard without delay. Costs will be in the cause.
32. It is so ordered.

**DATED AND SIGNED AT MOMBASA THIS 2<sup>ND</sup> DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Ngure, for the Respondent;

Ms Chege, for the Appellant/Applicant; and

Arthur – Court Assistant.

