Vision Scientific & Engineering Kenya Limited v Ngunah Enterprises Limited (Civil Appeal E062 of 2025) [2025] KEHC 13071 (KLR) (19 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13071 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E062 OF 2025

G MUTAI, J

SEPTEMBER 19, 2025

BETWEEN

VISION SCIENTIFIC & ENGINEERING KENYA LIMITED ..... APPELLANT

AND

NGUNAH ENTERPRISES LIMITED ..... RESPONDENT

RULING

1. Before this court is a notice of motion application dated 7th March 2025 vide which the appellant/ applicant seeks the following orders:-

    a. Spent;

    b. That pending the hearing and final determination of the appeal herein, there be a stay of execution of the judgment delivered on 21st February 2025 and all consequential orders;

    c. Spent; and

    d. That the costs of this application do abide the outcome of the pending appeal.

2. The application is premised on the supporting affidavit of Namburu Ramesh Acharya, the operations Manager of the appellant/applicant, dated 7th March 2025, vide which he stated that the said appellant/ applicant is bound to suffer substantial loss if the respondent proceeds with the execution, as the sum of Kes.17,909,834.97 plus costs would grind its operations to a halt. He deposed that the said amount was highly unlikely ever to be recovered from the respondent if the order of stay is not granted, as the respondent is not capable of refunding the same. Therefore it is only prudent for this honourable court to issue an order for stay to prevent substantial loss.

3. He stated that the application has been brought without unreasonable delay and urged the court to allow the application as prayed.

4. In response, the respondent filed a replying affidavit sworn by Ms Celestine Ngunah on 28th April 2025. Ms Ngunah deposed that the applicant has not demonstrated its willingness to abide by the conditions granting an order for stay of execution and that the respondent had a right to enjoy the fruits of the judgment in its favour. She urged the court to order the applicant to deposit the sum of Kes.17,909,834.97, in a joint interest-earning account in the names of the advocates for the parties pending hearing and determination of the appeal, in case it is inclined to grant the order for stay of execution.

5. The application was canvassed by way of written submissions. I shall state in summary each of the parties' respective submissions.

6. The applicant, through its advocates J. M. Njenga & Co. Advocates LLP, filed its written submissions dated 27th May 2025. Counsel for the appellant/applicant relied on Order 42 Rule 6 of the Civil Procedure Rules and submitted on the three elements for granting a stay of execution.

7. On substantial loss, counsel reiterated the applicant's position and submitted that the applicant will suffer substantial loss if the orders sought are not granted. Further, the application was filed without undue delay, as it was filed 9 days after the judgment.

8. On security counsel submitted that the applicant is willing to provide security for the due performance of the decree herein. Counsel urged the court to allow the application as prayed.

9. The respondent, on the other hand, through its advocates, Marende Necheza & Company Advocates, filed its written submissions dated 9th May 2025. Counsel relied on Order 42 Rule 6 of the Civil Procedure Rules and submitted that the applicant had not proved that it would suffer substantial loss, nor had it offered security. The court was urged to dismiss the application with costs. Counsel, however, reiterated the respondent's position that in case the court is inclined to grant the orders sought, it should do so on condition that the decretal sum be deposited in a joint interest-earning account.

10. I have considered the application, the responses thereto, as well as the rival submissions of the parties. What orders should the court issue? I have to look at what the Rules provides.

11. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 provides that:-

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
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> (2) No order for stay of execution shall be made under subrule (1) unless:-
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> (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."

12. From the provision above, it is evident that in the issuance of stay of execution orders, the court has to consider three factors, namely:-

i. Whether the applicant will suffer substantial loss unless the orders sought are granted;

ii. Whether the application has been made without unreasonable delay; and

iii. If security for the due performance of such decree or order that may ultimately be binding has been given by the applicant;

13. In discussing substantial loss, the court in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR) stated 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.
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> 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:-
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> > " ...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."

14. Further, in the case of Premier Industries Limited v Stephen Kilonzo Matiliku [2021] KEHC 4835 (KLR), the Court stated that:-

> " ...Put differently, the purpose of the jurisdiction to stay execution of judgment pending appeal is to prevent substantial loss being suffered by the party appealing, while protecting the rights of the decree holder. One of the most enduring legal authorities on the question of substantial loss is the case of Kenya Shell Kenya Ltd v Kibiru & Another [1986] KLR 410, cited by the Respondent. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell case are especially pertinent. These are that:-
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> > "
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> " 1. .....

2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

The decision of Platt Ag JA, in the Shell case, in my humble view, set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:-

> " The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in the two courts..."

15. In this case, the applicant has argued that it will suffer substantial loss if execution of the decision of the court below goes on, as the respondent would most likely be unable to repay the decretal sum. I note that the amount in issue herein is Kes.17,909,834.97. The said amount is quite substantial, and it would have been necessary for the respondent to demonstrate that it has the ability to repay the same if the appeal is successful. The respondent didn't do so. The respondent bore the burden of showing that it has that capacity the moment the appellant/applicant stated that the respondent's ability to pay was in doubt.

16. I am guided by the decision of the Court of Appeal in the case of National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR, wherein the then apex Court held that:-

> " Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has, since that is a matter which is peculiarly within his knowledge."

17. Guided by the above decision, I find and hold that the appellant/applicant will suffer a substantial loss unless the orders of stay are granted, as the respondent's ability to repay the decretal sum, if the execution is allowed to go on, is in doubt.

18. I must also point out that the appeal as disclosed by the Memorandum of Appeal is not idle, and is in fact arguable.

19. There is no dispute that the application was filed without unreasonable delay. The court will not therefore delve in to the same.

20. On security, the Court in the case of James Wangalwa & Another v Agnes Naliaka Cheseto (supra) stated:-

> " But my reading of order 42 Rule 6(2) (b) of the CPR reveals that it is the court that orders the kind of security the applicant should give, as may ultimately be binding on the applicant. This modelling of the law is to ensure the discretion of the court is not fettered."

21. Further, the Court in the case of Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] KEHC 7586 (KLR) stated that:-

> " Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.
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> Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal."

22. I note that the applicant in this case is willing to provide security for due performance of the decree.

23. It is clear, therefore, that the application has merit and ought to be allowed.

24. In the circumstances, allow the notice of motion application dated 7th March 2025 on the condition that the appellant/applicant deposits the decretal sum, that is to say Kes.17,909,834.97, as security, in a joint interest-earning account in the names of the advocates for both parties within 30 days of the date hereof.

25. Costs shall be in the cause.

26. Orders to issue accordingly.

DATED AND SIGNED AT MOMBASA, THIS 19TH DAY OF SEPTEMBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Wambua, for the Applicant;

Mrs Kyalo, holding brief for Mr Shimaka, for the Respondents; and

Arthur - Court Assistant.