



**Vivo Energy Kenya Limited Formally Known as Kenya Shell Limited  
v Francis M Mulatya t/a Ganjoni Agip Petrol Station (Civil Appeal  
205 of 2022) [2023] KEHC 22176 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22176 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 205 OF 2022  
F WANGARI, J  
JULY 14, 2023**

**BETWEEN**

**VIVO ENERGY KENYA LIMITED FORMALLY KNOWN AS KENYA SHELL  
LIMITED ..... APPELLANT**

**AND**

**FRANCIS M MULATYA T/A GANJONI AGIP PETROL  
STATION ..... RESPONDENT**

**RULING**

1. The appellant filed the Notice of Motion dated December 14, 2022 seeking *inter alia* stay of execution of the judgment delivered on December 2, 2022 in Mombasa CMCC No. 1470 of 2017 pending the hearing and determination of this appeal.
2. They stated that they have an arguable appeal which will be rendered nugatory if the order for stay is not issued. The appellant has assets and can pay should the court find that this appeal is not merited. The applicant is ready to comply with any reasonable condition the court may impose.
3. The respondent filed a replying affidavit of Francis Mulatya Kiema. The Respondent prayed that a sum of Ks 6,317,084 be deposited as a condition for the grant of stay.

**Analysis and determination**

4. I have considered the said submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, there is only one issue for determination which is whether the Appellant has made out a case for grant of orders of stay pending hearing and determination of appeal preferred. Corollary to this finding is the issue of costs.



5. The principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the [Civil Procedure Rules, 2010](#) which provides as follows: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

(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.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

6. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute. In [RRW v EKW](#) [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should 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. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”

7. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative. Having considered the Replying Affidavit that the Respondent has got no objection to grant of stay save for the deposit of decretal sum as security, this court shall limit itself to the issue of security only.



8. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“...The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose...”

9. In this case, the Respondent demands for the entire decretal amount as security. The Appellant states it would be inequitable to condemn it to deposit the entire amount. I have considered the submission by the Appellant that should the appeal not be successful, there is capacity to pay the decretal amount, which is the essence of the security. I therefore exercise the discretion of the court and order that a sum of Ksh. 1,700,000 be deposited as security in a joint interest earning account.

10. On the issue of costs, the same is provided for under section 27 of the *Civil Procedure Act* and the award of costs is discretionary. The costs should follow the outcome of the appeal.

11. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. There be stay of the judgment and decree of the court given in Mombasa CMCC 1470 of 2017 pending the hearing and determination of this appeal.
- b. The appellant to issue a bank guarantee for a sum of Ksh 1,700,000 within 60 days.
- c. Default of (b) above, the application stands dismissed
- d. Costs to follow the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF JULY 2023**

.....

**F. WANGARI**

**JUDGE**

**In the presence of;**

Miss Mwangi Advocate for the Appellant

N/A for the Respondent

Abdullahi, Court Assistant

