

REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E332 OF 2024

CAR & GENERAL (TRADING) LIMITEDAPPELLANT/APPLICANT

VERSUS

ROSE NDUNGE MUSYOKI..... 1ST
RESPONDENT
ROBERT MUTISYA 2ND
RESPONDENT

RULING

1. This ruling is on the Appellant/Applicant’s application by way of Notice of Motion dated 19/12/2024 .brought under Sections IA, 1B, 3A and 79G of the Civil Procedure Act, Cap 21 Laws of Kenya,. Procedure Rules Order 42 Rule 6 (I) and (2), Order 22 Rule 22 and Order 51 Rule I of the Civil Procedure Rules, 2010 seeking for orders:
 - a. Spent
 - b. Spent
 - c. **THAT, this Honourable court be pleased to grant orders of stay of execution pending the hearing and determination of the Appeal before this Honourable court.**
 - d. **THAT, costs be in the cause.**

2. The application is supported by the supporting affidavit of **Joseph Mulwa Mwambi** sworn on 19th December 2024 and which application is premised on the following grounds inter alia that;
 - a. There is a judgement delivered against the Appellant/Applicant on 27/11/2024 who was .the 1st Defendant in the lower court for the sum of Kshs.1,313,040.
 - b. The Applicant is apprehensive that the 1st Respondent may proceed with execution of the :said judgment at any time.
 - c. The Applicant had already disposed off the motorcycle that is alleged to have caused the .accident prior to the date of the alleged accident.

- d. The Applicant is not aware of the assets of the 1st Respondent.
- e. The Applicant is apprehensive that should the execution proceed against the Appellant, the Appellant will not be able in a position to recover the said sum of Kshs.1,313,040 should the Appeal succeed.
- f. The Appeal will be rendered nugatory and otiose should the execution proceed against the Appellant who has no knowledge of the whereabouts of the Respondent neither any of her assets.
- g. The Applicant is dissatisfied with the said judgement and has filed an appeal before this Honourable Court.
- h. The 1st Respondent did not prove before the lower court that the rider of the motorcycle that is alleged to have caused the accident was an employee, agent and/or servant of the Appellant nor was the said motorcycle being ridden under the Appellant's instructions and/or did the Appellant derive any benefit from the use of the said motorcycle.
- i. The Applicant has a strong Appeal which raises issues on liability as the Appellant was not in any way connected to the rider of the motorcycle and had no control and/ or derive any benefits from the use of the said motor cycle registration number KMFV 573D having sold it to Norieta Limited on 09/11/2021 prior to the date of the alleged accident the subject of the proceedings in Machakos Civil suit no. E075 of 2023.
- j. The Applicant is a Company in the business of selling and distributing motorcycles and three-wheeler motor vehicle and thus any registration done in its name was only for the purpose of compliance with statutory requirements under the National Transport and Safety Authority Act Number 33 of 2012 to enable the Applicant transact its business of selling the same.
- k. The Applicant does not have any motorcycles and/or free-wheeler motor vehicles for its own use neither has it any riders and drivers as its employees and further it does not use the said motorcycles for any other purpose other than seller and distributor of the same.
- l. The Applicant is further bound to suffer irreparable harm and economical loss if the said judgement is not stayed pending the

hearing of the Appeal, as it had no connection whatsoever in the occurrence of the alleged accident on the alleged date.

- m. The Applicant will suffer immeasurably if it proceeds to make payment of the amounts awarded which will have the effect of completely hampering the operations of the Appellant and putting to jeopardy the employment of its employees following the current economic situation prevailing in the country.
 - n. The judgment being Appealed from seeks that the Applicant makes payment for damages for an accident it was not aware of and never did it contribute to its occurrence.
 - o. That it is only fair and just that the stay of execution be granted until the appeal is heard and determined.
 - p. The 1st Respondent has no ascertainable assets that can be realized in the case the appeal is successful.
 - q. That once payments are made out to the 1st Respondent, there is no means of recovering the same from the said 1st Respondent.
 - r. The Applicant is ready to offer security as the court may determine and seeks that it deposit an insurance bond due to the hard economic situation prevailing in the country.
3. In opposition to the said application, the 1st Respondent filed a replying affidavit deponed on 05/02/2025 and sought for Applicants' notice of motion to be dismissed for reasons that;
- a The application is without basis and only meant to delay the enjoyment of the fruits of the legally obtained judgement.
 - b The Appellant/ Applicant has no arguable appeal as it is the registered owner of motorcycle registration number KMFV 573D and it neither proved sale of the said motorcycle to the alleged Norieta Limited nor did it join the said Norieta Limited as a third party in the suit.
 - c That the 1st Respondent is a farmer and parcels of land hence capable of refunding the decretal sums in the unlikely event the Appellant/Applicant appeal succeeds and as such the

Appellant/Applicant will not suffer substantial loss if no stay is granted.

- d The economic state of the country is not a justifiable reason for the Appellant/Applicant to eschew satisfying a legally obtained judgement, as were it for its negligence, the 1st Respondent would neither have suffered pain nor incurred any treatment costs.
- e That in the unlikely event that the court be inclined to allow the application, the Appellant/Applicant be directed to deposit the decretal sums in court as security pending appeal..
- f The Orders sought in the subject application are undeserved and urge the court to dismiss the application with costs as the 1st Respondent stands to suffer prejudice if the Orders sought are granted.

Brief Background

- 4. The Respondent/Plaintiff in the lower court instituted the suit against the Appellant/1st Defendant for an alleged road accident involving motorcycle registration number KMFV 573D in which the Appellant appeared to be the registered owner though it alleges to have sold the suit motorcycle prior to the date of the accident. Judgement was delivered on 27/11/2024 holding the Defendants jointly and severally liable for the sums of Kshs.1,313,040.
- 5. Aggrieved with the said judgement the Appellant/Applicant lodged an appeal vide memorandum of appeal dated 19/12/2024 and subsequently filed the subject application seeking stay of execution pending appeal.
- 6. The application was canvassed through written submissions. The Applicant's submissions are dated 12/02/2025 filed by Kabii & Co. Advocates whilst the Respondent's submissions are dated 03/03/2025 filed by Nyaata & Nyaata Advocates. The 2nd Respondent did not participate in the application.

Analysis and Determination

- 7. I have carefully perused and considered the application, the supporting affidavit, the replying affidavit and the Parties' counsel submissions as well as the judicial decisions relied upon. In my view, the issues for determination are as follows:-
 - a. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.***

b. Who shall bear costs of the application?

a. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.

8. The law relating to stay pending Appeal is Order 42 Rule 6 (2). It is also important to state that the power to grant an order of stay is discretionary and is dependent on certain conditions being met.
9. Order 42 rule 6(1) and (2) of the **Civil Procedure Rules,2010** provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.

(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.”

10. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely:

- (i) establishment of a sufficient cause,**
- (ii) satisfaction of substantial loss and**

(iii) **the furnishing of security.**

11. Further the application must be made without unreasonable delay.
12. To the foregoing, Justice Odunga in **Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR** held that:

*“I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the **Civil Procedure Act**, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the **Civil Procedure Act** or in the interpretation of any of its provisions. According to Section 1A (2) of the **Civil Procedure Act**: **“the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.”***

13. Under Section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.
14. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA** on 20/11/09 held *inter alia* that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.
15. The same Judge in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplement them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case.”

16. It therefore follows that all the pre-overriding objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the Civil Procedure Act are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice.
17. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.
18. In **Butt Vs. Rent Restriction Tribunal [1979]**, the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated thus:
 - i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.***
 - ii. 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 the Appeal court reverse the judge's discretion.***
 - iii. Thirdly, 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.***
 - iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the***

special circumstances of the case and its unique requirements.

19. On the first criterion as set out in Order 42 Rule 6 (2) i.e. Whether Applicant/Appellant has brought this application without unreasonable delay. The Judgement was delivered on 27/11/2024. The Memorandum of Appeal was filed 19/12/ 2024, which is less than a month. In the circumstances, I find that application has been brought without unreasonable delay.
20. On second criterion is whether the Applicant/Appellant has demonstrated that he is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In **Silverstein Vs Chesoni (2002)1 KLR 867** it was held that

“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”

21. The Appellant/Applicant has deposed that he stands to suffer loss if orders sought are not granted. Judgment was entered in favour of the 1st Respondent, who may execute against the Applicant. The Applicant will suffer immeasurably if he proceeds to make payment of the amounts awarded which will have the effect of completely hampering the operations of the Appellant and putting to jeopardy the employment of its employees following the current economic situation prevailing in the country. Once payments are made out to the 1st Respondent, there is no means of recovering the same from the said 1st Respondent.
22. That the order for stay is desirable so that the Appellant/Applicant may have their appeal heard in Court. If the decretal sum is released to the Respondent and the subsequent appeal allowed, where the financial capability of the Respondent is unknown then the Applicant stands to suffer loss.
23. The court is under a duty to hold the rings of justice even handed; it should not offer any illegitimate advantage to either party. The Appellant/Applicant appeals to this Honourable Court to grant the order of stay to enable the Applicant an opportunity to be heard on its Appeal.
24. In **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR**, it was held that:

"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 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 situation 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 must be prevented by preserving the status quo because such loss would render the appeal nugatory."

25. In response to the Applicant's assertions on the 1st Respondent's inability to refund the decretal sum if released to him, the 1st Respondent stated that is a farmer and parcels of land hence capable of refunding the decretal sums in the unlikely event the Appellant/Applicant appeal succeeds and as such the Appellant/Applicant will not suffer substantial loss if no stay is granted.

That the economic state of the country is not a justifiable reason for the Appellant/Applicant to eschew satisfying a legally obtained judgement

26. In granting an order of stay of execution, the court should not be seen to interfere with a party's enjoyment of the fruit of the judgment. See the case of **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No.6726 of 1991** where the court stated as follows: -

"The financial ability of a decree-holder solely is not a reason for allowing stay, it is enough that the decree-holder is not a dishonourable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime."

27. The loss the Appellant has alluded to is that the appeal herein will be rendered nugatory should the stay order be declined. It is my considered view that this being a monetary claim, any loss to be suffered by either party can adequately be compensated by an award in damages. The Applicant has not shown by evidence through an affidavit that the 1st

Respondent is incapable of refunding the decretal sums should the appeal succeed.

28. On the third criterion where the Applicant/Appellant must furnish security for the due performance of the decree. I am fully aware that the court has a delicate task of balancing the interests of both the Appellant and the Respondent. The Appellant who seeks 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. It is true that under Order 42 rule 6 aforesaid, the Applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. I agree with the position in **Mwaura Karuga t/a Limit Enterprises .vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR**, where it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words “ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

29. I also associate myself with the holding in **Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR**, where the court observed:

“... 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.

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 ... This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.”

30. The law is that where the Applicant intends to exercise its undoubted right of appeal, and in the event, it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** where the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It

would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so. The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

31. The Applicant has submitted that he is ready to offer security as the court may determine and seeks that it deposits an insurance bond due to the hard economic situation prevailing in the Country. This demonstrates good faith and commitment by the Appellant/Applicant to abide by the court’s directives thereby satisfying the legal requirement for security for costs.

b) Who should bear the cost of this application?

32. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section **27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See ***Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012: [2014] eKLR***. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.
33. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the Civil Procedure Act, I find and hold that the Appellant/Applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.
34. In the interest of justice, the appeal must be fast-tracked, heard and determined on its merits. Consequently, I make the following orders:

a.I hereby allow the Appellant/Applicant’s application dated 19th December 2024 and grant stay of execution of the

judgment delivered on 27th November 2024 in Machakos Civil Suit No. E075 of 2023 pending the hearing and determination of the appeal.

- b. The Appellant/ Applicant shall deposit in court an Insurance Bond equivalent to the value of the decretal amount with a copy to the 1st Respondent within 30 days of this ruling.**
 - c. The Order in (b) above shall automatically lapse on 30th November 2025 should the Appellant fail to comply.**
 - d. The Appellant shall file and serve a record of appeal within Sixty (60) days of this ruling failure to which the appeal will stand dismissed.**
- c. Costs shall be in the appeal;**
- d. A mention date to be fixed for directions on the disposal of the appeal.**

It is so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 30TH OCTOBER 2025

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 30TH OCTOBER 2025

In the presence of:-

Mr. Ndungu for Mr. Kaburu for Applicant
Mr. Mwangi for Mrs Nyaata for Respondent
Milly-Court Asst.