



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**CIVIL APPEAL NUMBER E079 OF 2025**

**MANAGING DIRECTOR**  
**BARCLAYS BANK LIMITED -----**  
**APPELLANT/APPLICANT**

**VERSUS**

**NAKURU TANNERS LIMITED ----- 1<sup>ST</sup>**  
**RESPONDENT**

**RAMADHAN JUMA ----- 2<sup>ND</sup>**  
**RESPONDENT**

**RULING**

1. This Ruling follows the Appellant's Notice of Motion dated 23<sup>rd</sup> April, 2025 by which reliefs are sought as hereunder;-

**1. Spent.**

**2. Spent.**

**3. This Honourable Court be pleased to grant a stay of execution of the entire Judgement of Hon. K. Kibelion dated 28<sup>th</sup> February 2025 and the consequential decree pending hearing and determination of the Appeal.**

**4. The costs of this Application be provided for.**

**5. That there has been fragrant and culpable delay on the part of the Appellant's in prosecuting this matter.**

**6. That costs for the application be provided for.**

2. The Appellant's Legal Counsel,- Legal and Compliance Department (Simon Mwangi) swore an affidavit on 23<sup>rd</sup> April 2025 in support of the Motion. He deposes *inter alia* that on 16<sup>th</sup> November 2015 the 1<sup>st</sup> Respondent Company lodged a claim against the Appellant for Kshs. 1,915,160/= among other reliefs, alleging loss on account of the Appellant's negligence. The Appellant refuted the claim contending that it was statute barred. The trial court, however, found in favour of the 1<sup>st</sup> Respondent, thus provoking the Appeal.

3. The Appellant fears substantial loss if execution of the lower court's decree is levied. It is averred that the 1<sup>st</sup> Respondent had no known assets and may not refund the total decretal sum of Kshs. 4,414,668/= were the Appeal to succeed.
4. The Appellant further expresses readiness and willingness to deposit a reasonable security pending hearing and determination of the Appeal.
5. According to the Appellant, this Application is brought without unreasonable delay.
6. One of the Directors of the 1<sup>st</sup> Respondent (Fahd Feisal) swore an affidavit in reply, opposing the Application. On advice of his Advocates, he avers that the Application does not meet the threshold for grant of stay of execution pending Appeal as required under **Order 42 Rule 6 of the Civil Procedure Rules 2010.**
7. The 1<sup>st</sup> Respondent asserts that it had financial capacity to refund the decretal sum claiming to own property and an account with Diamond Trust Bank. The court is

therefore urged not to deny it the right to enjoy the fruits of its litigation.

8. The 1<sup>st</sup> Respondent suggests that should the court be inclined to allow the Application, the Appellant be ordered to pay at least half of the decretal sum.
9. The parties filed written submissions which I have perused against the rival affidavit evidence. Is the Application merited?
10. **Order 42 rule 6(1) (2) of the Civil Procedure Rules 2010** governs disposal of an Application such as before me for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-
  - “a. unless 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.”**

11. The Appellant contends that it has brought the Motion without unreasonable delay given that the date the impugned judgement was delivered. It is should, however, be noted that even delay of one day, if unexplained, is bad enough. The Appellant have not explained the long delay of about two month to bring this Application.
12. In the circumstances, the delay is found to be unreasonable/ inexcusable and therefore this legal condition has not been satisfied.
13. Offer of security for costs is another mandatory legal requirement that has to be complied with. The court has power to determine the appropriate security for costs but an Applicant must first express willingness and readiness to offer security.
14. In **John Odungo vs Joyce Irungu Muhatia [2014] eKLR** the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows “preparedness as well as readiness to provide security should one be called upon to do so”.

15. The Appellants has satisfied the requirement having expressed readiness and willingness to furnish necessary security for costs.
16. Determination of the application turns on the question of substantial loss, if any, the Appellant might suffer if stay of execution is not ordered. The case of **Nyatera vs Nyakundi (Civil Appeal E033 of 2022) [2023] KEHC 3086 KLR) (16 March 2023) (Ruling)** is relevant for the proposition that the Applicant ought to show the manner in which his appeal would be rendered nugatory if stay of execution is not ordered. The court opined in the case that it is not enough to say that because the Respondent intends to proceed with execution, he should be stopped because of the appeal. The court is therefore required to tread a delicate balance of the parties' interests. As it is now trite, this is the cornerstone of the court's discretion to grant or refuse stay of execution pending appeal. The onus is on the Appellant to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds. In **Tropical Commodities Ltd.**

**International (in liquidation) (2004) 2 EA 331** my senior brother (*Ogolla J*) explained that ***substantial loss*** is a qualitative concept. It refers to;-

**“any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”**

17. In **RWW vs EKW [2019] eKLR** and **Re Global Tours & Travel Ltd HCWC No. 43 of 2000** In **Milimani HCMCA No. 1561 of 2007, Century Oil Trading Company Ltd vs Kenya Shell Ltd**, this court again explained 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 when, 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 judgement.”**

18. In **Shell Ltd vs Kibiru & Another** (1986) KLR 410 it was famously postulated that;-

**“Substantial loss in its various forms is the cornerstone of the court’s jurisdiction to grant stay pending appeal. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”**

19. Regarding the burden of proof, the Court of Appeal held in **National Industry Credit Limited vs Aquinas Francis Wasike & Another** [2006] eKLR 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.”**

20. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including **Matata & Another vs Rono & Another** (Civil Appeal No. E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling).

21. Based on the affidavit evidence the impugned judgement was delivered on 23/4/2025 while this Application was brought about two months later. The long delay is unexplained as already noted. The Appellant has, however, expressed willingness and readiness to deposit security for costs as may be required.
22. As regards the question of substantial loss, the Applicant has not made out a *prima facie* case of the 1<sup>st</sup> Respondent's inability to refund the decretal sum if paid out. It has the onus of initial proof before the 1<sup>st</sup> Respondent is called upon to respond. This condition for grant of stay pending Appeal has not therefore been quite satisfied.
23. Doing my best in balancing the interests of the parties, however, I hereby allow the Application but on conditions as hereunder;-

**a) Stay of execution pending Appeal is ordered on condition that the Applicant pays out half of the outstanding decretal sum within thirty (30) days from the date**

**hereof, and deposit the balance within the same period, in default of which the 1<sup>st</sup> Respondent shall be at liberty to levy execution.**

**b)The costs of this Application shall abide the Appeal.**

24. Ruling accordingly.

**J. M. NANG'EA, JUDGE.**

**Ruling delivered virtually at Nakuru this 29<sup>th</sup> day October, 2025.**

**In the presence of:-**

**Mr. Mungai Advocate for the Appellant**

**Ms Kiprop Advocate for Ms Ndeda Advocate for the Respondents**

**C/A (Jeniffer)**

**J. M. NANG'EA, JUDGE.**