



**Star Rental Limited v Maalim & another (Legal Representatives of the Estate of Ali Hussein Ngure - Deceased) (Civil Appeal E001 of 2025) [2025] KEHC 15973 (KLR) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15973 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CIVIL APPEAL E001 OF 2025  
JN NJAGI, J  
OCTOBER 30, 2025**

**BETWEEN**

**STAR RENTAL LIMITED ..... APPLICANT**

**AND**

**ABDI MADOW MAALIM ..... 1<sup>ST</sup> RESPONDENT**

**HALIMA IBRAHIM ABDI ..... 2<sup>ND</sup> RESPONDENT**

**LEGAL REPRESENTATIVES OF THE ESTATE OF ALI HUSSEIN NGURE -  
DECEASED**

**RULING**

1. The Appellant/Applicant herein has filed a Notice of Motion application dated 15<sup>th</sup> August 2025 seeking that there be an order for stay of execution of the decree in Hola CMCC No. E045 of 2024 delivered on 10<sup>th</sup> December 2024 pending the hearing and determination of the appeal filed herein.
2. The application is based on grounds stated on the face of the application and supported by the affidavit of the counsel for the Applicant, Philip Adede. The grounds in support of the application are that judgment has been obtained against the Applicant at the lower court. That the Applicant was dissatisfied by the judgment of the subordinate court and instituted the appeal herein. That on the 22<sup>nd</sup> August 2025, the lower court issued warrants of attachment of the Applicant's property and on 25<sup>th</sup> August 2025 Mutrix Auctioneers proceeded to proclaim the Applicant's assets. That unless stay orders are granted, it will render the appeal nugatory. Additionally, that if the decretal sum is paid to the respondents, it will not be recoverable from them in the event that the appeal is successful.
3. The application was opposed by the Respondent through the replying affidavit of their counsel, Mr. Wambua Kilonzo on the grounds that the application has not met the conditions for grant of stay execution pending appeal and is thus an abuse of the court process. That the application has been brought after undue delay and was filed so as to obstruct the execution of the decree. That it has not



been demonstrated that the applicant will suffer substantial loss if the application is not granted. That no security has been deposited in the matter.

4. It was averred that the applicant had filed a similar application at the lower court which was dismissed on 23/4/2025 and the applicant took 4 months to file the present application. That this shows that the application was an afterthought and is only meant to frustrate the execution of the decree.

### **Submissions**

5. The application was canvassed by way of written submissions of counsels representing the parties. Counsel for the applicant submitted that the application herein was filed on 25/8/2025 after their application for stay of execution was dismissed at the lower court on 23/4/2025. That the applicant acted promptly. Reliance was made in the case of *Amal Hauliers Limited v Abdulnadir Abukar Hassan* (2017) eKLR where the court held that an application filed 4 months after judgment was not inordinate.
6. Counsel submitted that the amount claimed is over Ksh.2,000,000/=. That the assets of the applicant stand to be sold unless stay is granted which will not only disrupt the business of the applicant but also render the pending appeal nugatory.
7. It was submitted that the applicant is apprehensive that if the decretal sum is paid to the respondents, they will not be able to refund the same should the appeal succeed. That the respondents have not filed an affidavit of means to demonstrate their financial capacity to make restitution. In this respect the applicant placed reliance on the case of *National Industrial Credit Bank v Aquinas Francis Wasike & another (UR)* as cited in *Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa* (2016) eKLR where the Court of Appeal 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 lack of them. Once an applicant expresses 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.”

8. It was submitted that the applicant has expressed willingness to deposit security as the court may direct which is an expression of good faith as held in the case of *Focin Motor Cycle Company Ltd v Ann Wambui Wangui & another* (2018) eKLR. Counsel for the applicant urged the court to allow the appeal.
9. Counsel for the Respondent on the other hand submitted that the applicant has not satisfied the conditions set out in Order 42 Rule 6(1) of the Civil Procedure Rules as to warrant an order for stay of execution pending appeal. That it has not demonstrated how it stands to suffer substantial loss if stay orders are not granted nor have they shown that the respondents are people of straw who will be unable to refund the decretal sum should the appeal succeed. That the burden to show that the respondents were people of straw was on the applicants, which they failed to prove. Reliance in this respect was placed in the case of *Antoine Ndiaye v African Virtual University* (2015) KEHC 6783 KLR where it was held that:

The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before



the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya and his means is unknown.

10. Further reliance on the same proposition was placed in the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another (1986) KECA 94 (KLR) where the court while dismissing an application for stay of execution held that:

It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.

11. It was submitted that the applicant has not demonstrated substantial loss.
12. Counsel for the respondent submitted that the application for stay of execution was made 9 months after judgment of the trial court was delivered on 10/12/2024 and 4 months after a similar application as the current one was dismissed by the trial court on 23/4/2025. Therefore, that the application has been made with unreasonable delay.
13. It was submitted that no deposit for due performance of the decree has been made. That should the court be inclined to allow the application, it should order half of the decretal sum be paid to the respondents and the balance be deposited in court as security.

### **Analysis and determination**

14. The applicant is seeking for stay of execution pending appeal. I have carefully considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the learned counsels for the respective parties. The issue for determination is whether the application has merit and whether it should be allowed.
15. An Applicant for stay of execution pending appeal is required to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. These are that:
  1. The application was brought without unreasonable delay.
  2. The Applicant will suffer substantial loss unless the orders sought are granted.
  3. The Applicant has given security for due performance of the decree as may be binding on him.
16. On the first condition, it is not disputed that the applicant had filed a similar application at the lower court which was dismissed on 23/4/2025. The instant application was filed on 25/8/2025, which was 4 months after the dismissal of the application by the trial court. The applicant has not given any reason why they waited for 4 months before filing the current application with this court after their application for stay was dismissed by the trial court. Consequently, the applicant has not, in my view, shown that the application was filed without unreasonable delay.



17. The second condition for grant of stay of execution is that an applicant is required to demonstrate that he/she will suffer substantial loss if the orders sought are not granted. In *Kenya Shell Limited v Kibiru & another* (1986) KLR 410, Platt Ag. JA (as he then was) expressed himself as follows on the subject:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. 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”.

18. The Applicant says that the decretal sum involved in the matter is over Ksh.2.000,000= . That it is apprehensive that if the money is paid to the respondents they may not be in a position to refund the money should the appeal succeed. That the respondents have not sworn an affidavit of means to show that they are in a position to do so. Therefore, that they will suffer substantial if they fail to recover the money paid to the respondents.

19. The applicant in their pleadings expressed an apprehension that they may not recover their money if paid to the respondents. Once such an issue was raised, it was incumbent upon the respondents to demonstrate that they were not people of straw and that they were in a position to refund any money paid to them in the event of the appeal succeeding, see *Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa* (supra). It is the respondents who know their own means. In failing to respond to that assertion by the applicant, the inference that can be drawn is that they were not in a position to refund any money that may be paid to them in the event of the appeal succeeding. The applicants have thereby shown that they may have difficulties in recovering money that may be paid to the applicants in the event of the appeal succeeding. This will occasion them to suffer substantial loss. The condition of substantial loss has thereby been demonstrated.

20. The third condition for grant of stay of execution pending an appeal is that the applicant has to offer security for due performance of the decree. This is meant to give the Respondent something to fall back to in the event that the appeal is not successful. In *Arun C. Sharm Vs. Ashana Raikundalia T/A/ Rairundalia & Co. Advocates & 2 Others* [2014] eKLR, 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...”

21. The Applicant herein has offered to deposit security though they have not indicated the form of security they wish to deposit. It is however the discretion of the court to determine what kind of security an applicant should deposit in court and therefore the court will proceed to determine the kind of security to be made by the applicant. Though the applicant has not shown that the application was filed without unreasonable delay, I am persuaded that I should in this case grant orders for stay of execution pending appeal.

22. The court is alive to the fact that the purpose of an application for stay of execution pending appeal is to preserve the subject matter of the appeal. The court is required to balance the interests of the two parties. In *HGE v SM*, Civil Appeal No.20 of 2020, Kakamega (2020) eKLR the court observed that:

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.

23. In balancing the rights of both sides in this matter, I will allow the application on condition that the applicant deposits security for due performance of the decree. Having perused the grounds of appeal, I do not find sufficient reasons for me to order that part of the decretal sum to be paid to the respondents as sought by counsel for respondents. I therefore make the following orders:

1. Stay of execution of the decree is granted as prayed pending the hearing and determination of the appeal herein.
2. The applicant to deposit the decretal sum in an interest earning account to be opened in the joint names of the advocates appearing for the parties at a bank to be agreed upon between themselves which account should be opened and the deposit made within 30 days from date of this ruling in default of which, if the default is occasioned by the applicant, the orders for stay of execution as granted will stand vacated.

24. The Costs of the application to abide by the outcome of the appeal.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT GARSEN THIS 30<sup>TH</sup> DAY OF OCTOBER 2025**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Adede HB for Mr. Gor for Appellant

Miss Nyambuto for Respondent

Court Assistant Ms Rahma

