



REPUBLIC OF KENYA



**KENYA LAW**  
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**Weihai Construction Group Ltd v Chege t/a Graphmann Engineering (Small Claims Appeal E014 of 2025) [2025] KEHC 14961 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14961 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SMALL CLAIMS APPEAL E014 OF 2025  
RN NYAKUNDI, J  
OCTOBER 23, 2025**

**BETWEEN**

**WEIHAI CONSTRUCTION GROUP LTD ..... APPELLANT**

**AND**

**BONIFACE MWANGI CHEGE T/A GRAPHMANN  
ENGINEERING ..... RESPONDENT**

**RULING**

1. Before this Court for determination is a notice of motion dated 2<sup>nd</sup> October 2025 expressed under the provisions of section 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, Order 42 Rule 6 of the Civil Procedure Rules where the applicant seeks orders as follows:
  - a. Spent
  - b. That pending inter-parties hearing of this application, this Honorable Court be pleased to issue an interim order of stay of execution of the Judgment entered on 5<sup>th</sup> September 2025.
  - c. That pending hearing and determination of this application, this Honorable Court be pleased to issue an interim order of stay of execution of the Judgment entered on 5<sup>th</sup> September 2025.
  - d. That pending the hearing and final determination of the intended appeal, this honorable Court be pleased to issue an order for stay of execution of the judgment entered on 5<sup>th</sup> September 2025.
  - e. That the Applicant/Appellant be at liberty to apply for further Orders and/or directions as this honorable Court may deem fit and just to grant.
  - f. That the costs of this application do abide the outcome of the appeal.
2. Which application is based on the grounds that:



- a. Through a judgment delivered on 5<sup>th</sup> September 2025, the Learned Adjudicator, the Honorable Tabitha Mbugua R.M, upheld the Respondents claim of Kshs 368,640 together with cost and interest and dismissed the Appellant’s appeal of Kshs 1,000,000 as against the Respondent.
- b. In issuing the Judgment, the Learned Adjudicator relied on a non-existent written undertaking purportedly by the Appellant admitting the debt and promising to settle in instalments.
- c. That no undertaking was ever made, filed, or produced in the trial court by either party, hence the Judgment is founded on an error apparent on the face of the record. This renders the Judgment liable to be set aside for being erroneous, unlawful, and gravely prejudicial to the Applicant.
- d. At the delivery of the Judgment, the Honourable Adjudicator granted the Applicant/ Appellant herein 30 days stay of execution, and the same is to lapse on 4<sup>th</sup> October 2025, hence paving the way for the execution of the Judgment and Decree.
- e. In the circumstances, execution is imminent.
- f. The Applicant has since filed a Memorandum of Appeal against the impugned decision of the Honorable Trial Court.
- g. In the event that the Respondent proceeds with the execution of the Judgment, the Appellant faces the grave prospect of inordinate prejudice and the prospect of substantial pecuniary loss.
- h. Further, the Respondent’s financial standing is doubtful and it is highly probable that the Respondent may be incapable of refunding the decretal sum should the Appeal ultimately succeed, thereby compounding the prejudice and injustice visited upon the Applicant.
- i. The intended appeal risks being rendered wholly nugatory and atiose if the orders of the Trial Court are not stayed. Pending the disposal of the intended appeal.
- j. The Appellant is ready and willing to abide by all the Orders of the Honourable Court that will ensure the fair and just disposal of the instant application and the intended appeal.

### **Decision**

3. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. At the time of crafting this decision, the Respondent had not filed a response on the CTS platform but I shall nonetheless proceed to consider the application on the merits.
4. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:
 

“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.”



5. Further to the above, stay may only be granted for sufficient cause 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.
6. Section 1A(2) of the *Civil Procedure Act* provides that "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" while under section 1B some of the aims of the said objectives 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."
7. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely
  - a. That substantial loss may result to the applicant unless the order is made;
  - b. That the application has been made without unreasonable delay, and;
  - c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
8. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, 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, 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. 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 ... 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."
9. In the instant case, the Applicant avers that it stands to suffer substantial loss of Kshs. 368,640 together with costs and interest if stay of execution is not granted. The Applicant further avers that the Respondent has not demonstrated that he is able to refund the sum if the appeal succeeds. The Appellant has also pleaded that it is able to comply with any order as to security of costs.
10. I have carefully considered the Applicant's grounds for stay. A central ground for the appeal is that the judgment was founded on a non-existent written undertaking. This is an arguable ground that raises a serious question of law and goes to the foundation of the judgment. Such an error, if established on appeal, would be fundamental.
11. In *Kenya Shell Limited vs. Benjamin Karuga Kigibu & Ruth Wairimu Karuga* [1982-1988] 1 KAR 1018, the Court of Appeal stated that:
 

"It is usually a good rule to see if Order 41 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 cornerstone of both jurisdiction for granting stay”

12. The Applicant has averred that the Respondent’s financial standing is doubtful and that he may be incapable of refunding the decretal sum should the appeal succeed. In the absence of a response from the Respondent, there is no material before this court to demonstrate the Respondent’s ability to refund the decretal sum. The onus of proving substantial loss lies with the Applicant, but once prima facie evidence is adduced, the evidential burden shifts to the Respondent to demonstrate ability to refund.
13. In the present case, the Respondent has not filed any response to address the issue of his financial capacity to refund the decretal sum. In such circumstances, and considering that the decretal sum of Kshs. 368,640/= together with costs and interest is substantial, I am satisfied that the Applicant has demonstrated that substantial loss may result unless stay is granted.
14. On the question of unreasonable delay, the judgment was delivered on 5th September 2025 with a 30-day automatic stay which was to expire on 4th October 2025. The present application is dated 2nd October 2025, which is within the 30-day period and before the expiry of the automatic stay. The Memorandum of Appeal has also been filed. In these circumstances, I am satisfied that there has been no unreasonable delay in bringing this application.
15. As to the question of security, the purpose of security under Order 42 Rule 6 is to guarantee due performance of the decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor. Civil process differs from punitive measures as the judgment creates a debt relationship. The modeling of the law under Order 42 Rule 6(2)(b) is to ensure the discretion of the court is not fettered. It is the court that orders the kind of security the applicant should give.
16. I am conscious that both parties have rights which must be reconciled: the Appellant’s constitutional right to appeal which includes the right that the appeal should not be rendered nugatory, and the Respondent’s right as the decree holder to the fruits of the judgment. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.
17. The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law. Anything that renders the appeal nugatory impinges on the very right of appeal. In the case of *Butt v Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal emphasized that if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory.
18. 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 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.
19. Accordingly, I hereby allow the Applicant/Appellant’s application dated 2<sup>nd</sup> October 2025 and grant stay of execution of the judgment and decree entered on 5<sup>th</sup> September 2025 in the Court below on the following conditions:
  - a. The Applicant/Appellant shall deposit the entire decretal sum of Kshs. 368,640/= (Three Hundred and Sixty-Eight Thousand, Six Hundred and Forty Shillings) into an interest earning account at a reputable commercial bank in the joint names of PMAK Advocates and Mwaka & Company Advocates, within 21 days from the date of this ruling.



- b. In the event the Applicant fails to comply with the condition in paragraph (a) above within the stipulated period of 21 days, the stay of execution granted herein shall automatically lapse and the Respondent shall be at liberty to proceed with execution of the decree.
- c. The Appellant shall file and serve a record of appeal within thirty (30) days from the date of this ruling;
- d. The costs of this application shall be in the cause;

20. Orders accordingly.

**DATED SIGNED AND DELIVERED VIA E-MAIL AND CTS AT ELDORET THIS 23<sup>RD</sup> DAY OF OCTOBER, 2025**

.....

**R. NYAKUNDI**

**JUDGE**

