

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

ELRC APPEAL NO. E197 OF 2025

CALE INFRASTRUCTURE CONSTRUCTION CO. LTD.....APPELLANT

VERSUS

FRANCIS ONYANGO OYIENGO.....1ST RESPONDENT

BETABASE AUCTIONEERS.....2ND RESPONDENT

(Being an Appeal from the ruling and order delivered by Honorable Lucy Ambasi, Chief Magistrate, dated 10 June 2025 with respect to a Notice of Motion Application dated 15th April 2025 in Nairobi (Milimani) Magistrates Employment and Labour Relations Court Case No. MCELRC/E334/2023)

-BETWEEN-

FRANCIS ONYANGO OYIENGO.....CLAIMANT/RESPONDENT

-VERSUS-

CALE INFRASTRUCTURE CONSTRUCTION CO. LTD.....RESPONDENT/APPLICANT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

RULING

1. The applicant being aggrieved by the Ruling delivered by Hon L. Ambasi on the 10th June 2025 filed a memorandum of appeal and application dated 16th June 2025 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling laws seeking for the following orders-
 - a) Spent.
 - b) Spent.
 - c) THAT this Honourable Court be pleased to set aside and/or stay execution of the judgement entered on 1st October 2024 and all other consequential orders thereto pending the hearing and determination of this Application and Appeal.
 - d) THAT the Appeal be admitted and listed for hearing on priority.
 - e) THA this Honourable Court be pleased to make and/or issue such other orders as it may deem fit to grant.
 - f) THAT the cost of this application be provided for.

Grounds of the application

2. The Appellant/Applicant is presently exposed to the risk of execution through public auction and the risk is real as there are no orders for stay of execution.
3. The Appellant/Applicant will suffer substantial and irreparable loss and damage if the orders for stay sought herein are not granted.
4. The Appellant/Applicant is willing and ready to abide by the conditions for appealing as may be required.

5. That it is in interest of justice that the orders sought herein be hereby granted on priority basis.
6. The application was supported by the affidavit of Xheng Xing sworn on the 25th April 2025 where, among others, he annexed application dated 15th April 2025 (ZX-4), a copy of the impugned ruling dated 10th June 2025 (ZX5), warrants of attachment of 13th June 2025(ZX6) and a copy of the memorandum of appeal.
7. The application was opposed through a replying affidavit of Francis Onyango Oyiengo (1st respondent), sworn on the 21st July 2025, which the court perused. Among others the respondent contended that –
8. The Appellant's present application is an attempt to re-agitate issues that have already been decided by a court of competent jurisdiction. The learned Magistrate exercised her discretion judiciously in dismissing the application, and the Appellant has not demonstrated any error in principle to warrant this Court's interference.
9. The Appellant has failed to meet the legal threshold for grant of a stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. Specifically:
 - a) It has not demonstrated the substantial loss it will suffer, beyond mere speculation.
 - b) It has not offered any security for the due performance of the decree, which is a mandatory condition.
10. That the respondent was a successful litigant who has been awaiting the fruits of my judgment. Further delay occasioned by a stay of execution would prejudice me greatly,

especially considering the Applicant's lack of diligence in prosecuting its own case at the earliest opportunity.

11. The intended appeal is not arguable and has low chances of success, as it primarily challenges factual findings on service which were squarely within the trial court's domain to determine.
12. It is in the interest of justice that this application be dismissed to allow the lawful execution process to continue.

Decision

13. The application was canvassed by way of written submissions. Both parties filed and the court perused the same.

Whether the application was merited.

Applicant's submissions

14. On stay of execution pending appeal, the Employment and Labour Relations Court (Procedure) Rules, 2024 under Section 21 states that: - (1) Where an application for stay of execution pending appeal has been lodged, the applicant shall, in the supporting affidavit, declare whether a similar application has been filed in any other court:(2) An application for stay of execution pending appeal shall be filed in the appeal file." Since the Rules are silent on the conditions for granting stay then the lacuna is addressed by Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:- "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."

15. Onto the issue of as to whether the Appellant/Applicant stands to suffer substantial loss, the Appellant/Applicant submits that the Respondents herein have extracted the warrants of attachment and proclamation notice dated 12th June 2025 and 13th June 2025 respectively and caused the same to be served upon the Appellant/Applicant. The Appellant/Applicant now faces the imminent risk of being executed and the risk is real. The Appellant/Applicant is apprehensive that should the Respondents proceed with execution and the appeal turns out to be ultimately successful, the Respondents may be unable to refund the decretal sum as he has no known sources of income, employment or attachable assets. In the case of Chandaria v Mungai (Employment and Labour Relations Appeal E086 of 2025) (Ruling) the Learned Judge cited with approval the case of Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 wherein the court's approach where the issue of refund of the decretal sum by the decree holder is raised, the court held as follows:- "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 where 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 judgment." The court further cited the case of National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Another [2006] eKLR, which expounded on the issue as to which party on whom the burden of proving the Respondent's financial ability befalls, wherein the Court of Appeal stated 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 Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that 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 - see for example Section 112 of the Evidence Act, Chapter 80 Laws of Kenya.” (Emphasis Mine)”

16. That under Order 42 Rule 6 as aforesaid, the second condition to consider is whether the application has been made without unreasonable delay. The present application was brought approximately 8 days after delivery of the Ruling by Hon. Lucy Ambasi which is dated and delivered on 10th June 2025. It was therefore brought without unreasonable delay. On the issue of furnishing security, the Appellant/Applicant has already deposited 1/2 of the decretal sum in court as per the court's direction and also as a measure of good faith in the part of the Appellant/Applicant. It is the Appellant/Applicant's submission that it has complied with all the conditions required for grant of an order of stay pending appeal in line with Order 42 Rule 6 of the Civil Procedure Rules.

The Respondent's submissions

17. SUMMARY OF ARGUMENTS - The 1st Respondent shall contend that the application is devoid of merit for the following reasons:
- a) The Applicant has failed to demonstrate the substantial loss it stands to suffer, which is the cornerstone for granting a stay.
 - b) The Applicant has not offered any security for the due performance of the decree, a mandatory statutory requirement.
 - c) The intended appeal is not arguable and has low chances of success.
 - d) The Applicant has not come to court with clean hands.

18. A. THE APPLICANT HAS FAILED TO DEMONSTRATE SUBSTANTIAL LOSS -Order 42 Rule 6(2) of the Civil Procedure Rules provides that no order for stay shall be made unless the court is satisfied that substantial loss may result to the applicant if stay is not granted. The burden of proving such loss lies squarely and heavily on the Applicant. The Applicant has merely deponed in a blanket fashion that it "will suffer substantial and irreparable loss and damage." This is a mere averment, not evidence. No facts have been placed before this Honourable Court to demonstrate what specific substantial loss will befall the Applicant, a limited liability company, if the 1st Respondent, a successful litigant, executes the decree. The Law is Settled: In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court held that: "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. This is so because execution is a lawful process." In *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410, the classic principle was stated: "Substantial loss is the cornerstone of both jurisdictions for granting stay. The applicant must prove that he will suffer loss if the order for stay is not granted." In *Bungoma High Court Misc Application No. 42 of 2011 - Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others*, the court emphasized that the fear of execution alone is not substantial loss. The Applicant must prove the Respondent's inability to refund the decretal sum. In *Nairobi Civil Application No. 238 of 2005 (UR 132/2005) - Tropical Africa Co. Ltd v J. K. Limited*, the Court of Appeal reiterated that the evidential burden to show the respondent's financial incapacity rests with the applicant. The 1st Respondent is an individual who has proven his claim against the Applicant. The Applicant has not provided a shred of evidence to suggest that the 1st Respondent would be unable to refund the decretal sum should the appeal succeed. The application therefore fails at this primary hurdle.

19. B. THE APPLICANT HAS FAILED TO OFFER SECURITY FOR THE DUE PERFORMANCE OF THE DECREE - Order 42 Rule 6(2)(b) is mandatory and provides that the court “shall make such order as to security as the court may deem just and reasonable.” The provision is not discretionary. The Applicant’s application is conspicuously silent on the issue of providing security. The Law is Settled: o In *G. N. Muema C.B.K v Samuel Kamau Macharia & Another* [2012] eKLR, the court held that furnishing security is a condition precedent to granting a stay order. o In *Victoria Commercial Bank Ltd v Jagjit Singh Kalsi & Another* [2016] eKLR, the court dismissed an application for stay where the applicant had not proposed any security, stating that the requirement is meant to protect the decree-holder. In *Catherine Wanjiru Karanja & 2 Others v James Kiarie Githinji* [2021] eKLR, the court was clear: “The provision for security is not a mere technicality. It is the price for an order of stay of execution.” In *Mohsin Ali Naurashi v Kharidini (K) Limited* [2020] eKLR, the Court of Appeal declined to grant stay where the applicant had not offered any security, terming it a fundamental failure. The Applicant’s vague statement of willingness to “abide by conditions” is insufficient to meet this mandatory statutory obligation. The application is fatally defective for this reason alone.
20. C. THE INTENDED APPEAL IS NOT ARGUABLE - The sole ground upon which the Applicant seeks to impeach the judgment and the subsequent ruling is the alleged lack of service. This issue was fully litigated and determined by the learned Chief Magistrate in the ruling of 10th June 2025, which found the application “wanting of merit.” The Applicant, a corporate entity, is bound by the address it registers with the Registrar of Companies. Service at the CR-12 address is deemed proper service. The attempt to blame the 1st Respondent for its own failure to maintain updated records is misconceived. The Law is Settled: o In *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, an arguable appeal was defined as one that is “not frivolous...” and raises “a bona fide issue worthy of

consideration by the court.” In Mercury Capital Partners II LP & another v 4G Capital Limited & 4 others [2023] eKLR, the Court of Appeal stressed that an appeal must have a “high chance of success” to justify an injunction (a similar discretionary order). In Prime Media Services Limited v Justus Munyoki M’Maingi & another [2021] eKLR, the court held that where a trial court has made a finding of fact on service, an appellate court will be slow to interfere unless the finding is based on no evidence. The intended appeal, being a challenge to a factual finding on service, has low chances of success and is not sufficiently arguable to warrant the grant of a stay.

21. D. THE APPLICANT HAS NOT COME TO COURT WITH CLEAN HANDS - The Applicant’s allegation that the 1st Respondent “intentionally undertook service at the wrong address to steal a match” is scandalous, unsubstantiated, and made in bad faith. A party seeking the equitable discretion of this court must do so with clean hands. The Law is Settled:- In Nairobi Civil Application No. 28 of 2018 - Econet Wireless Kenya Ltd v Minister for Information & Communication & Another, the Court of Appeal cited the maxim “he who comes to equity must come with clean hands.”

DECISION

22. The parties relied on several authorities which the court noted were consistent with the decision in Butt -vs Rent Restriction Tribunal (1982) KLR 417 where the Court of Appeal (Madan J.A) gave guidance on how a Court should exercise discretion in an application for a stay of execution, that: -

“ If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion

will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458: "I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory."

23. It is trite in application for stay of execution the court is to be satisfied on the three conditions under Order 42 (6) of the Civil Procedure Rules namely:-*'(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.'*
24. The Court, applying the foregoing decision(Butt), finds that the applicant had already complied with the interim order on the deposit of ½ of the decretal sum in court as security under section 42(6) of the Civil Procedure Rules a mandatory condition for grant of stay of execution order. The respondent did not file an affidavit of means, and this being a money degree, there is a demonstration of likely substantial loss in the event the appeal is successful. The court found the memorandum of appeal raised triable issues related to a fair hearing before the lower court. The court is guided not to push parties out of the appeal seat (**Butt**).

25. The court for the foregoing reasons, allows the application. That this Honourable Court be pleased to issue order of stay execution of the judgement entered on 1st October 2024 and all other consequential orders thereto pending the hearing and determination of the intended Appeal. The court upholds the deposited ½ decretal sum as security to be held by court until determination of the appeal. Costs of the application in the cause.
26. Mention before the Court Hon Deputy Registrar on the 24th November 2025 for purpose of monitoring the filing of a record of appeal.
27. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH
DAY OF NOVEMBER, 2025.**

**J.W. KELI,
JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Absent

Respondent- Absent