

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. E031 OF 2025

SHAKE DISTRIBUTORS LIMITED.....

.....APPELLANT

=VERSUS=

JOSEPH SHAKO ONGWAYO.....

RESPONDENT

RULING

1. The application coming for consideration in this Ruling is the one dated 27th October 2025 brought under Order 51 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules 2010 Article 48 and 50 of the Constitution of Kenya and all other enabling procedures of the law seeking the following orders:-

(i) THAT this application be certified as urgent and service of the same be dispensed with in the first instance.

(ii) THAT this Honorable Court be pleased to issue an order staying execution of Judgment and all its consequential orders in VOI SCCC NO E001 OF 2024 pending hearing and determination of this application.

(iii) THAT this Honorable Court be pleased to issue an order staying execution of Judgment and all its

consequential order sin VOI SCCC NO E001 OF 2024 pending hearing and determination of **this application.**

(iv) Cost of the application be provided for.

(v) Any other relief that this Honorable Court may deem just and fair to grant to meet the ends of justice.

2. The application is based on the following grounds:-

(i) THAT upon the Judgment by Honorable F. M. MULAMA - RM/ADJUDICATOR in VOI SCCC NO. E001 of 2024 the Appellant/Applicant being aggrieved by the same decided o lodge an Appeal and there was no intention by the Respondent to execute the matter.

(ii) THAT recently the Respondent filed an application in the trial court and was granted Garnishee order nisi for the attachment of the Applicant's bank accounts.

(iii) THAT following the intention by the Respondent to execute the Lower Court's Judgement it will be proper if an order of stay is granted.

(iv) THAT failure to stay the Lower Courts orders the Appeal in this Honorable Court will be rendered nugatory.

(v) THAT the Appellant is more than willing to offer a deposit of Kshs. 200,000/= to curt as security.

(vi) THAT the Respondent will not suffer any prejudice if this application is allowed.

(vii) THAT it is in the wider interest of justice that this application be allowed.

3. The application is supported by the supporting affidavit of Peter Mbogho Mwangombe where he stated as follows:-

(i) He deponed that he is one of the Directors of the Applicant and was well versed with the matter, and was therefore competent to swear the affidavit.

(ii) He stated that following the Judgement in Voi SCCC No. E001 of 2024, they had decided to proceed with an Appeal and there had been no intention by the Respondent to execute the matter.

(iii) He further stated that recently the Respondent had filed an application in the Lower Court and had been granted a Garnishee order nisi for the attachment of the Applicant's bank accounts.

(iv) He contended that, given the intention by the Respondent to execute the Lower Court's Judgement, it would be proper if an order of stay was granted.

(v) He averred that a failure to stay the Lower Court's orders would render his Appeal nugatory.

(vi) He stated that he was willing to offer and deposit in court the sum of Kshs. 200,000 as security so that he could proceed and expedite his appeal.

(vii) He concluded by stating that the Respondent would not suffer any prejudice if the application was allowed.

4. The Respondent opposed the application and filed a Replying Affidavit where he stated as follows:-

(i) He stated that the Applicant is wholly undeserving of the orders sought, having failed to demonstrate sufficient cause or satisfy the necessary legal conditions.

(ii) He characterized the application as frivolous, an afterthought, and based on deliberate misrepresentations intended to mislead the court, waste judicial time, and prevent him from enjoying the fruits of his judgment.

(iii) He contended that the Applicant had failed to meet the mandatory conditions under Order 42 Rule 6 of the Civil Procedure Rules.

(iv) He pointed out that the appeal was filed on 20th May 2025, while the application for a stay was filed nearly six months later on 28th October 2025, which he deemed an inordinate and inexcusable delay intended solely to frustrate execution.

(v) Further, that no Substantial Loss Demonstrated. He asserted that the Applicant failed to specify the substantial loss it would suffer, noting that the mere threat or act of execution is not substantial loss.

(vi) He emphasized that the appeal only challenged part of the decree (Kshs. 350,000 in general damages), leaving an undisputed sum of Kshs. 140,006.61 which the Applicant had refused to pay.

(vii) He argued that the Applicant's proposed security of Kshs. 200,000 was manifestly inadequate and intended to shield itself from execution rather than secure the Respondent's interests.

(viii) He maintained that since a portion of the decree was undisputed, the Respondent's right to execute should be upheld.

(ix) He concluded that the application was devoid of merit, an abuse of court process, and should be dismissed with costs.

5. The parties filed written submissions as follows:- The Appellant submitted that he is seeking an order for stay of execution of the judgment in VOI SCCC NO. E001 OF 2024 pending the hearing and determination of its appeal.

6. Although the Application dated 27th October 2025 has two prayers for stay of execution pending the hearing of the

application, the Appellant's submissions delved on stay of execution pending appeal.

7. The Appellant further submitted that the purpose of such a stay is to preserve the subject matter of the dispute, safeguarding the Appellant's undoubted right of appeal and ensuring that a successful appeal is not rendered nugatory, while also balancing this against the Respondent's right to enjoy the fruits of his judgment.
8. Further that the Appellant has established sufficient cause for this order, having filed its appeal without unreasonable delay shortly after the judgment was issued.
9. Furthermore, that the Appellant argued that the Respondent's subsequent initiation of garnishee proceedings threatens the Appellant's statutory right to appeal. Should execution proceed, the Appellant will suffer substantial loss, as the garnishee orders have already frozen its bank account, impeding its day-to-day business operations and causing irreparable harm to a company that is a source of livelihood for its directors and dependents.
10. To guarantee the due performance of the decree should the appeal fail, the Appellant is willing to furnish reasonable security and proposes to deposit the sum of Kshs. 200,000.00.
11. Granting a stay under these conditions would not prejudice the Respondent, as the appeal will be heard on its merits.

12. Finally, the Appellant submitted that the costs of this application should be borne by the Respondent, as it was his actions that necessitated this filing despite the existence of a pending appeal. We therefore pray that the application be allowed as sought.
13. The Respondent contends that the application is fundamentally incompetent and should be dismissed.
14. That the core defect is that the motion fails to seek an order for stay of execution pending the appeal, instead only requesting a stay pending the hearing and determination of the application itself.
15. This failure means the application does not invoke the court's jurisdiction under Order 42 Rule 6(1) of the Civil Procedure Rules, as a court can only grant the specific relief prayed for.
16. Beyond this fatal flaw, the Respondent argues the Appellant has failed to satisfy any of the mandatory conditions for a stay.
17. The application was filed after an inordinate and unexplained delay of nearly six months following the judgment, showing a lack of diligence.
18. Furthermore, the Respondent submitted that the Appellant has not demonstrated what substantial loss it would suffer if execution proceeds, merely stating that its accounts have been

attached without showing how this would render the appeal nugatory.

19. Finally, the Respondent stated that the security offered—Kshs. 200,000—is inadequate for a decretal sum of Kshs. 490,006.61, especially since Kshs. 140,006.61 of this amount is not even disputed by the Appellant.
20. The Respondent prays for the application to be dismissed with costs as an abuse of the court process designed to obstruct a lawful decree.
21. The Respondent proposes an alternative, equitable arrangement: the Appellant should immediately pay the undisputed Kshs. 140,006.61 to the Respondent, and for the disputed Kshs. 350,000, deposit Kshs. 200,000 in court and pay Kshs. 150,000 to the Respondent, with all payments to be facilitated from the funds already garnished by the trial court.
22. **The sole issue for determination in the Application dated 27th October 2025 is whether the Applicant has met the conditions for grant of stay of execution pending appeal.**
23. Although the Application dated 27th October 2025 has two prayers for stay of execution pending the hearing of the application, the Appellant's submissions delved on stay of execution pending appeal.

24. The Respondent submitted that the motion fails to seek an order for stay of execution pending the appeal, instead only requesting a stay pending the hearing and determination of the application itself.
25. The law in Kenya has evolved to prioritize substantive justice over procedural technicalities.
26. The principle that rules of procedure are handmaidens and not cruel mistresses of justice is now so well entrenched in our jurisprudence that it requires no restating.
27. The principles governing the grant of a stay of execution pending appeal are well settled under Order 42 Rule 6 of the Civil Procedure Rules.
28. The applicant must demonstrate that he will suffer substantial loss if stay is not granted; that the application has been made without unreasonable delay; and that he has provided or is willing to provide such security as the court may order for the due performance of the decree.
29. On the issue of delay, the judgment of the lower court was delivered on a date not specified, but the appeal was filed on 20th May 2025 and the present application on 28th October 2025.
30. While this period of approximately five months is not insignificant, the court takes note that the Appellant was only

spurred into action upon the Respondent's successful application for a garnishee order nisi.

31. In the circumstances, and given that the appeal itself was filed timeously, the delay in bringing this application is not, in itself, so inordinate as to be fatal.

32. The cornerstone of an application for stay, however, is the demonstration of substantial loss.

33. It is not enough to merely state that an appeal will be rendered nugatory.

34. The Appellant contends that the garnishee orders have frozen its bank account, impeding its business operations.

35. The court finds that this assertion, while serious, is made in a general manner without specific details of the nature of the business, the accounts frozen, or the precise impact on its operations.

36. 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.

37. The mere fact that execution may proceed is not by itself substantial loss.

38. However, the court is cognizant of the fact that if the entire decretal sum is paid out to the Respondent and the appeal

succeeds, the Appellant may face difficulties in recovering the money.

39. The Appellant is willing to deposit Kshs. 200,000 as security for the due performance of the decree.

40. A party seeking the equitable remedy of stay must be prepared to do equity.

41. The court must balance the interests of both parties to ensure that the appeal, if successful, is not rendered nugatory, while also not unduly depriving the successful litigant of the fruits of their judgment.

42. Consequently, the application for stay of execution is allowed, but on strict conditions designed to balance the rights of both parties.

43. The Appellant is granted an opportunity to pursue its appeal on condition that the Appellant deposits a sum of Kshs. 300,000 in court within thirty (30) days from the date of this Ruling.

44. In the event that the Appellant fails to comply with that condition within the stipulated thirty (30) days, the order for stay of execution shall automatically stand discharged, and the Respondent shall be at liberty to proceed with execution.

45. The costs of this application shall be in the cause.

46. ORDERS TO ISSUE ACCORDINGLY.

**Dated, signed and delivered this 7th day of November 2025 in
open court at Voi High Court.**

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

..... **for the Appellant**

..... **for the Respondent**

ORIGINAL