



REPUBLIC OF KENYA



Takaful Insurance of Africa Limited v Milestone Contractors Limited (Civil Appeal E067 of 2025) [2025] KEHC 16136 (KLR) (10 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E067 OF 2025
S MBUNGI, J
NOVEMBER 10, 2025**

BETWEEN

TAKAFUL INSURANCE OF AFRICA LIMITED APPELLANT

AND

MILESTONE CONTRACTORS LIMITED RESPONDENT

RULING

1. Vide a notice of motion application dated 16th May 2025, the counsel for the applicant moved this court seeking the following orders;
 - a. That this application be certified urgent and the same be heard *ex parte* in the first instance.
 - b. That there be a temporary stay of execution of the decree emanating from the judgment that was delivered on Butali CMCCC E018 of 2020; Takaful Insurance of Africa Limited vs. Milestone Contractors Limited pending inter-parties hearing and determination of this application.
 - c. That there be a stay of execution of the decree emanating from the judgment that was delivered on 22nd April 2024 pending the hearing and determination of the appeal.
 - d. That this Honourable Court does issue such further orders or directions that it may deem fit to grant in the interest of justice.
 - e. That the costs of this application be in the cause.
2. The application was supported by the affidavit of the applicant's legal manager, who asserts that the judgment was delivered on 22nd April 2024 in favour of the Respondent and as such they instructed their counsel to appeal because the court's decision was based on constitutional principles of equity, fairness and justice to resolve a contractual dispute.



3. He stated that they had already complained to the High Court at Kakamega, where they annexed a copy of the Memorandum of appeal marked “KK1” and prayed that the application be allowed in the interest of justice.
4. The respondent filed their grounds of appeal dated 10th June 2025, asserting that the applicant failed to provide sufficient cause to have the orders sought, such as not demonstrating their substantial loss and not providing security for the due performance of the decree if the stay is granted.
5. They claim that they would be prejudiced as they would not enjoy the fruits of the judgment and, as such, the application ought to be dismissed for not meeting the elements under Order 42 Rule 6 of the Civil Procedure Rules. And the same ought to be dismissed with costs.
6. The application was to be canvassed by way of written submissions.
7. In their submission dated 30th August 2025, the applicant quoted order 42 rule 6 of the Civil Procedure Rules and discussed the three grounds that ought to be met for the stay to be granted. On the ground of substantial loss, they relied in the case of Tropical Commodities suppliers Ltd & others vs. international credit Ltd and aver that they are at risk of being condemned to take up defense of all matters from the road traffic accident and asserting that the respondent was in breach of their insurance policy and them being held liable for the breach which goes against the principle of contract law and they will be prejudiced financially and legally rendering the appeal nugatory.
8. On the second element that the application should be made without undue delay, and claim that the judgment was delivered on 22nd April 2024, and the application filed on 15th May 2025 and assert that the application was filed without undue delay.
9. On the element of providing security for due performance, they relied on the case of Dalara Logistics Limited & another vs. Samson (2025) KEHC 13549 (KLR) and claimed that the decree is non-monetary and submitted that they are amenable to security as imposed by the court, including providing security for costs and relied on the case of Kinuthia vs. County Government of Kiambu (2025) KEELC 6428 (KLR).
10. They finally submit that they had met the requirements needed to satisfy the requirements needed to be granted the stay of execution to be granted and pray that the application be allowed.

Analysis and determination.

11. Having carefully considered the application, the grounds of appeal and the submissions, the main issue for determination by this court is whether the applicant has met the threshold for the grant of orders of stay of execution of the judgment.
12. The law governing the granting of orders for a stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules, which stipulates as follows: -
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on the application being made, to consider such application and to make such order thereon as may to it seems just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is referred may apply to the appellate court to have such order set aside.



- (2) No order for a stay of execution shall be made under sub-rule (1) unless—
- (a) The court is satisfied that a 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.
13. The three conditions to be fulfilled can therefore be summarised as follows;
- a) That substantial loss may result for the applicant unless the order is made.
 - b) Application has been made without unreasonable delay.
 - c) Security as the court orders for the due performance.
14. The Court of Appeal in *Butt Vs Rent Restriction Tribunal* [1979] stated what ought to be considered in determining whether to grant or refuse a stay of execution pending appeal. The court said that: -
- The power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal.
15. The first condition that the applicant should meet is whether they will suffer substantial loss if the stay orders are not granted.
16. According to the applicant, they will suffer substantial loss and the appeal will be rendered nugatory if the stay is not granted, as the respondent would be in a position to execute the decree. On the other hand, the respondent opines that the applicants would suffer no loss.
17. What would render an appeal nugatory was discussed in the case of *Kenya Industrial Estate Limited & another v Matilda Tenge Mwachia* [2021] eKLR, which stated that:
- “On the nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed, if allowed to happen, is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved.”
18. The court, in *RWW v EKW* [2019] eKLR, it was equally stated 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.
19. The applicant claims that they have an arguable case with a high chance of success, and if the stay is not granted, the appeal would be rendered nugatory.
20. On the other hand, the Respondent states that they have the right to enjoy the fruits of the judgment since the case was determined on merit.
21. They hold that the Applicant has not demonstrated any reason that they will suffer irreparable harm.



22. I have looked at the parties' submission and ground of opposition and note that the applicant has filed their memorandum of appeal, waiting for a determination, and is willing to bear the costs and deposit some form of security pending the stay order being granted. The Respondent, on the other hand, has not given any material as to his ability to repay the decretal sum in case the appeal succeeds; they have not provided any evidence that they shall suffer substantial loss if the stay is not granted. Accordingly, I am persuaded that a substantial loss has been proved.
23. The second consideration is whether the application was made without undue delay. I have perused the court records and note that the judgment by the Honourable Magistrate was delivered on 22nd April 2024, and the application and draft memorandum of appeal were made on 15th May 2025. which is almost 11 months after the judgment was delivered. Although the applicant has not demonstrated the reason for the delay in the interest of justice, I find that the delay was not inordinate.
24. On the final element, the applicant is required to offer security for the due performance of the decree, and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. I agree with the position in *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where it was held that:
- “... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under Order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”
25. The Applicant, in their submission, indicated that they are willing to provide security as the court will determine. While the respondent claimed that they had not provided any form of security.
26. The Court of Appeal in *Nduhiu Gitahi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, expressed itself as follows:
- “The process of giving security arises constantly. So long as the opposite party can be adequately protected, it is proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is an immaterial matter. In an application for a stay pending appeal, the court is faced with a situation where a judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants, or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so... The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest



at court rates. Indeed, in this case, there is less need to protect the defendant because nearly half the sum will have been paid, and the balance was at one stage open to negotiation to reduce it”.

27. I am inclined to agree with the respondent, although the applicant is willing to put up a security, the same has not been specified for the respondent.

28. In the case of Mwaura Karuga t/a Limit Enterprises –vs- Kenya Bus Services Ltd & 4 others [2015] eKLR, where it was held that;

... the security must be one which shall achieve the due performance of the decree, which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words “ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under Order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

29. In the circumstances, I will hereby grant a stay of execution pending the hearing and determination of the Appeal on condition that the Applicant deposit half the decretal sum into an interest-earning account in a reputable commercial Bank, to be held by both the advocates parties to this appeal within 90 days from today failure, stay order to lapse.

30. Accordingly, the application dated 16th May 2025 is allowed.

31. Mention 6.4.2025 to take directions on main appeal.

32. It is hereby so ordered.

33. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 10th DAY NOVEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong’a

Parties absent.

Advocates absent.

Representative of the Respondent present.

