

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMDIRALTY DIVISION
CIVIL CASE NO. 67 OF 2019

VIRAT

BUILDERS.....PLAINTIFF

VERSUS

PEPONI PARADISE LIMITED.....1ST

DEFENDANT

HARIA PRAKASH SHANTILALA.....2ND

DEFENDANT

HARIA DIPTI PRAKASH.....3RD

DEFENDANT

DINESHCHANDRA DEVCHAND JAKHARIA.....4TH

DEFENDANT

PARIHAR AVINASH KUMAR.....5TH

DEFENDANT

RULING

1. By an application dated 29th April 2025, the 1st, 2nd and 3rd Defendants/Applicants seek an order of stay of execution of the judgment and decree delivered on 23rd January 2025 pending the hearing and determination of the intended appeal. The application is brought under Order 42 Rule 6 of Civil Procedure Rules inter alia.

2. The application is predicated on the grounds that there is a judgment against Defendants/Applicants amounting to Kshs. 24,680,630.00 together with costs. The Applicants contend that they will suffer irreparable loss and injury and the intended appeal shall be rendered nugatory.
3. The application is supported by the affidavit sworn by Haria Prakash Shantilal sworn on 29th April 2025 which reiterates the same grounds. He deposes that the intended appeal is meritorious and if the amount is paid the Plaintiff may not be able to refund the same in the event the appeal is successful and thus irreparable loss. And that the Applicants are ready and willing to provide security for the decretal sum and abide by any conditions the Court may set.
4. To oppose the application, the Plaintiff/Respondent has filed grounds of opposition dated 19th May 2025 which are to the effect that, whereas the application has been brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, no such appeal has been lodged by the Applicants at the Court of Appeal. That the application is a tactic to delay the Plaintiff's realization of the fruits of its litigation. And further that the application has not satisfied the conditions for granting stay pending appeal, that is, demonstration of irreparable loss and furnishing of financial security.
5. The application was canvassed by way of written submissions which I have considered alongside the pleadings.

6. The Applicant submits that it has met the threshold of granting of stay of execution under Order 42 Rule CPR and thus ought to be granted Orders sought. On the limb of substantial loss, the Applicant submits that same is to be prevented by preserving status quo because the loss would render the appeal nugatory. And on security, it submits that it is ready, able and willing to commit in giving security.
7. Finally, on the third limb of delay in filing the application, the Applicant submits that they filed the notice of appeal timeously and have applied for typed proceedings, but are yet to be supplied with the same.
8. The Respondent submits that the Applicants have not met the thresh hold of an arguable appeal.
9. Having considered all the material placed before the Court, I find that the singular issue for determination is whether the Applicant has satisfied the conditions for grant of stay of execution set out under Order 42 rule 6(1) and (2) of the Civil Procedure Rules.
10. Order 42 Rule 6 above stipulates that:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 appeal from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (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.”

11. The inbuilt ingredients to be satisfied are a demonstration that:

(a) The application has been presented without undue delay

(b) If stay sought is not granted the applicant will suffer substantial loss.

(c) Security has been provided.

12. There are also ingredients that have been established by case law emanating from the court of Appeal and as dutifully followed by the superior courts namely, a demonstration that:

(a) There exist an arguable appeal with chances of success.

(b) If stay is not granted the appeal will be rendered nugatory.

(c) Care has to be taken to ensure that the successful party has not been unreasonably withheld from the enjoyment of the fruits of his judgment

(d) Care has to be taken to ensure that the beneficiary of stay order, does not use the said order as a shield and sword against his opponent.

(See Nitin Properties Limited v Jagjit Kalsi and Another 2009 KEHC 1909 (KLR)).

13. The ingredient for the presentation of the application without undue delay has been satisfied.
14. On irreversible loss the court, is satisfied that this being a money decree, the likeliness of great loss is real. Therefore, care has to be taken to ensure that both sides are spared this hardship.
15. As regards security for the due performance of the decree, the Respondents are willing to abide by any condition the Court may impose.
16. Then there is the ingredient on the existence of an arguable appeal whose result should not be rendered nugatory. The Plaintiff contended, and the Applicants did not deny, that there is no appeal filed as yet, but only a notice of appeal.
17. The Applicants allege that they requested for the typed proceedings but there was delay in getting the same. I have perused the court record and find that application for certified copies of proceedings was made on 4th February 2025 and supplied on 4th April 2025 and a certificate of delay issued. Even then, the seriousness of the intended appeal has not been demonstrated as Applicants took no steps to file a memorandum of appeal. So essentially there is no appeal which can be considered to be arguable or otherwise.

18. It is evident that the litigation herein has been prolonged and the court having been invited to allow the Respondent to enjoy the fruits of the judgment, I so agree.
19. To that end, the Notice of Motion dated 29th April 2025 is found to have no merit and is dismissed. No orders as to costs.

RULING delivered virtually, dated and signed at **NAIROBI**
This **20th** day of **November** 2025.

P.M. MULWA
JUDGE

In the presence of:

Mr. Maranga for Plaintiff/Respondent

Ms. Nkatha for 1st-3rd Defendants

Court Assistant: *Carlos*