

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL APPEAL NO. E050 OF 2025.

**CHINA STATE CONSTRUCTION
ENGINEERING CORPORATION LTD..... 1ST**

APPELLANT

YASSIN AHMED 2ND APPELLANT

- V E R S U S -

NAOMI ATIENO NONDI..... RESPONDENT/APPLICANT

R U L I N G

By the Notice of motion dated 30/10/2025, the 1st appellant/applicant sought orders of stay of the Judgment and decree in Kitale Civil suit no. E031 of 2024 pending hearing and determination of the application inter parties.

This court granted a conditional stay in Kitale CMCC No. E0301/2023 on condition that the appellant deposit half the decretal sum in court within fourteen (14) days. The matter was then supposed to be placed before the Judge for directions on 14/1/2026.

On 7/11/2025, the Respondent, Naomi Atieno Nondi through the firm of Kisaka filed the Notice of motion of even date seeking the following orders.

1. Spent

2. That the court do review and vary the exparte order issued on 6/11/2025 to the extent that: -

(a) half ($\frac{1}{2}$) of the decretal sum be released directly to the respondent; and

(b) The remaining half ($\frac{1}{2}$) the decretal sum be deposited in a joint interest earning account in the names of both parties advocates within fourteen (14) days of the court's order.

3. Alternatively, that the court do order Counsel on record for the appellants to furnish a professional undertaking to secure payment of the decretal sum and costs in the event that the 1st Appellant closes or relocates its business from Kenya before the appeal is determined.

The application is premised on grounds in the body of the application and Affidavit of the Applicant/Respondent. The

main ground for the application is that she has been informed by her advocates that the 1st appellant is a foreign construction company which entered into a contract with KENHA on 17/8/2017 to run for thirty (30) months and it is likely to be completed and demobilize from Kitale. The applicant relied on a letter by KENHA (NAN-1) a press release. The applicant is therefore apprehensive that if the company winds up and relocates, recovery of the decretal sum may be impossible, if the appeal fails. That is why she prays that part of the decretal sum be paid to her and the balance in a joint account of the Advocates.

A replying affidavit was sworn by Lui Tong, the administrator in charge of Endebess project; He deponed that the order of 6/11/2025 protects the interests of both parties and it is not true that the 1st appellant is likely to relocate from Kenya before payment of the decretal sum because the 1st Appellant is a company registered in Kenya and has a head office in Nairobi and has on going businesses in Kenya beyond the contract executed by KENHA on 17/8/2017. He annexed a certificate of incorporation and urged that the 1st appellant intends to pursue the appeal to its logical conclusion; that the

decretal sum arises from an accident caused under an insurance policy by Britam Company Limited which the Insurer declined to settle and that a declaratory suit has been filed to determine liability; that CMCC E048/2024 between the Britam Insurance Company versus the 1st appellant comes up for taking judgment date on 27/11/2025; that release of funds to the Respondent/Appellant would be unfair to the 1st appellant; that if the order sought is granted, the court would have allowed execution of the Judgment prematurely and the appeal would be rendered nugatory.

The applicant /Respondent filed a further affidavit dated 11/11/2023 in which she reiterates that the 1st appellant remains a foreign company and once it finishes its projects, it will relocate back to its home county; that the 1st appellant has not demonstrated it has any other ongoing projects; that it has admitted that the subject project in Trans Nzoia is complete; that the declaratory suit is irrelevant and the only issue is whether sufficient security was offered; that the court order of 6th November, 2025 did not mention costs of the lower court and High Court; that since the appeal is founded on quantum or liability the security was insufficient; that the outcome of the

appeal depends on outcome of the declaratory suit and if the 1st appellant succeeds they will be compensated by the Insurer.

I have duly considered the application, the affidavit in support, further affidavit, that in response and the parties' submissions.

The order made on 6th November, 2025 was an ex parte order awaiting the hearing of the Notice of Motion inter parties.

The only issue to be considered at this stage is whether the security ordered by the court is sufficient and whether the court can vary it or not.

The applicant/Respondent is apprehensive that since the KENHA project of upgrading of Kitale-Endebess-Suam Road has come to an end, the 1st appellant being a foreign company, may leave Kenya. However, the 1st appellant has demonstrated that it is a company registered in Kenya. The applicant has not demonstrated that the 1st appellant is about to be wound up or relocate without due process. I believe that winding up or relocating would be a process made known to the public. I am guided by the decision cited by the 1st appellant - **Kenya Hotels & Allied Workers Union -V- Southern Sun Hotel (2021) KECA 432 (LR)**

“In any event, ceasing business and winding up are not synonymous. The fact that a company ceases business does not mean that it is wound up. The procedure for winding up of limited companies like the respondent is elaborately provided for in law and any person who alleges that a company is about to wind up must demonstrate how that conclusion has been reached by submitting proof to the court of the steps that have been taken in furtherance of that intention. This has not been demonstrated. The creditors such as the applicant herein shall in any event, at an appropriate time during the winding process if at all, have opportunity to stake its claim.

The fact that the 1st appellant may have completed the subject project is no evidence of its winding up or leaving the jurisdiction of this court.

Whether this court should review its order; - Order 45 of the Civil Procedure Rules provides for review of orders. **In Tom Ojienda Associates -V- Mumias Sugar Company Limited 2019 KEHCS 374 (KLR)**, the court considered what the court

needs to consider in an application for Review. The court said
“The aggrieved person instituting a review must satisfy the court that:

- a) There has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or**
- b) There is some mistake or error apparent on the face of the record, or**
- c) There exists sufficient reason to review the decree/order.”**

I have considered the material before this court. I find that the applicant /the Respondent has not demonstrated that there is an error on the face of the record or new evidence or any other sufficient reason to warrant the grant of an order of review. I have already observed that there is no evidence that the 1st appellant is about to wind up or leave the jurisdiction of the court.

Should court order the 1st appellants Counsel to issue a professional undertaking. It is the applicant’s contention that

the appeal is a non-starter and the Counsel should have advised his client as much and that is why the court should order Counsel to provide a professional undertaking. What is a professional undertaking? In the case of **Conrad Masinde Nyukuri and another -V- Robson Harris & Company Advocates & Another KEHC 6246 KLR**, the court considered what a professional undertaking is. At paragraph 131 it was stated **“131 An undertaking is a formal promise whose effect is to make the person giving it responsible for the fulfilment of the obligations in respect to which it is given. An Advocate’s undertaking is a personal promise as well as a professional and legal obligation. It is based on the concept of the legal professional as an honourable profession and the expectation that an honourable person will honour his/her word. In legal practice professional undertakings are a standard method of mediating transactions. Without such undertakings there would be much difficulty and inconvenience suffered by clients.”**

“133, A professional undertaking is enforceable against the Advocate personally and therefore the Advocate must exercise care when giving and accepting an undertaking, care requires that the Advocate observes the following principles in giving an undertaking:

- (a) Obtain the client’s express authority to give it;**
- (b) Give the undertaking in writing and, where given verbally, reduce it into writing as soon as reasonably practicable thereafter to avoid misunderstanding as regards the interpretation to be given to the undertaking;**
- (c) Only given an undertaking which the Advocate has full control over the ability to fulfil;**
- (d) Neither give nor accept an undertaking which, to the Advocate’s knowledge, the Advocate giving the undertaking has no means with which to fulfil it;**
- (e) Where the Advocate does not intend to accept personal responsibility for the fulfilment of the undertaking make this clear in the terms of the undertaking given;**

(f) Exercise diligence when accepting an undertaking from an Advocate”

In this case, the applicant wants the court to impose or force the 1st appellant’s Counsel to give an undertaking. From the above cited case, it is a promise which the advocate should make by himself hence should be voluntary because he is taking on a financial risk from the litigant and is enforceable against the Advocate. It cannot be imposed by the court.

Having said the above, my view is that the order sought to be reviewed is an ex parte order and the applicant will have an opportunity to argue the application inter parties after the court gives directions on 14/1/2026.

I find no merit in this application and it is hereby dismissed. Costs will be in the cause.

Dated, signed and delivered on 27th day of November, 2025.

HON. R. WENDOH - JUDGE.

Ruling read virtually in the presence of

Appellant- Ms. Keya holding brief for Mr. Munje

Respondent-Ms. Machinga holding brief for Mr. Kisaka

Juma/Hellen-Court Assistants