

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(CIVIL DIVISION)**

HCCA NO E149 OF 2025

**UNIFREIGHT TRUCKING SERVICES
LTD.....APPELLANT/APPLICANT**

VERSUS

**AUTO CONTINENTAL
LIMITED.....RESPONDENT**

RULING

1. The appellant/applicant filed an application dated 30th July 2025. Vide the said application, it sought a stay of execution of the judgment of the court below, pending the inter partes hearing of the application and the hearing of the appeal. The presiding judge considered the said application on 30th July 2025. In a terse ruling, he directed that the application be served for mention before me on 17th September 2025 for directions on its disposal.

2. The court stated, in part, that:-

“In the meantime, stay of execution pending the hearing of the application is granted on conditions that the decretal sum is deposited in an interest-earning bank account in the joint name of the parties’ respective counsel within 45 days of the date of this order. It is so ordered.”

3. The court was concerned that the impugned judgment was delivered on 17th April 2025, and it was only on 30th July 2025 that the instant application for stay was filed; nevertheless, as I have stated, a conditional stay of execution was granted.
4. It is a common ground that the conditions under which the stay was granted at the ex parte stage were not met. The appellant/applicant failed to deposit the decretal sum in a joint account within the requisite period. When the matter was mentioned on 17th September 2025, directions regarding the hearing of the instant application were given.
5. On 16th September 2025, more than 45 days after the impugned order was issued, the appellant/applicant filed a second application dated 16th September 2025 through which it sought to have the earlier orders reviewed, that is to say, for the order requiring it to deposit Kes.21,462,925/40, in a joint interest earning account, be set aside and in lieu thereof, for the appellant/applicant to provide log books for its six vehicles whose value was given Kes.23,050,000/- as security.
6. The respondent opposed the application by filing grounds of opposition dated 16th September 2025, and two replying affidavits sworn on 16th October 2025, through which its director, Arif Pasta, contended, *inter alia*, that the proposed security was insufficient as motor vehicles are depreciating assets.

7. The two applications were heard together on 17th November 2025. Ms Murage, learned counsel for the appellant/applicant, submitted that the two applications have merit and should be allowed.
8. On his part, Mr Oloo, learned counsel for the respondent, opposed the two applications.
9. I will consider the notice of motion application dated 16th September 2025 first, as it seeks to review the orders granted at the *ex parte* stage. The same seeks review of the orders issued *ex parte* by Ngaah J. Are they capable of review at this point? I do not think so. In my view, the said orders were conditional and were to last for 45 days, that is, up to 13th September 2025, which was a Sunday. The 45th day was therefore Monday, 14th September 2025, in view of the provisions of section 57(b) of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya. As of the said date, no deposit had been made. That being the case, the orders lapsed.
10. Can I review orders that have lapsed? In my view, such an action is as useful as flogging a dead horse in the hope that it can be revived, mounted, and used for locomotion. whereas it could be argued, with questionable credibility, that impugned orders were to subsist until the hearing of the application *inter partes*, the direction of this court that the two applications would be heard together rendered the application dated 16th September 2025 otiose.

11. The upshot of the foregoing is that I find the application dated 16th September 2025 to be wholly without merit. The same is dismissed with costs.
12. Having not found merit in the application dated 16th September 2025, I shall turn to the application dated 30th July 2025. As I have stated, the same seeks to stay the execution of the judgment of the subordinate court. That being the case, I must consider whether the appellant/applicant has met the requirements set out in the Rules, and if so, whether the orders it seeks should issue.
13. Order 42 rule 6 (2) of the Civil Procedure Act provides that:-
“(2) 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.”
14. In my view, an applicant must demonstrate that the following elements exist: -
- a. There is a risk that the applicant will suffer substantial loss unless the orders sought are granted;
 - b. The application was filed without undue delay; and

c. Such security has been given/offered for the due performance of the decree, which may ultimately be binding.

15. Stay of appeal is intended to preserve the subject matter pending the hearing and determination of the appeal. The High Court, per A. Ongeru, J, in the case of RWW v EKW [2019] KEHC 6523 (KLR) stated that:-

“ 8. 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.”

16. It is evident from the foregoing decision that this Court is called upon to undertake a delicate balancing act between the concerns of the appellant/applicant, that the appeal may end up being an academic exercise if a stay is not granted, and that of the successful litigant in the court below seeking to enjoy the fruits of a judgment in its favour. Whither thee the court?

17. The first condition that the appellant/applicant must satisfy is whether there is a risk that it will suffer substantial loss. What amounts to substantial loss was discussed in the case of **JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO [2012] KEHC 1094 (KLR)** where it was held that: -

“ 11.No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

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 what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

18. The judgment of the court below ordered the appellant/applicant to pay the respondent the sum of Kes.21,402,925/40. The said amount is substantial by any rational measure. That being the case, I am satisfied that the first condition has been met.

19. Was the application filed without undue delay? I, like Ngaah J, take notice of the appellant/applicant's conduct. Firstly, it applied for stay of execution more than 3 months after the date of judgment. Secondly, when the court issued its orders on 30th July 2025, it waited until after the 45-day period had lapsed before applying for review. This, with respect, does not bespeak a party acting diligently. Rather, I am persuaded that the appellant/applicant has been running down the clock to frustrate recovery. That said, and given the judgment sum involved, I very reluctantly find, purely in the interest of justice, that the delay was not inordinate, in the circumstances of the case. Thus, the second condition has been met.

20. What of the third test? The applicant is a Ugandan company. It has offered log books of its six motor vehicles as security in place of

depositing the decretal sum in a joint interest-earning account. With respect, these are insufficient. As Mr Oloo, counsel for the respondent, rightly stated, motor vehicles are depreciating assets that may be involved in road accidents and be written off. In any case, the execution of a decree in Uganda against the appellant/applicant would involve unreasonable expenditure.

21. In the circumstances, it is my view that the only security that would preserve the interest of all parties is a deposit of the decretal sum into an interest-earning account in the name of both parties' counsel.
22. The upshot of this is that the application dated 30th July 2025 is hereby allowed on condition that the decretal sum is deposited, as stated above, within 45 days of the date hereof. In default of deposit, execution is to issue forthwith.
23. Costs are at the discretion of the court. I order that costs be in the cause.
24. It is so ordered.

Dated and signed at Mombasa, this 28th day of November 2025.

Delivered virtually through **Microsoft TEAMS.**

Gregory Mutai

JUDGE

In the presence of:-

Ms Murage, holding brief for Mr Gikandi, for the Appellant/Applicant;

Mr Oloo, for the Respondent; and

Arthur - Court Assistant.

Original