

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**

**HCCC 359 OF 2016**

[Coram: Gikonyo ]]

**JOSAP LOGISTICS & SUPPLIES  
LIMITED.....  
.....PLAINTIFF**

**VERSUS**

**GREAT RIFT VALLEY DRILLING (KENYA)  
LIMITED.....  
.....DEFENDANT**

**DAVID JAMES STEWARD  
COULSON...INTERESTED PARTY**

**RULING**

**Stay of execution pending appeal**

1. The interested party is the applicant in the Notice of Motion dated 17.2.2025 seeking stay of proceedings and stay of execution pending an appeal before the Court of Appeal against the ruling delivered on 27.1.2025.
2. The applicant also seeks an order to restrain the plaintiff/ respondent or its agent from committing the applicant to civil jail or taking any further steps to enforce the decretal sum

against the applicant pending the determination of the appeal.

3. The application is supported by an affidavit sworn by the interested party on 17.2.2025 and written submissions dated 1.4.2025.
4. The respondent filed a preliminary objection (PO) dated 4.3.2025 and a replying affidavit sworn on the same date by its director, **Joseph Mwangi Wachuri**. It also filed written submissions dated 23.6.2025.
5. The gist of the objection is, that: -
  - (1) the application is mala fides, an abuse of the court process as the issue of stay of execution is res judicata.
  - (2) the court has no jurisdiction to hear and determine the application as it is premature, misconceived, incompetent, fatally defective as it seeks to stay a negative order of dismissal.

- (3) the application is frivolous and devoid of merit as the applicant has failed to satisfy the conditions for stay.

### **Submissions**

6. The applicant submitted that he has satisfied the requirements for the grant of the order sought. He highlighted that he has already filed his notice of appeal dated 29.1.2025 and has sought typed proceedings by letter of the same date for purposes of preparing the record of appeal.
7. The applicant contended that he stands to suffer substantial loss if a stay of execution is not granted as the proceedings before the DR will proceed and the pending ruling on the NTSC will be issued committing him to civil jail for six months. He will then be deprived of his liberty before having a chance to pursue his intended appeal against the impugned ruling. By the time the intended appeal is determined,

the applicant will have served his time in jail and the said appeal will be rendered nugatory.

8. The applicant asserted that the intended appeal has high chances of success. He highlighted that the decretal sum of Kshs. 43,009,216.51/- was issued against the defendant and not him in his personal capacity. He asserted that the defendant is a distinct and separate legal entity. He argued that the plaintiff/ respondent has neither pleaded nor proven any allegations of fraud against him, a prerequisite for lifting the corporate veil.

9. The applicant contended that in the absence of an application seeking to lift the corporate veil, the opportunity for cross-examination upon that evidence, the attempt to hold the applicant personally liable for the defendant's debts amounts to a violation of the fundamental right to a fair hearing. He also contended that he is being condemned for an

act that was neither pleaded nor proven in disregard of natural justice, which constitutes an abuse of the court process and an arbitrary deprivation of liberty, in violation of **Articles 29 and 50 of the Constitution of Kenya**.

He therefore submitted that he has demonstrated that he stands to suffer substantial loss unless the orders sought are granted.

10. The applicant added that the application was filed timeously. He also submitted that this is not a proper matter for an order of security as the impugned ruling simply dismissed his earlier proceedings seeking to set aside execution proceedings before the DR.

11. In closing, the applicant submitted that the application is not res judicata as it seeks a stay pending an appeal against the ruling of 27<sup>th</sup> January 2025.

12. On its part, the respondent submitted that the application is res judicata as the prayer for

stay of execution have been replicated in various applications filed by the applicant in the past.

13. The respondent also argued that the application is legally untenable for seeking stay arising from a negative order of dismissal.

14. The respondent contended that the applicant has not made any attempt to demonstrate in any manner the substantial loss that he may suffer in the event the judgment and decree are executed save to state that the decretal sum is substantial. It also contended that it behooved the applicant to show the tangible substantial loss he would likely suffer if the execution is allowed to proceed.

15. The respondent highlighted that the record shows that the corporate veil was regularly lifted on 11<sup>th</sup> March 2020 and faulted the applicant for alluding that the defendant's corporate veil was not lifted despite participating in the proceeding. It submitted

that the applicant has approached the court with unclean hands and that therefore, the court should not exercise its discretion in his favour.

16. The respondent asserted that execution, in whichever form it may take, does not amount to substantial loss. It also asserted that the fact that the applicant may be thrown into civil jail because he cannot pay the decretal sum does not amount to substantial loss because committing one to civil jail is part of the lawful execution process.

17. The respondent pointed out that the applicant has not offered any security as required by law and has merely stated that the orders sought should be granted unconditionally. It submitted that the burden or obligation to furnish security is upon the applicant and that the obligation is mandatory. It also submitted that the applicant's failure to provide security is a clear indication that the

application is frivolous, vexatious, misconceived and orchestrated to frustrate it and keep it away from the fruits of its judgment.

18. The respondent suggested that the applicant be compelled to deposit the full decretal sum in an interest earning account opened by the parties' advocates as it has been kept away from enjoying the fruits of its judgment since 2019, six years ago.

19. The respondent relied on: -

- (1) **Kenya Commercial Bank Limited & another v Muiri Coffee Estate Limited & 3 others [2016] KESC 6 (KLR)**
- (2) **Mwanthii & 2 others v Mukami [2024] KECA 624 (KLR)**
- (3) **Shah Rekhavanti Pankaj v Bank of Baroda & another [2021] eKLR**
- (4) **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR)**

(5) **Ruth Wanjiku Mwangi v Nancy  
Muthoni Nyaruai [2020] KEHC 4138  
(KLR)**

**Analysis and Determination**

**Issues**

20. The primary issue before the court is whether stay of execution pending appeal should be granted.

21. Nonetheless, preliminary issues on res judicata, stay of negative order touching on the legal soundness and competence of, and jurisdiction of the court to hear, the application will be determined first.

**Res judicata**

22. A preliminary question is whether the issue of stay of execution is res judicata.

23. The respondent argued that the instant application is a replica of several applications filed in the past seeking stay of execution of the decree issued in the matter.

24. The doctrine of res judicata is a jurisdiction-regulating principle. It is provided for under **section 7 of the Civil Procedure Act**. For res judicata to be invoked, the applicant must demonstrate that the issue was directly and substantially in issue; between the same parties or litigating under the same title, that the issue was heard and finally determined by a competent court. **Uhuru Highway Developers Limited v Central Bank of Kenya & Others [1999] eKLR**

25. From a reading of the ruling dated 16.1.2025, the subject was the notice of motion dated 19.10.2023 seeking an order to set aside all execution proceedings against the applicant. The applicant contended that no personal decree was issued against him. That the

Deputy Registrar (DR) lacked jurisdiction to give directions on the applications of 15 and 16.2.2022. That he was not served with a Notice to Show Cause (NTSC) or witness summons, making the warrants of arrest issued against him unlawful and void.

26. The applicant also contended that the respondent was misusing criminal measures to recover a civil debt. He also argued that the execution proceedings violated his rights to a fair trial, administrative justice, potentially causing him to suffer irreparable harm.

27. The court found that the applicant had not made a case to warrant setting aside the execution proceedings. It held that the issue of service of the NTSC is not one of the objections contemplated under **Order 49 Rule 5 of the Civil Procedure Rules** and that the issue is within the DR's jurisdiction.

28. In the application of 15.2.2022, the applicant's gravamen was that he was not

personally served with the NTSC and that the order committing him to civil jail issued based on the notice was unlawful, irregular and unconstitutional. The applicant mainly sought the setting aside of that order. He also sought leave to cross-examine the process server and stay of execution of the decree dated 17.9.2021 pending the hearing and final determination of the application.

29. The application dated 16.2.2022 by the defendant/ judgment debtor sought the setting aside of the judgment dated 12.4.2017 and the decree issued on 5.7.2019 and all consequential orders, extension of time to file a statement of admission and receipt of a fresh decree in compliance with **Order 21 Rule 8**.

30. On 30.6.2022 the court (**Hon. Majanja J.**) recorded that the application dated 15.2.2022 is settled by the consent dated 27.5.2022 which is adopted as an order of the court.

31. Through the application dated 19.10.2023, the interested party also challenged the DR's jurisdiction to give directions on the applications dated 15 and 16.2.2022.

32. Through the ruling dated 16.1.2025, the court found that: -

**“33. The interested party contended that the Deputy Registrar gave directions to the effect that the consent between the parties filed and adopted by this Court on 30/5/2022 settled the applications dated 15<sup>th</sup> and 16<sup>th</sup> February 2022, thus the said applications were no longer live matters. This order and/or directions by the Deputy Registrar have not been varied and/ or set aside therefore there are still valid and enforceable. For this reason, if at all the interested party was dissatisfied with the said directions, he ought to have approached the Deputy Registrar with an application for review of the said directions, and/ or appealed against them to the High Court.”**

33. From the foregoing, both the applicant and the judgment debtor have sought stay of execution through previous applications. However, through the instant application, the applicant seeks a stay of execution pending his

appeal against the ruling of 16.1.2025. The previous applications sought interim stay of execution pending hearing and determination of the various applications which were on distinct subject matters.

34. Therefore, it is my considered view that the plea of res judicata does not apply to the instant application that is seeking a stay of execution pending appeal under **order 42 rule 6 of the Civil Procedure Rules**. I so find and hold.

### **Stay of a negative order**

35. A second preliminary issue raised by the respondent is that the application is legally untenable for seeking stay arising from a negative order of dismissal.

36. The ruling dated 16.1.2025 dismissed the applications dated 19.10.2023 seeking stay of

execution proceedings against the interested party.

37. In my considered view, although the subject of the application was the execution proceedings against the interested party/applicant, those proceedings relate to the execution of the judgment and decree issued in this matter. Therefore, the execution proceedings are positive and are capable of being stayed pending appeal. Thus, I do not agree with the respondent's proposition.

### **Stay pending appeal**

38. I now turn to consider the main issue on whether stay of execution pending appeal should be granted.

39. Under **Order 42 Rule 6(1) of the Civil Procedure Rules** '...the court appealed from may for sufficient cause order stay of execution of such decree or order...'

40. In determining the application for stay of execution pending appeal, the court will consider, whether: -

- (a) the application has been made without unreasonable delay;
- (b) substantial loss may result to the applicant unless the order is made; and
- (c) 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.

41. The court's power to grant stay pending an appeal is discretionary. But, the discretion ought to be exercised based on principle and in a way that does not hinder the appeal, if successful. **(Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nai 15 of 1990 [1990] KLR 365)**

42. The exercise of discretion must ensure a proportioned balance of the right of the applicant to appeal vis a vis the respondent's right to enjoy the fruits of its judgment.

**Machira T/A Machira & Co Advocates vs.  
East African Standard (No 2) [2002] KLR 6**

**Of timeliness of application**

43. Has the application been made without unreasonable delay?

44. The impugned ruling dated 16.1.2025 was delivered on 25.1.2025. The application is dated 17.2.2025, about three weeks after the delivery. Therefore, the application was filed timeously.

**Substantial loss**

45. Will substantial loss occur if stay of execution is not granted?

46. Substantial loss'...refers to any loss, great or small, that is real-worth or value, as distinguished from a loss without value or loss that is merely nominal" **(Sewankambo Dickson v Ziwa Abby HCT-00-CC MA 0178 of 2005, the High Court of Uganda at Kampala.)**

47. **Thus, ‘...such eventuality reduces a successful appellant to a mere holder of a barren result which he cannot realize. Eric Muriungi & another v Jackson Muriuki [2016] KEHC 4249 (KLR).**

48. Each case should be decided on its own merits. In this case, the applicant argued that he would suffer substantial loss should he be deprived of his liberty before having a chance to pursue his intended appeal against the impugned ruling.

49. On the other hand, the respondent asserted that execution does not amount to substantial loss and that the fact that the applicant may be thrown into civil jail because he cannot pay the decretal sum does not amount to substantial loss because committing one to civil jail is part of the lawful execution process.

50. The applicant’s intended appeal is premised on the court’s decision to lift the corporate veil and find him personally responsible for

payment of the decretal sum. The applicant contended that he was not afforded an opportunity to be heard due to lack of personal service of the notice to show cause. He claims he will be denied of liberty and served the jail term if stay is not granted.

51. In my view, the applicant has demonstrated that he will suffer substantial loss if a stay is not granted and that there is sufficient cause for a stay.

### **Suitable security?**

52. The applicant argued that this is not a proper matter for an order of security as the impugned ruling simply dismissed his earlier proceedings seeking to set aside execution proceedings before the DR.

53. The respondent took a different view of the matter and urged the court to compel the applicant to deposit the full decretal sum in an interest earning account opened by the parties' advocates as it has been kept away

from enjoying the fruits of its judgment since 2019, six years ago.

54. I do not agree with the proposition that this is not a matter where an order of security could be issued. As noted earlier, the court ought to balance the applicant's right to appeal and the respondent's right to enjoy the fruits of its judgment.

55. The court has the discretion to determine suitable security depending on the circumstances of the case. **Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR**

56. However, in determining the amount of security, the court should also consider that; "...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals - especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts".

**(Sewankambo Dickson v Ziwa Abby HCT-00-CC MA 0178 of 2005, the High Court of Uganda at Kampala.)**

### **Conclusion and Orders**

57. In conclusion, the court makes the following orders: -

- (1) A stay of execution of the decree herein against the applicant is issued pending the hearing and determination of the appeal on condition that the applicant deposits a sum of KES. 5,000,000 in an interest-earning account in the joint names of legal counsel for the parties herein within 60 days of today.**
- (2) If the applicant fails to comply with these orders within the time allowed, the stay order will lapse automatically.**
- (3) The applicant shall bear the costs of this application.**

**Dated, signed and delivered at Nairobi  
through Microsoft Teams online application  
this 4<sup>th</sup> day of December, 2025**

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**F. Gikonyo M**

**Judge**

**In the presence of: -  
Kimanthi for plaintiff  
Ms. Kihunji for Interested Party  
CA- Kinyua**