



**Kenya Ports Authority Retirement Benefits Scheme v Cemtec Engineering Ltd (Civil Appeal E017 of 2025) [2025] KEHC 18250 (KLR) (5 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18250 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E017 OF 2025**

**G MUTAI, J**

**DECEMBER 5, 2025**

**BETWEEN**

**KENYA PORTS AUTHORITY RETIREMENT BENEFITS  
SCHEME ..... APPELLANT**

**AND**

**CEMTEC ENGINEERING LTD ..... RESPONDENT**

**RULING**

1. The application before the Court is dated 9<sup>th</sup> September 2025. The same is brought under the provisions of sections 1A, 1B, and 3A of the *Civil Procedure Act* and Order 41 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The applicant, Kenya Port Authority Retirement Benefits Scheme, seeks the following orders:-
  1. Spent;
  2. Spent;
  3. Spent;
  4. That pending the hearing and determination of this appeal, there be issued an order of stay of execution of the decree in Mombasa CMCC No 105 of 2017; Cemtec Engineering Ltd v Kenya Ports Authority Retirement Benefits Scheme, including all consequential orders and garnishee proceedings;
  5. That pending the hearing and determination of this appeal, this honourable Court be pleased to set aside the garnishee order nisi issued on Mombasa CMCC No 105 of 2017; Cemtec Engineering Ltd v Kenya Ports Authority Retirement Benefits Scheme on 3<sup>rd</sup> September 2025; and
  6. That the costs of this application be provided.



2. The grounds upon which the application is based are that the Court below entered judgment for the respondent on 10th December 2024, in the sum of Kes.14,520,000/-, together with interest at court rates. Being aggrieved by the said decision, the appellant lodged an appeal, which it stated is meritorious and has good prospects of success. The appellant contended that no sum was due from it to the Respondent, as an advance payment of Kes.18,997,272/- was made, which sum exceeds the amount awarded in the judgment, when the value of 2880 poles that were to be delivered is reckoned, by the sum of Kes.958,328/-.
3. The appellant contended that the respondent commenced execution proceedings by way of garnishment, seeking the sum of Kes.21.699,346.67 which amount exceeds the judgment sum. The appellant/applicant stated that execution would cause it to suffer substantial loss as the amount, if paid over to the Respondent, was likely to be irrecoverable.
4. The appellant/applicant also challenged the execution as costs had not been assessed, and averred that, for that reason, execution was premature and irregular.
5. It was further urged that the garnishee proceedings sought to execute against accounts that belong to a totally different entity, to wit, the Kenya Ports Authority Pension Scheme.
6. The application was supported by the affidavit of Vincent Oweya, sworn on 9<sup>th</sup> September 2025.
7. The application is opposed. The respondent filed a replying affidavit sworn by Kenneth Njuguna Mwangi on 24<sup>th</sup> September 2025. In the said affidavit, the deponent averred that a draft decree was sent to the firm of AB Patel & Patel Advocates on 7<sup>th</sup> February 2025. He denied that there was any requirement, in any event, that the decree be sent to the appellants. He stated that the Rules apply to the High Court and not to a decree arising from the Chief Magistrate's Court. He noted that the decree was lawful and in accordance with the judgment and that the applicant had not identified any defects in it.
8. It was further deposed that the garnishee proceedings in respect of KCB account numbers 1169xxx & 1169xxx and Stanbic account number 010000xxx were proper.
9. Mr. Mwangi deposed that the company was owed Kes.21,699,346/67, based on the principal sum awarded, interest accrued, and upon deducting what had been paid (Kes.18,997,272/-) and the value of the undelivered concrete poles (Kes.5,000,000/-). The interest was calculated at the Court rate of 14% from 26th February 2017 to 3rd September 2025, on compound interest rates.
10. He further urged the Court to order the appellant to deposit Kes.21,699,346/67 as a condition for stay.
11. I must point out that when the instant Notice of Motion was filed in this Court, the court issued interim orders.
12. The application was canvassed by way of oral and written submissions.
13. The submissions of the applicant are dated 3<sup>rd</sup> October 2025. The applicant's counsel, Mr Khagram, identified two issues as being due for determination: -
  - i. Whether a stay of execution ought to be granted; and
  - ii. Whether the garnishee order nisi ought to be set aside.
14. Regarding the 1<sup>st</sup> issue, it was urged that the respondent irregularly and prematurely executed the judgment and the decree in respect of the sum of Kes.21,699,366/70, which amount is not due to the respondent under the impugned judgment. It was urged that the appellant was in fact owed



- Kes.9,041,672/- which ought to be refunded. The appellant's counsel submitted that compound interest had not been ordered by the Court below and could not therefore be levied. Counsel relied on the case of *Anab Hussein Arab v Small Enterprises Finance Co Ltd* [2005] KEHC 784 (KLR).
15. Mr Khagram contended that unless a stay of execution were granted, his client would suffer substantial loss. He submitted that the respondent had not demonstrated that it had the ability to pay back the decretal sum in the event the appeal was successful. In support of this contention, reliance was placed in the case of *Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa* [2016] KEHC 4573 (KLR). It was contended that the amount already held by the respondent was sufficient and that no further security was needed.
  16. Counsel urged that the accounts held in the KCB bank did not belong to the appellant/applicant. He submitted that the amount allegedly owed was disputed. For that reason, he prayed that the garnishee order nisi be set aside. Mr Khagram relied on the case of *Mengich t/a Mengich & Co Advocates & another v Joseph Mabwai & 10 others* [2018] KEHC 9737 (KLR). For the foregoing reasons, it was urged that the garnishee orders nisi be set aside.
  17. The appellant/applicant filed supplementary submissions dated 24<sup>th</sup> October 2025, vide which the foregoing submissions were reiterated.
  18. The submissions of the respondents are dated 14<sup>th</sup> October 2025. Mr Karina, learned counsel for the respondent, identified the issues as being: -
    - i. Whether the appellant had demonstrated that it would suffer substantial loss unless a stay of execution were granted;
    - ii. Whether the application was made without undue delay;
    - iii. Whether the applicant should give security.
  19. On the first issue, Mr Karina submitted that the applicant did not plead that it would suffer substantial loss nor show what the loss was likely to be. He contended that it was the duty of the applicant to demonstrate that it would suffer loss and that it failed to do so.
  20. Regarding the time taken to apply, it was urged that the delay of 0 months was inordinate and had not been explained.
  21. Mr Karina submitted that security was mandatory in this instance. He urged that the amount of Kes.21,699,346/67 ought to be deposited in Court.
  22. Mr Karina concluded his submissions by urging the Court to confine itself to the issue of security, but not to consider the merits of the appeal, which would be considered during the hearing of the appeal on the merits.
  23. I have considered the Notice of Motion application before me, the response thereto, the oral and written submissions of the parties, as well as the applicable law. I agree with the parties that the issues for determination by the Court are: -
    - i. Whether a case has been made for a stay of execution;
    - ii. If so, on what terms should the stay of execution be given; and
    - iii. If the garnishee orders, in the Court below, ought to be set aside.



24. Order 42 Rule 6 (2) of the Civil Procedure Rules provides that: -

“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.”

25. For an application for stay of execution pending appeal to be successful, an applicant must satisfy the following test: -

- i. Demonstrate that it will suffer substantial loss unless stay of execution is granted;
- ii. Convince the Court that the application was filed without undue delay; and
- iii. Give security for the due performance of the decree that may ultimately be binding.

26. It has been stated that in various decisions of the Court that these requirements are conjunctive, that is to say that they must all be present, for a stay in respect of a money decree to issue.

27. What is a substantial loss? Kimaru, J as he then was in *Century Oil Trading Co Ltd v Kenya Shell Ltd Nairobi (Milimani) HCMCA No 1561 of 2007* stated as follows: -

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent become an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

28. In the case of *James Wangalwa & another v Agnes Cheseto [2012] KEHC 1094 (KLR)*.

“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." With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory."

29. The amount sought to be recovered in this case is quite substantial. It is Kes.21,699,346/67. The Court has perused the Memorandum of Appeal and notes, purely on a prima facie basis, that the appeal is not idle. Substantial issues which deserve scrutiny have been raised regarding the manner in which the decretal sum was arrived at, and whether the trial Court ordered payment of compound interest.
30. The appellant/applicant also questioned the ability of the respondent to pay back the decretal sum if the money is paid to it. This is important as the Court is called upon to balance the interests of the successful litigant and those of the appellant.
31. In the case of RWW v EKW [2019] KEHC 6523 (KLR), it was 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.”
32. Since the appellant/applicant expressed a reasonable fear of the respondent's ability to pay back the decretal amount, it was up to the respondent to demonstrate that it has the financial muscle to pay back. I am guided by the decision of the Court of Appeal in the case of National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR, where it was held that: -
  - “Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has, since that is a matter which is peculiarly within his knowledge.”
33. The Respondent failed to demonstrate that it could pay back the said amount. The first element has thus been met.
34. Was the application filed in good time? I note that there was a considerable time lapse between the delivery of judgment and the filing of the application for stay. That said, what amounts to a reasonable time depends on the circumstances of each case and would vary from case to case. In this case, I reluctantly agree that the time taken is not inordinate.
35. What of security for the due performance of the decree? The applicant has stated that this should be necessary in this case, as the appellant/applicant made a prepayment of the contract sum. This Court cannot agree with this proposal, as to do so would require it to prejudge the appeal without hearing the parties on the merits. In any case, the subject matter of the appeal is a money decree. I must, however, take into account the fact that the provision of security should be reasonable and shouldn't deny a party access to court or needlessly hobble its business.



36. From the foregoing, it is clear that the application has merit.
37. It has been urged that the garnishee proceedings in the Court below ought to be set aside. Based on the KCB Bank documents, the account belongs to the Kenya Ports Authority Pension Scheme, which is a distinct entity from the Kenya Ports Authority Retirement Benefits Scheme. In any case, having found the application to be meritorious, garnishee proceedings, being execution proceedings, must be set aside.
38. I therefore find and hold that the application dated 9<sup>th</sup> September 2025 has merit. Consequently: -
1. I grant an order staying execution of the judgment and the decree of the Court below dated 10<sup>th</sup> December 2024 pending the hearing and determination of the appeal on condition that the half decretal sum, (that is to say, half of Kes.21,699,346/67), is deposited in a joint interest earning account in the names of both parties' counsel within 30 days of the date hereof; and
  2. I set aside the garnishee proceedings in the Court below, and discharge the existing orders therein, in exercise of my supervisory jurisdiction under Article 165 (6) & (7) of the Constitution.
39. I order that the costs shall be in the appeal.
40. It is so ordered

**DATED AND SIGNED AT MOMBASA THIS 5<sup>TH</sup> DAY OF DECEMBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Ms Essajee, holding brief for Mr Khagram, for the Appellant/Applicant;

Mr T. Kongere, holding brief for Mr Karina, for the Respondent;

Ms Osewe, for the Garnishee in the Lower Court; and

Norah – Court Assistant.

