



REPUBLIC OF KENYA



KENYA LAW
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**Ngusur v Absolute Vantage Limited (Civil Appeal E009 of 2025)
[2025] KEHC 18191 (KLR) (5 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E009 OF 2025
JM NANG'EA, J
DECEMBER 5, 2025**

BETWEEN

PAUL NCHENE NGUSUR APPELLANT

AND

ABSOLUTE VANTAGE LIMITED RESPONDENT

RULING

1. By Notice of Motion dated 14th January, 2025 the Appellant seeks these reliefs:
 1. Spent
 2. Spent
 3. That there be a stay of execution and interim preservative Orders do issue upon the judgment delivered on 11th December, 2024 and resultant decree therefrom the hearing and determination of the Appeal (sic).
2. The Appellant deposes inter alia vide his affidavit in support of the Motion that the Respondent has applied for the decree of the lower court together with warrants of attachment and sale of property, and if stay of execution as prayed is not granted, execution shall be levied. Being a money decree, the Appellant fears that the decretal sum would be beyond his control or reach if paid out to the Respondent and therefore he would suffer irreparable loss.
3. The Respondent opposes the Application through an affidavit of Mercy Kaima who is the Claims Manager of the Respondent's Insurer, M/s Sanlam General Insurance Limited. She avers purportedly with the Respondent's authority that the Application is devoid of merit, misconceived, ill-advised and warrants dismissal with costs. The court is told that the Respondent instituted the lower court's suit on behalf of Sanlam General Insurance Limited under the insurance doctrine of subrogation after the Insurer paid compensation to the former following material damage to its motor vehicle.



4. The Respondent's witness further contends inter alia that the Appellant is not willing to comply with conditions for stay of execution pending Appeal.
5. The Appellant answered the averments in the replying affidavit by putting in a further affidavit. He reiterates among other averments that he would suffer great prejudice if execution of the impugned decree is allowed to proceed.
6. The Appellant offers to deposit security for costs in the sum of Kshs.250,000 which he says is half of the decretal sum. He thinks that being a "huge" insurance company, the Respondent's Insurer would not suffer substantial loss if the Application is granted.
7. Learned Counsel for the parties filed written submissions which I have perused against the rival affidavit evidence and the record.
8. Order 42 rule 6 (1) (2) of the *Civil Procedure Rules 2010* governs disposal of an application such as before me for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-
 - a. unless 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."
9. The Appellant asserts that has brought the Motion without unreasonable delay. It is should, however, be noted that even delay of one day, if unexplained, is bad enough. He has not explained the long delay of over one month to bring this Application.
10. In the circumstances, the delay is found to be unreasonable and inexcusable, no explanation having been given. This condition for grant of stay of execution pending Appeal is not therefore satisfied.
11. Provision of security for costs is a crucial condition precedent to grant of an order of stay of execution pending hearing and determination of an Appeal. This is a mandatory legal requirement that has to be complied with. The court has power to determine the appropriate security for costs but the Applicant must first express willingness and readiness to offer security.
12. In *John Odungo v Joyce Irungu Mubatia* [2014] eKLR the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows "preparedness as well as readiness to provide security should one be called upon to do so".
13. The Appellant has not also quite satisfied the requirement for offer security for costs, having failed to express willingness and readiness to comply in his affidavit in support of the Motion. He only, rather half-heartedly, offered to deposit half the decretal sum he states as Ksh. 250,000 after the Respondent pointed out in its reply that no offer of the requisite security for costs was alluded to in the affidavit in support of the Application.
14. Determination of the application would turn on the question of substantial loss, if any, the Appellant might suffer if stay of execution is not ordered. The case of *Nyatera v Nyakundi* (Civil Appeal E033 of 2022) [2023]KEHC 3086 KLR) (16 March 2023) (Ruling) is relevant for the proposition that the Applicant ought to show the manner in which his appeal would be rendered nugatory if stay of execution is not ordered.. The court opined in the case that it is not enough to say that because the Respondent intends to proceed with execution, he should be stopped because of the appeal. The court



is therefore required to tread a delicate balance of the parties' interests. As it is now trite, this is the cornerstone of the court's discretion to grant or refuse stay of execution pending appeal. The onus is on the Appellant to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds.

15. In *RWW v EKW* [2019] eKLR and *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 In Milimani HCMCA No. 1561 of 2007, *Century Oil Trading Company Ltd v Kenya Shell Ltd*, this court again explained 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 becomes an issue. The court cannot shut its eyes when, 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.”

16. In *Shell Ltd V. Kibiru & Another* (1986) KLR 410 it was famously postulated that “substantial loss in its various forms is the cornerstone of the court's jurisdiction to grant stay pending appeal. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

17. Regarding the burden of proof, the Court of Appeal held in *National Industry Credit Limited v Aquinas Francis Wasike & Another* [2006] eKLR 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.”

18. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including *Matata & Another v Rono & Another* (Civil Appeal No. E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling) and *Muinde Mulatya & Another* (2021) eKLR and *Kenya Commercial Bank Limited v. Sun City Properties Limited 7 & 5 Others* (2012) eKLR.

19. Based on the affidavit evidence of the parties neither of them has stated their financial position. The Appellant who shoulders the burden of proof has in particular not made out a prima facie case of the Respondent's inability to pay back any decretal sum to warrant the latter to debunk the claim.

20. In the particular circumstances of this case, therefore, the Appellant has not satisfied the key substantial loss test as well as the requirements to institute such application without inordinate or unreasonable delay , and in addition offer security for costs or at least express readiness and willingness provide such security when called upon to.. The onus was on the Appellant to meet all the conditions stipulated hereinabove.

21. In the end, the Application is dismissed with costs to the Respondent.

J. M. NANG'EA

JUDGE.

RULING DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER, 2025

In the presence of:



The Advocate for the Appellant, Mr Odhiambo.

The Advocate for the Respondent, Mr Ombeo.

Court Assistant, Justine.

J. M. NANG'EA

JUDGE.

