



**Nyali Late Night Chemist & Medical Service Company Limited  
& 2 others v Transwide Pharmaceuticals Limited (Civil Appeal  
E326 of 2025) [2025] KEHC 18249 (KLR) (3 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18249 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E326 OF 2025  
G MUTAI, J  
DECEMBER 3, 2025**

**BETWEEN**

**NYALI LATE NIGHT CHEMIST & MEDICAL SERVICE COMPANY  
LIMITED ..... 1<sup>ST</sup> APPELLANT  
DR SHABDIN KHADIJA ..... 2<sup>ND</sup> APPELLANT  
DR JOSEPH SKUDI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**TRANSWIDE PHARMACEUTICALS LIMITED ..... RESPONDENT**

**RULING**

1. Before this Court is a Notice of Motion application dated 13<sup>th</sup> October 2025 through which the appellants/applicants seek a stay of execution of the judgment of the Court below pending the hearing and determination of the appeal, and for the instant appeal to be consolidated with HCCA No E026 of 2025 between the same parties.
2. It is contended in the grounds that an appeal was filed against the judgment of the Small Claims Court vide which judgment was entered for Kes.998,824.64 against the appellants on 30<sup>th</sup> January 2025. Being aggrieved, the appellants filed an appeal (HCCA No E026 of 2025). While the said appeal was pending, they filed an application for review before the Court below, alleging that they had discovered new material evidence. The Court below declined to allow the application. The dismissal led to the filing of the instant appeal (HCCA No E326 of 2025).
3. The application is opposed. The respondent filed a replying affidavit sworn by Linus Kinoti, in which it was contended that the application was time-barred, relied on false statements, lacked legal foundation, and was inequitable. Mr. Kinoti prayed that the application be dismissed with costs of Kes.60,000/- and that the execution be allowed to proceed.



4. The parties filed written submissions. The submissions of the appellant/applicant are dated 13<sup>th</sup> November 2025, while those of the respondent are dated 12<sup>th</sup> November 2025.
5. This is an application seeking a stay of execution. Under Order 42 Rule 6(2) of the Civil Procedure Rules, the applicants must satisfy the following requirements before the court can issue a stay in exercise of its discretion:-
  1. Show that they are likely to suffer substantial loss unless a stay is granted;
  2. The application was filed without undue delay; and
  3. Provide such security as may ultimately be binding on them.
6. The three elements stated above must all be present as they are conjunctive, and not disjunctive.
7. Have the applicants met the above-stated conditions? I note that the decision of the Court below was negative in nature; the small claims Court declined to allow the application for review. A negative Order is incapable of being stayed. I am guided by the decision of the Court of Appeal in *Kaushik Panchamatia & 3 others v Prime Bank Limited & another* [2020] KECA 359 (KLR) where it was stated that

“We reiterate the position taken by the Court in the above case that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”

I would imagine that the appellants/applicants know this, for they cleverly seek to have the instant appeal consolidated with the previous appeal so that they can escape the time bar for appealing against a judgment delivered by the Small Claim Court.

8. The foregoing notwithstanding, have the appellants/applicants otherwise shown that they should be granted a stay?
9. The appellants/applicants had the duty of showing that they would suffer substantial loss.
10. 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 judgment 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.”



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

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“ 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.”

12. I do not agree that the appellants/applicants in this case will suffer substantial loss for being subjected to lawful execution process. But even if I was wrong, it is clear that the application for stay wasn't filed within a reasonable period from the time it was delivered or the ruling made. The appellants/applicants have therefore not satisfied the 3<sup>rd</sup> test by failing to offer or provide security.

13. The upshot of the foregoing is that the application dated 13<sup>th</sup> October 2025 has no merit. The same is dismissed with costs of Kes.30,000/-.

14. It is so ordered.

**DATED AND SIGNED AT MOMBASA, THIS 3<sup>RD</sup> DAY OF DECEMBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Bunde, for the Appellant/Applicant;

Mr Chebii, for the Respondent; and

Norah – Court Assistant.

