

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL E042 OF 2023

AUTO INDUSTRIES LTD..... APPELLANT

VERSUS

ESINA MORAA PENGO.....RESPONDENT

RULING

1. The applicant filed the notice of motion dated 19.3.25 seeking stay of execution of the Judgment in Ogembo CMCC no. 259 of 2019 pending hearing and determination of the intended appeal against ruling of this court dated 9.3.25 to the Court of Appeal.
2. The application is based on the annexed affidavit of Salman Cocker and the grounds on the face of it. Mr. Cocker deponed that they were aggrieved by the ruling of this court dated 19.3.25 and have filed a notice of appeal. Also, the applicant will suffer substantial loss of Kshs. 8,012,180 .00 which was the ½ decretal sum in the lower court which was deposited in this court pending the appeal herein if the same is released to the respondent. Further that applicant seeks that the said sum remains in court as security pending hearing and determination of the intended appeal. He also deponed that the intended appeal will be render nugatory and the applicant will be prejudiced unless the application is allowed.
3. The respondent filed a replying affidavit dated 25.3.25 in which she opposed the application terming it baseless, Res judicata, a delaying tacti and having been filed in bad faith. She said the4 notice of appeal does not indicate grounds of appeal and is not a ticket to an automatic stay. The respondent filed a notice of preliminary objection dated 24.3.25 on the main ground that:

1. The application dated is Res judicata under Section 7 of the Civil procedure Act as the applicant filed a similar application being application dated 8.6.23 in which a ruling dated 14.6.23 was delivered. This was denied by the applicant who stated that the applications are different. The other grounds are based on facts and thus do not form part of the preliminary objection. The doctrine of Res judicata is provided for in Section 7 of the Civil Procedure Act. Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. Section 7 lays down five conditions which, when co-existent, will bar a subsequent suit. The conditions are: -

- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;
- (ii) the former suit must have been between the same parties or parties claiming under them;
- (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and
- (iv) the matter in issue must have been heard and finally decided in the former suit. (See *Lotta v Tanaki* (2003) 2 EA 556).

4. I have carefully considered the preliminary objection and the submissions and I find that the same does not meet the threshold under Section 7 of the Civil procedure Act as in the previous application the stay was for pending the appeal herein while in this case is stay has been sought pending hearing and determination of the intended appeal in court of appeal.

5. On the application for stay of execution I have perused the application the affidavits and the submissions by both counsels. The law on stay of execution pending appeal is anchored on order 42 Rule 6 of the civil procedure Rules. **Order 42 Rule 6 of the Civil Procedure Rules, 2010** provides as follows: -

Stay in case of appeal

[1] No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court to have such order set aside.

[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.

[3] Notwithstanding anything contained in subrule [2], the court shall have power without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

[4] For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

[5] An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

[6] Notwithstanding anything contained in subrule [1] of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

6. It is not disputed that the application herein was filed without delay and there is security already deposited in court in the appeal herein.
7. On the issue of substantial loss, the applicant says he will suffer substantial loss unless stay is granted pending appeal as it will loss about

Kshs. Eight Million which is the decretal sum herein. The respondent opposed the application saying it is a delaying tactic. The decree herein is valid. Whereas the applicant has a right of appeal, the respondent is also entitled to enjoy the fruits of his judgment. The court has a duty to weight the two rights and arrive at a just determination on the issue of substantial loss. The order sought to be appealed against is a negative one. It is trite law that courts would not ordinarily stay negative orders as was held in the case of Co-operative Bank of Kenya Limited vs Banking Insurance and Finance Union (Kenya) eKLR an Kenya Commercial Bank Limited vs Tamarind meadows Limited and others (2016) eKLR. I have weighed the rights of both parties in this case an I find that the weight tilts in favour of the respondent. The decree is herein is dated 10.2.2023 and the respondent is entitled to the fruits of her judgment. I disallow the application as it lacks merit and direct that the half of the decretal sum deposited in court be released to the respondent.

7. Costs to the respondent.

**T.A ODERA
JUDGE
19.12.25**

Delivered virtually via teams platform on this 19th day of December 2025 in the presence of:

Mr. Kori for the Applicant / appellant

Matiko -Court Assistant

Kori: I seek 30 days stay.

Order: granted.

T.A ODERA
JUDGE

19.12.25