

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 213 OF 2016

MACHIRI LIMITED PLAINTIFF/DECREE HOLDER

-VERSUS-

CHINA WUYI COMPANY LIMITED DEFENDANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY THIRD PARTY

RULING

1. The application dated 25th November 2025 was filed by the defendant. It has been brought under the provisions of Order 42 Rule 6(1),(2), (3) and (4) of the Civil Procedure Rules, 2010, and Section 1A of the Civil Procedure Act.
2. The defendant prays for stay of execution of the Judgment and/or decree herein pending the hearing and determination of the intended Appeal. The defendant also prays for costs of the application to be provided for.
3. The application is supported by an affidavit of Mr. Luo Zicheng, the defendant's General Manager, sworn on 25th November 2025.
4. He deposed that this Court delivered its Judgment on 7th November 2025 in which it held that the defendant is liable to pay the plaintiff the sum of Kshs.139,471,809.70 as per the consent dated 21st May 2019, together with interest and costs. He further deposed that this Court dismissed the defendant's claim against the Third Party, in which the defendant sought to compel the Third Party to settle the Judgment sum.

5. Mr. Zicheng stated that the defendant filed a Notice of Appeal on 19th November 2025 which was within the prescribed timeline prescribed by the Civil Procedure Rules, 2010. He stated that the instant application has been brought timeously as it has been filed before the expiry of the 30-day stay of execution granted by the Court on 7th November 2025.
6. Mr. Zicheng contended that if the orders being sought herein are not granted and the defendant is made to pay the plaintiff the decretal sum of Kshs.139,471,809.70 before the intended Appeal is heard and determined, there is a very reasonable likelihood that the plaintiff will not be able to refund such a large sum of money in the event that the Appeal succeeds, thereby causing the defendant to suffer substantial loss. He further stated that if the defendant is made to pay the decretal sum before the intended Appeal is heard, it will have a negative impact on the defendant's ability to finance its day-to-day operations and meet its obligations, which impact it will not be able to recover from, in the event that the intended Appeal succeeds, thus occasioning it substantial loss.
7. He averred that the defendant is willing to provide a bank guarantee as security in satisfaction of the decree in the event that the intended Appeal is not successful. He also stated that the defendant is willing to deposit such other security as the Court may deem appropriate in the circumstances.
8. Mr. Zicheng stated that no prejudice will be suffered by the plaintiff if the orders being sought herein are granted as any delay in settlement of the decretal sum will be compensated by an award of interest, in the event that the intended Appeal does not succeed. He contended that if execution proceeds, then the instant application and the intended Appeal will be rendered nugatory.
9. The plaintiff's Managing Director, Eng. James Mbugua Macharia, filed a replying affidavit sworn on 4th December 2025, to oppose the application. He

stated that the principal sum of Kshs.139,471,809.70 arises from a Consent Judgment between the plaintiff and the defendant entered on 21st May 2019 and that the defendant even made a partial payment of Kshs.8,874,978.00.

10. Eng. Mbugua averred that the defendant's Notice of Appeal dated 19th November 2025 intends to appeal against the Judgment of 7th November 2025, which awarded the plaintiff interest and costs of the suit. He stated that there is no Appeal challenging the principal sum which forms the subject of the Consent Judgment.
11. He further stated that his Advocate had advised him that there can be no Appeal against a decree passed by the Court with the consent of the parties. In addition, that there can be no valid Appeal against the Consent Judgment awarding the plaintiff Kshs.139,471,809.70 as payment for the plaintiff's work in relocation of water and sewerage facilities along Thika Road, which the plaintiff completed on 15th March 2012, and the amount certified for payment on 13th June 2014.
12. He deposed that despite the amount being certified 11 years ago, the plaintiff is yet to be paid for work done, which non-payment by the defendant has highly prejudiced the plaintiff.
13. Eng. Mbugua averred that the plaintiff is the largest locally owned construction company in Kenya, and carries out projects that vastly exceed the principal amount it is entitled to from the defendant, in the unlikely event that it is ordered to refund the same. He added that the plaintiff is a company of means that can easily refund the said amount.
14. He stated that he had been advised by his Advocates that on 7th November 2025, upon delivery of the Judgment, the defendant made an application for stay of

execution pending Appeal, which was granted for 60 days on condition that the defendant pays the principal sum to the plaintiff within 30 days of the delivery of the Judgment. He asserted that having made a determination for stay of execution, this Court is *functus officio*, and is precluded from revising its own decision.

15. Eng. Mbugua averred that the defendant was given a condition for stay of execution, but has failed to remit the principal sum to the plaintiff, thus the defendant does not deserve to be granted the orders being sought herein.
16. He stated that the interest accrued as at 30th November 2025 was Kshs.226,255,818.76 as per the statement attached to the plaintiff's affidavit as JM1. He asserted that if the defendant intends to appeal against the award of interest, it should deposit the interest accrued to date, in an interest earning bank account in the joint names of the Advocates on record.
17. Eng. Mbugua asserted that the plaintiff stands to be highly prejudiced as it cannot enjoy the fruits of its Judgment and has not been paid for work done over a decade ago. He termed the instant application as frivolous, and an abuse of the Court process. He prayed for the defendant's application to be dismissed with costs to the plaintiff.
18. He subsequently filed a supplementary affidavit sworn on 5th December, 2025, in which he stated that the interest amount stated in paragraph 12 of his replying affidavit was erroneous. He indicated that the correct accrued interest as at 30th November 2025 was Kshs.533,427,989.44. He attached a revised interest computation sheet covering the period 16th July 2014 to 30th November 2025.
19. Mr. Luo Zicheng, the defendant's General Manager filed a further affidavit sworn on 8th December 2025, in which he stated that his Advocates had advised

him that the Court in an application for stay pending Appeal should consider if a Notice of Appeal was filed in the stipulated time, whether the application has been brought without unreasonable delay whether the applicant will suffer substantial loss if the order for stay of execution is not granted, and whether the applicant has provided security for the satisfaction of the decree.

20. He stated that he had been further advised that this Court cannot consider if there is an arguable Appeal as it will amount to this Court sitting of Appeal of its own Judgment, which consideration will be made by the Court of Appeal. He emphasized that the defendant's Appeal is against the whole Judgment and not just on the issue of interest.
21. Mr. Zicheng contended that there is no rule of procedure that bars an applicant from filing a formal application for stay of execution pending Appeal when the Court had issued a limited stay of execution at the time of delivery of the Judgment. He asserted that the instant application is necessary as the intended Appeal cannot be determined within the 60 days.
22. The application proceeded for hearing by way of oral submissions. Mr. Cecil Miller Advocate appeared for the defendant with Mr. Wena Advocate. Mr. Miller reiterated what Mr. Zicheng had stated that the Appeal filed before the Court of Appeal is against the entire Judgment. He contended that the issue of the Consent Judgment has two varying positions as rendered by Hon. Lady Justice Nzioka and Hon. Justice Mabeya.
23. Counsel stated that this Court in its Judgment referred to certificates (for work done) and took evidence on the entire case. He indicated that the defendant was willing to deposit security in the sum of Kshs.139,471,807.70 within thirty (30) days from 15th December 2025. He prayed for the defendant to be given 30 days to deposit the money due to the holiday season. He stated that substantial

evidence was adduced on the entire case. Mr. Miller prayed for the prayers in paragraphs 2 and 3 of the application to be granted.

24. On his part, Mr. Njuguna opposed the application on the ground that a partial decree was passed on 21st May 2019. He stated that Hon. Lady Justice Ngenye granted leave to the plaintiff to execute the partial decree on 10th June 2023, and subsequent to that, the defendant paid Kshs.8.8 Million and convinced the Court to have execution withheld, pending Judgment.
25. Mr. Njuguna stated that the principal amount owing was not in issue during the hearing of the case, as evidence was given as to when the interest became due and the amount of interest, issues which this Court dealt with. He stated that the other issue was if the defendant was entitled to indemnity from the Third Party, a matter that did not involve the plaintiff.
26. Counsel submitted that under Section 67(2) of the Civil Procedure Act, no Appeal can lie against a consent passed by the parties and stated that in so far as the principal amount is concerned herein, no Appeal can lie.
27. He asserted that the Judgment being appealed against did not award the principal sum and no Appeal can be sustained on that. He submitted that this Court's Judgment granted the plaintiff interest at commercial rates from 16th July 2014 until payment in full, and costs.
28. Counsel stated that annexed to the plaintiff's further affidavit is interest computation which amounts to Kshs.533,427,9889.00. He added that the amount calculated as interest has not been challenged.
29. He proposed that the interest accrued to date should be deposited in an account for the Advocates on record, and that the outstanding principal amount should be paid.

30. Mr. Njuguna submitted that the sum of Kshs.139,471,807.70 was for work done in the year 2014, and the consent was entered in the year 2019, which means that 11 years after the work was done, the defendant is insisting that the amount should not be paid. He pointed out that the interest has exceeded the principal amount three (3) times, and the plaintiff has suffered prejudice.
31. He stated that on 7th November, 2025, conditional stay was given, and the issue of stay was determined on that day, but the defendant has not made any payment.
32. As to whether the Appeal will be rendered nugatory, Mr. Njuguna submitted that monetary decrees cannot be rendered nugatory. He indicated that the plaintiff is a big company as stated in paragraph 6 of the replying affidavit, which demonstrates that it has been dealing with higher amounts than the one in this case. He prayed for the application in respect to the principal sum to be dismissed.
33. In a rejoinder, Mr. Miller submitted that the issue of the principal amount was addressed to this Court through evidence. He contended that the principal amount and the interest cannot be separated. He reiterated that the defendant is willing to deposit the principal amount in a joint bank account.
34. He submitted that the varying positions taken by Hon. Lady Justice Nzioka in 2020 and Hon. Justice Mabeya in 2022 are also in issue, and that this Court was in agreement with Judge Mabeya. Mr. Miller stated that the issue of the consent is alive before the Court of Appeal. He further stated that the issue of who was to pay is also in issue.
35. Regarding the Appeal, he submitted that the Third Party Notice was considered by this Court, a determination was made on the issue of interest due from the

principal amount and on the issue of indemnity. Additionally, that the issue of who was to pay was determined by this Court, and needs to be determined on Appeal.

36. As to the plaintiff being a company with means, Mr. Miller pointed out that no bank statement had been provided to demonstrate that the plaintiff handled a contract worth Kshs.3 Billion in 2020. In regard to the other contracts referred to by the plaintiff which it was awarded, Mr. Miller stated that it is not known if the said contracts will end up in Court, just like this case.
37. In regard to computation of interest, Mr. Miller stated that it had been computed by the plaintiff's Counsel.

ANALYSIS AND DETERMINATION

38. Having considered the application, the supporting and the further affidavits by the defendant, as well as the replying and the supplementary affidavits by the plaintiff, and also having considered the oral submissions made by Counsel for the defendant and the plaintiff, the issue for determination is if stay of execution of the Consent Judgment and the Judgment delivered on 7th November 2025 should be granted.
39. Stay of execution pending Appeal is provided for under the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, which states as follows-

No order for stay of execution shall be made under sub rule (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.”

40. In determining an application for stay of execution pending Appeal, Courts are under a duty to balance the competing interests of the parties taking into account the fact that an appellant has an undoubted right of Appeal, whereas the respondent has a decree which he/she/it should not be obstructed from executing unless there is a good reason. In the case of **Vishram Ravji Halai v Thornton & Turpin** [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant stay pending Appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules, is fettered by three conditions namely –

- i) establishment of a sufficient cause;***
- ii) satisfaction of substantial loss; and***
- iii) the furnishing of security.***

41. On the issue of whether the defendant has established a sufficient cause to be granted an order for stay of execution pending Appeal, Mr. Miller submitted that the Appeal to the Court of Appeal is on the entire Judgment of 7th November, 2025, which also contests the consent. It must however be noted that 6 years prior to the said Judgment, a consent was entered into between the plaintiff and the defendant. The said consent was recorded in the Court proceedings of 21st May 2019 before Hon. Lady Justice G. Nzioka. Mr. Njuguna Advocate was present for the plaintiff and Mr. Kairu Advocate was present for the defendant.

42. The consent recorded was in the following terms;-

“By the consent of the plaintiff and the deft Jd (sic) be and is hereby entered in favour of the plaintiff as against the defendant in the sum of Kshs.139,471,807.70. The issue of interest be negotiated out of Court and if the parties do not agree they return to Court for hearing.” (Emphasis added).

43. Following the said Consent Judgment of 21st May 2019, it is erroneous for the defendant to wholly link the said Judgment to the one of 7th November 2025. The only linkage that can be gleaned from the latter Judgment is that a decision was made on the issue of interest arising from the principal sum of Kshs.139,471,809.70. The fact that this Court mentioned the said Consent Judgment in its Judgment of 7th November, 2025 does not make it a decision rendered on the latter date.
44. Pursuant to the entry of the Consent Judgment, in a Ruling delivered on 10th June 2021, Hon. Ngenye J., (as she then was), granted leave to the plaintiff to execute the partial decree from the Consent Judgment entered on 21st May 2019 awarding the plaintiff the principal sum of Kshs.139,471,807.70.
45. It is evident that the defendant sought an order for stay of execution of the Judgment of 21st May 2019 and the consequential partial decree. Hon. Justice A. Mabeya in a Ruling delivered on 4th February 2022 granted the defendant stay of execution for 120 days within which the defendant’s suit for indemnity against the Third Party should have been determined.
46. In the said Ruling, addressing the issue of whether the Consent Judgment should be set aside, the Judge declined to do so noting that there was no evidence to show that ever since 2019 when the consent was entered, the defendant had ever challenged the same, and that the only issue that the defendant kept insisting on, is that the money was to be paid by the Third Party.

47. Since the stay of execution Orders made by Hon. Justice Mabeya, the said Orders were extended from time to time throughout the hearing of the case. Immediately after the delivery of the Judgment on 7th November 2025, Mr. Ngatia (SC), prayed for stay of execution for 60 days.
48. I granted stay of execution for 60 days on the issue of interest and costs, subject to the defendant paying the plaintiff the principal amount of Kshs.139,471,807.70, within 30 days from the date of the Judgment of 7th November 2025, as the consent has never been varied or set aside, I further stated as follows-

Even if the issue of interest and costs which I have determined, arises from the same cause of action as per the principal amount, having entered into a consent way back in the year 2019, the defendant should have settled the said amount way before the hearing of this case on the issue of interest. That would have been an act of good faith.

49. As I have earlier noted, the consent entered into was between the plaintiff and the defendant. It did not involve the Third Party who was brought into the suit to indemnify the defendant. Although lengthy proceedings were taken in determining the issue of interest, that on its own did not invalidate the Consent Judgment.
50. Having waited for 6 years since the consent was entered into in 2019, and having waited since 2014 when the plaintiff completed the contract, the plaintiff is entitled to the fruits of the Consent Judgment.

51. From the analysis that I have made, it is my finding that the defendant has not established sufficient cause for being granted an order for stay of execution of the Consent Judgment.
52. On the issue of whether the defendant stands to suffer substantial loss if stay of execution is not granted, I respectfully do not agree with the position taken by Mr. Miller that the defendant will suffer substantial loss if the principal amount of Kshs.139,471,807.70 is paid to the plaintiff. I say so because that is an amount that is rightfully due to it as per the Consent Judgment of 21st May 2019.
53. It is trite law that when a decree is a money decree, Courts generally do not grant stay of execution pending Appeal unless it is clearly shown that the decree-holder lacks financial capacity to refund the decretal sum if the Appeal succeeds. The Court of Appeal in the case of **Kenya Shell Limited v Benjamin Karuga Kibiru & another** [1986] eKLR, in addressing the issue of substantial loss held as follows-

The Appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended Appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since

the Respondents would be unable to repay the decretal sum plus costs in two Courts...

54. Mr. Njuguna for the plaintiff relied on the provisions of Section 67(2) of the Civil Procedure Act in submitting that no Appeal can lie from a consent. The said provisions state as follows;-

Appeals from original decree

- 1) ***An appeal may lie from an original decree passed ex parte.***
- 2) ***No appeal shall lie from a decree passed by the Court with the consent of the parties.*** (Emphasis added).

55. It is clear that the above provisions are couched in mandatory terms. In addition, the Court of Appeal in the case of **South Nyanza Sugar Company Ltd v Davic Ojwang Okebe & 12 others** [2013] KECA 534 (KLR), held that no appeal can lie from a consent.

56. It is my finding that by making payment that is due and owing from the Consent Judgment the defendant will not suffer any substantial loss, since no appeal can lie from the said Consent Judgment. Since the said consent was never varied or set aside, nothing can stand in the way to stop the payment of the said amount.

57. Further, in the event that the defendant succeeds in its Appeal, the plaintiff has through a Settlement Agreement dated 18th March, 2025 which is to the tune of Kshs.274,572,403.45 owed to it from Central Rift Valley Water Works Development Agency (CRVWDA), demonstrated that it is a company with the financial means to compensate the defendant if its Appeal succeeds.

58. On the issue of deposit of security, the Mr. Miller submitted that the defendant has offered to deposit the decretal sum of Kshs.139,471,809.70 in an interest earning joint bank account in the names of the Advocates for the plaintiff and

the defendant. It must be noted that I addressed the issue of stay of execution of the principal amount after the Judgment of 7th November, 2025, wherein I ordered the defendant to pay the said amount to the plaintiff as a condition for stay of execution. Having given a conditional stay of execution, I cannot now review my decision on the said issue and direct the defendant to deposit security in a joint earning interest account, instead of paying the plaintiff the principal amount as per the Consent Judgment.

59. I therefore decline to grant stay of execution for the sum of Kshs.139,471,807.70 which should be paid forthwith, and in any event, not later than fourteen (14) days from today, since the 30 days within which the said amount was to be paid elapsed on 6th December 2025.
60. Mr. Njuguna for the plaintiff argued that the interest due from the principal amount stood at Kshs.533,427,989.44 as at 30th November 2025. He explained that the plaintiff has no objection to stay of execution being granted for the said amount subject to the defendant depositing the entire amount in an interest earning account.
61. Mr. Miller opposed the said proposal on the ground that the interest awarded forms part of the Appeal to the Court of Appeal. Noting that computation of the interest due as at 30th November 2025 was done by the Advocate and not by the Deputy Registrar, the accuracy of the said calculations cannot be ascertained without the involvement of the Deputy Registrar in computing the interest due to the plaintiff.
62. Further, the issue of interest was left to trial and having heard the case on the said issue, and having made my determination on the same, and further, noting that the amount being sought as interest is a large amount, I decline to make an order for the deposit of the sum of Kshs.533,427,984.44. I agree with Mr.

Miller that deposit of such a large amount is likely to incapacitate the operations of the defendant. Instead, I hereby grant stay of execution of the Judgment of 7th December 2025 on the issue of interest and costs due to the plaintiff from the defendant, on condition that the defendant deposits a bank guarantee for the sum of Kshs.100,000,000/= with the Deputy Registrar within twenty-one (21) days from today.

63. As such, and for the avoidance of doubt, I only grant an Order for stay of execution of the interest and costs due from the defendant to the plaintiff, and not on the principal amount. The defendant's application is therefore partly successful.
64. Costs of the application herein shall abide the outcome of the Appeal at the Court of Appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 19th day of December 2025. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Messrs. Cecil Miller and Wena for the defendant/applicant

Mr. Njuguna for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.