

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. E043 OF 2025**

**NYA UGENYA EXPRESS LIMITED.....1<sup>ST</sup> APPLICANT/APPELLANT**  
**FREDRICK OTIENO OMOLLO.....2<sup>ND</sup> APPLICANT/APPELLANT**  
**VITALIS ANYANGO ALOO.....3<sup>RD</sup> APPLICANT/APPELLANT**  
**VERSUS**  
**COLLINS KIPKOGEI YEGO.....RESPONDENT**

**RULING**

1. What is pending before this court is the Applicants' Notice of Motion dated 18<sup>th</sup> March 2025 seeking the following orders;

1) Spent

2) Spent

3) That this Honourable court be pleased to grant an order for stay of execution of the judgment delivered on 21<sup>st</sup> February 2025 in Eldoret CMCC 538 of 2020 – Collins Kipkogei Yego vs Nya Ugenya Express Limited, Fredrick Otieno Omollo & Vitalis Onyango Aloo pending the hearing and determination of the appeal herein HCCA E043 of 2025.

4) That this Honourable Court allow the Applicants to furnish the Court with security in the form of a joint interest Bank Deposit for the sum of Kshs. 2,026,550/-.

5) That costs of this application be provided for.

2. The application is expressed to be brought under **Section 1A and 3A of the Civil Procedure Act, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, Section 5(b) of the Insurance (Motor Vehicle Third Party Risks Act, Chapter 405 of the Laws of Kenya, Article 159 of the Constitution, and ‘any other enabling provisions of the law’.**
3. The application is premised on the grounds on the face of it and the averments of the 2<sup>nd</sup> Applicant in the supporting affidavit.
4. He deponed that judgment was delivered in **Eldoret CMCC No. 538 of 2020 Collins Kipkogei Yego -vs- Nya Ugenya Express Limited, Fredrick Otieno Omollo & Vitalis Onyango Aloo** on 21<sup>st</sup> February, 2025 in the sum of Kshs, 2, 026, 550/-plus s costs and interests, annexing and marking as FOO-1 a copy of the Judgment. Further, that being aggrieved with the decision of the trial court, they instructed their counsel on record to lodge an appeal against the judgment at Eldoret High Court. He annexed and marked as FOO-2 a copy of the Memorandum of Appeal.
5. The deponent avers that the judgment subject matter is substantial, and should the Respondent proceed with execution, then the Appellants/Applicants stand to suffer irreparable loss and prejudice and additionally, that the ability of the Respondent herein to refund the decretal amount is unknown. He further deponed that the Memorandum of Appeal in **Eldoret HCCA No. E043 of 2025** raises triable issues and unless stay is granted in this suit, the Application herein and subsequent Appeal stand to be rendered nugatory and/ or mute.

6. He urged that the Appeal is meritorious with high chances of success and stated that they are apprehensive that the Respondent may proceed and levy execution against them as the 30 days stay period granted by the trial court have since lapsed. Additionally, that if payments are ordered to be made to the Respondent then such payments will be utilized and alienated by the Respondent and recovery of the same will be arduous in the event that this appeal on the issue of liability and quantum succeeds. He urged that if stay is not granted then the respondent will levy execution rendering the appeal nugatory and causing irreparable loss and damage.
  
7. The deponent stated that the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing and further, that the application has been brought promptly and without unreasonable delay and it is in the interest of justice that the same be allowed.

### **Respondents' Replying Affidavit**

8. The respondent filed a replying affidavit dated 1<sup>st</sup> April 2025. He deponed that the applicants had valid insurance cover with Directline Insurance Company Ltd vide policies number 085/6279 and further, that the applicants have not demonstrated that he is impecunious hence undeserving to be paid the decretal dues. He averred that the Application does not meet the requirements for grant of stay pending appeal in that: The application has not put facts in the affidavit to show that he will be unable to pay the decretal sum on conclusion of appeal is successful; There is no credible evidence or sufficient cause to enable the court reach a conclusion that the applicants will suffer substantial loss if the decretal sum is paid; The refusal of stay of execution will not render the appeal nugatory as that case involves a money decree capable of being repaid and; The applicants are relying on mere

apprehension which cannot be a basis of grant of stay without proof that he is impecunious.

9. The deponent averred that litigation must come to an end and a successful party allowed to enjoy the fruits of their judgment and the delay would amount to undue hardships on his part. Further, that they are people of means capable of offering restitution to the applicant even if the appeal succeeds and hence the applicant will not suffer irreparable loss. He stated that if security has to be offered then it should be the deposit of the decretal sum as the bank guarantee is inappropriate. Additionally, he stated that he was amenable to have three quarters of the decretal sum paid to him and the balance deposited in a joint interest earning account. He prayed that the application be dismissed with costs.

### **Applicants' Submissions**

10. Learned counsel for the applicants submitted that the issues for determination before this Court is whether the Applicants have satisfied the conditions set out under **Order 42 Rule 6 of the Civil Procedure Rules, 2010** to warrant the Court exercising discretion in its favour.
11. On Substantial Loss, he cited the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR** and **Century Oil Trading Company Limited vs. Kenya Shell Limited Nairobi (2008) eKLR** on the definition of the same. He reiterated that if orders for stay are not granted then the respondent will proceed to execute the decree yet the respondents' financial standing is unknown. That the Applicants having expressed concerns that the Respondent will be unable to refund the decretal sum should the appeal succeed, the Respondent is/ was under the obligation to prove that should the

decretal sum be paid to him, then they would be in a position to refund the decretal sum should the appeal succeed.

12. He cited **National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Anor (URI C.A. 238/2005** in this regard. Further, he urged that the Respondent has not produced anything to prove that he would be able to refund the decretal sum of the appeal succeeds. Counsel placed reliance on the case of **Jairus Momanyi Buranda & another v Ojwang Emmanuel Ochieng [2001]** and the case of **Kenya Orient Insurance Co Ltd v Paul Mathenge Gichuki & Another [2014] eKLR** on the burden of proof in this context.

13. On security, counsel submitted that the Applicant has proposed a joint interest bank deposit for the sum of Kshs 2,026,550/= which is the entire decretal sum. By offering to furnish security, it shows good faith on the part of the Applicants as the application for stay is not only meant to deny the Respondent the fruits of the judgment, as the form of security will ensure that the interests of both the Applicant and the Respondent will be secured pending the hearing and determination of the appeal.

14. He placed reliance on the case of **Focin Motorcycle C. Ltd vs Ann Wambui Wangui [2018] eKLR** in this regard. He prayed that the court adopts the proposal of furnishing a bank deposit in a joint interest earning account as security in due performance of the decree as the judgment sum is substantial. Depending on the outcome of the appeal, either of the parties will be at liberty to proceed and liquidate the bank deposit.

15. On unreasonable delay, counsel submitted that the judgment of the trial court which is the subject of the appeal herein was delivered on 21<sup>st</sup> February, 2025. The Memorandum of Appeal was lodged within the required timelines

(within 30 days from the date of judgment). The application seeking orders for stay of execution was drawn and dated on 18<sup>th</sup> March, 2025. Counsel submitted that the application was timeously filed without unreasonable delay. He placed reliance on the case of **Jasper Juma Nzuki vs James Wanyamu Mathuku & Another (2009) eKLR**.

### Respondents' submissions

16. The respondents filed submissions dated 15<sup>th</sup> April 2024. Counsel for the respondents opened his submissions by citing the provisions of **Order 42 Rule 6 2 (a) and (b) of the Civil Procedure Rules 2010**. He urged that the applicants have not met the threshold to warrant stay of execution as per the above quoted provisions of the law.
17. Counsel submitted that the mere fact that the applicants state in their application that the financial ability of the respondents is unknown and are therefore unlikely to refund the judgement sum in itself is not an automatic ground for granting stay of execution. He urged that the law of evidence is crystal clear that he who alleges must prove, for the applicant to state in their supporting affidavit that the respondents' financial abilities are unknown and they may be unlikely to refund it if paid is an unfounded allegation. He placed reliance on the case of **Nairobi HCCC No. 830 of 2003 Triton Petroleum Co. Ltd vs Kirinyaga Construction (K) Ltd** in this regard. He urged the court to dismiss the application with costs.
18. On delay, counsel urged that the application was served after the thirty days granted for stay period had been exhausted after the delivery of judgment. That the Judgement notice was served upon the Applicants on 21<sup>st</sup> February, 2025, the same day judgement was issued. He urged the court to dismiss the

applicant's application under this limb for having been brought after lapse of the stay period.

**19.**On security, counsel submitted that a consent on liability was recorded at 100% in favour of the Plaintiff against the defendant. He urged that in the event it upholds the defendants' application, the defendants applicants should be ordered to pay half of the decretal amount i.e. Kshs. 1,013,275/= to the respondents and the other half to be deposited in a joint interest earning account in the names of both counsels. He further submitted that it should be noted that the costs of the suit are estimated at Kshs 226,369.95/=. Since the said amount is not contested, he prayed that the same be paid together with the three quarters of the decretal amount all to totaling Kshs, 1,239,644.95/= . He placed reliance on **Kericho HCCMA No 34 of 2011 Eldoret Bus Services vs William Kipkirui & Another** and **Bungoma HCCA 31 of 2012 Tabro Transporter Limited vs Absalom Dova Lumbasi** in support of this submission.

### **Analysis and Determination**

**20.**The principles guiding the grant of a stay of execution pending appeal are well settled and the same are provided under Order **42 Rule 6(2)** of the **Civil Procedure Rules** which provides as follows:

**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**

21. The factors to consider in stay pending appeal the court is guided by the decision of the Court of Appeal in **Butt v Rent Restriction Tribunal [1982] KLR 417, (Supra)**. On the issue of substantial loss, the Court of Appeal decision in **Kenya Shell Limited –vs- Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018 (Supra)** refers. On the issue of substantial loss, the court associates itself with the holding of Ogola, J in **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 (Supra)**

22. Further, the court does associate itself with the finding in **Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR**, on the issue of security for the due performance of the decree and on whether there has been any delay which can termed to be unreasonable, the court is guided by the decision of the Court of Appeal sitting in Meru in Civil Appeal No. 45 of 2015 **M'ndaka Mbiuki v James Mbaabu Mugwiria [2016] eKLR**. Lastly on whether an Applicant has an arguable appeal, the court is guided by the decision **Athuman Nusura Juma Vs. Afwa Mohamed Ramadhan [2016] eKLR**

23. On the assertion that the Respondent will be unable to refund the decretal sum if the same is released to him and the appeal is successful, the applicant states that once this averment is made by them, the onus is on the Respondent to demonstrate otherwise. The Respondent on the other hand contends that he is of means and is able to refund the decretal sum and that the onus is on the Applicants to demonstrate otherwise and they haven't. In light of the two

divergent submissions the court is guided by the Court of Appeal decision in **ABN Amro Bank NK V Le Monde Foods Limited, Civil Application No. 15 of 2002 [NRB]** wherein the learned Judges stated as follows;

**“...in those circumstances, the legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on...”**

24. From my summation of the pleadings as herein, it is clearly apparent that the Respondent has not at all discharged that burden as is required of him and the court is therefore satisfied that he has not at all demonstrated that if the entire decretal sum, which the court finds to be significantly substantial is released to him, he will be able to refund the same in the event that the Appeal is successful. Further, I am satisfied that this Application was filed without any undue delay and given my finding the ability of the Respondent to refund the decretal sum as above, I am also satisfied that the Applicant has sufficiently demonstrated that they stand to suffer substantial loss. I

25. In addition to the above, I have perused the Memorandum of Appeal and I am satisfied that the Applicants have demonstrated that they have an arguable appeal. I am therefore satisfied that the Application has merit. I also note that Applicants are willing to deposit the entire decretal amount in a joint interest earning account. The above said however, the court notes

that a *consent judgement* on liability was entered against the Applicant and in favour of the Respondent and at 100% and so even as the court finds that the Application does have merit, the court is of the considered opinion that with this admission on liability by the Applicant, it would not be fair to completely lock out the Respondent from enjoying the fruits of his judgement even as the Applicant disputes the award given by the Trial Court in damages against which he has lodged an appeal.

26. In this regard, I allow the Applicant's Application for stay of execution pending appeal. However, the Applicant is to pay to directly to the Respondent half the decretal sum being Kshs. 1,013,275/= and deposit the balance thereof in a joint interest earning account in the name of both Advocates for the parties within the 45 days from the date of this Ruling failure to which these orders shall be deemed to have lapsed and the entire decretal sum becomes due and payable and the Respondent is at liberty to proceed with execution. The Applicant is also to pay the costs of this Application.

**Read Dated and Signed at ELDORET on 19<sup>th</sup> December 2025**

**E. OMINDE**  
**JUDGE**