



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

COMMERCIAL APPEAL NO. E008 OF 2025

SILVERHAWK CARGO LIMITED.....APPLICANT/APELLANT

VERSUS

MICHAEL ROTICH.....RESPONDENT

***(Being an Appeal against the Ruling and Orders of Hen. Edward
Obwoye delivered on the 3rd day of February 2025 in NAKURU
SCCOMM NO. E2017 OF 2024)***

BETWEEN

MICHAEL ROTICH..... CLAIMANT

AND

SILVERHAWK CARGO LTD.....RESPONDENT

Ruling

1. Before me is a Notice of Motion Application dated 6th October 2025 filed pursuant to Order 42 Rule 6 of the Civil Procedure Rules, Sections 1A, 1B, 3A of the Civil Procedure Act Cap 21 and all other enabling provisions of the law, the same is supported by the sworn

Affidavit of Daniel Muthenya Nzeki evenly dated seeking the following relief(s);

a) SPENT

b) SPENT

c) That Pending the hearing and determination of the Appellant's appeal, the Honorable Court be pleased to issue a stay of execution and/or enforcement of the ruling and orders of Hon. Edward Oboge (SRM) delivered on 18th September 2025 in Nakuru SCC COMM Claim No. E.2017 of 2024.

d) Costs of this application be provided for.

2. The Application is ground upon the general deposition by the Applicant that;

i. On the 18th September 2025, the Chief Magistrate's Court at Nakuru (Hon. Edward Oboge, SRM) delivered a ruling in SCC COMM Claim No. E.2017 of 2024 in which the corporate veil of the Appellant was lifted and he, together with his co-director, were compelled to attend court and to produce the company's books of accounts and other documents.

ii. In the impugned ruling, the Learned Magistrate proceeded to pierce the corporate veil of the Appellant's company. That he is advised by his advocates on record, which advice he verily believe to be true, that the principle of separate corporate personality is a protected and settled principle of law, and

that piercing the corporate veil is an exceptional remedy only permitted upon strict proof of fraud, bad faith, use of the company as a façade or alter ego, or other egregious circumstances.

- iii. No cogent evidence of fraud, bad faith, use of the company as a façade or alter ego, or other egregious circumstances was adduced against the directors, and indeed the Learned Magistrate acknowledged that fraud had not been proved. That he is advised by his advocates on record, which advice he verily believe to be true, that despite the absence of proof of fraud, the court proceeded to find a "fraudulent effort" by the Appellant.
- iv. According to the application dated 15th August 2025, the prayer for lifting the corporate veil was expressly conditional upon the directors failing to provide a satisfactory record of the company's means under Order 22 Rule 35 of the Civil Procedure Rules.
- v. That he is advised by his advocates on record, which advice he verily believe to be true, that the proper order in the circumstances should therefore have been to summon the directors for examination, not to pierce the veil at once.
- vi. The matter is scheduled to come up on 13th October 2025 for purposes of directions on compliance with the impugned orders, thereby creating imminent risk of coercive steps being taken against him and his co-director.

- vii. Unless stay of execution is granted, he and his co-director face imminent personal prejudice, including coercive sanctions in default of compliance, which will irreversibly defeat the substratum of the intended appeal.

3. The Court had in the interim allowed a temporary stay order directing that the Application be heard on merit by way of filed written submissions.

Applicants case

4. The Applicant elected not to file any written submissions in support of its case.

Respondents Case

5. The Respondent opposed the Application by filing a replying Affidavit dated 21st October 2025 and written submissions dated 13th November 2025.
6. The Respondent essentially argues that the instant Application is fatally flawed, without merit and offends the sub-judice rule.
7. That, a judgment in the subordinate court was delivered on 3rd February, 2025, the Applicant filed an application dated 13.3.2025 in Nakuru High Court Misc. Application NO. E005 of 2025 seeking for an order for extension of time to file an appeal against judgment of 3rd February, 2025 and an order for stay of the said judgment. That application is still pending before Justice Gichohi.

8. That, even before the parties complied with the directions of the court on filing of submissions in respect to the said application, the Applicant instructed another advocate who filed another similar application dated 5th August, 2025.
9. That, the history narrated herein above clearly describes a party who is keen on abusing the process of the court to avoid its obligations and to frustrate the decree holder.
10. That, he is advised by his advocates on record, which advice he believes to be true and sound, that Order 42 Rule 6 (2) gives this court powers to order stay of execution, either of its judgment or order or that of the court below, but on conditions. On an application for stay from a lower court decision, there must be an appeal filed. The court will not have jurisdiction to order a stay where no appeal has been filed.
11. That, the applicant has not demonstrated any substantial loss it will suffer. Substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. The total amount being claimed as costs from the applicant is not quite substantial.
12. That, in the alternative, the Applicant has not offered any security for stay orders sought

13. That, in the event that the court will allow the application, The Respondent urges that the decretal sum and costs in the sum of Kshs. 780,924/- be deposited in a joint interest account.
14. That this application is therefore in breach of the principle of sub-judice as this court is excluded from hearing and determining a matter that is in issue before another court of competent jurisdiction.
15. This was the position of the Court in the case of **Daniel Kipkemoi Bett & another vs Rong 120221 KEELC 1470 (KLR)** where it stated as follows:

"The concept of sub-judice is one that bars a court from trying a matter that is in one way or another before another court of competent jurisdiction by way of previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the relief or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be res-judicata."

16. Further, that, the Applicant's appeal challenges the ruling and order issued by the trial court in an application filed under Order 22 of the Civil Procedure Rules for which the right to appeal is not automatic.
17. That Section 75 (1) of the Civil Procedure Act as read together with Order 43 Rule (1) of the Civil Procedure Rules expressly provides that for the orders from which appeals lie as a matter of right and those from which appeals would lie only with leave of the court making the order sought to be challenged on appeal or the court to which the appeal would lie if leave was granted.
18. The Respondent submits that, although the Applicant was expected to seek leave for filing their Memorandum of Appeal, there is no evidence before this Court indicating that such leave was sought. This renders the appeal fatally incurable, incompetent, baseless and a nullity.
19. Reference is made to the Court of Appeal in the case of **Peter Nyaga Muvake v Joseph Mutunga (2015) eKLR** where the court expressed itself as follows:

"Section 75 of the Civil Procedure Act, Cap 21. stipulates the thematic orders from which appeals lie as of right. Appeals from other orders lie only with the leave of the court... As the effect of this is that no appeal lies without such leave, this Court would have no jurisdiction to entertain, hear or determine the applicant's appeal. Without leave of the High Court, the applicant was not entitled to give notice of appeal. Where, as in this case,

leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules, the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water. We so find and hold."

20. Therefore, without such leave, the Respondent submit that, this Court lacks the requisite jurisdiction to hear and determine the appeal and this instant application.

21. Further Reference is made to the Court of Appeal in **Kakuta Maimal Hamisi Vs Peris Pesi Tobiko & 2 others (2013)** where the court expressed in itself as follows:

"The question of a right to appeal goes to jurisdiction and is so fundamental we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the Constitution. We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash that cures and mends all ills, misdeeds and defaults of litigation.... Having already found that jurisdiction stands on a higher, firmer and more peremptory position than procedural rules, we can only

re-iterate that it goes to the very heart of substantive validity of court processes and determinations and certainly does not run afoul the substance - procedure dichotomy of Article 159 of the Constitution."

22. That the Applicant has not satisfied the conditions for grant of an order of stay of execution as provided under Order 42 Rule 6 (2) of the Civil Procedure Rules which provides that no order of stay of execution shall not be made unless:

*i. The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been given without unreasonable delay:
and*

H. 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.

23. The Respondent Submits that, substantial loss is the cornerstone of a court's jurisdiction in granting an order of stay of execution. This was the position of the court in the case of **James Wangalwa & another vs Agnes Naliaka Cheseto 120121 eKLR**. when it stated that:

"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...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."

24. That the Applicant has failed to demonstrate how it will suffer substantial loss. This is because the total amount being claimed as costs from the Applicant is not quite substantial.

25. However, the Respondent will definitely suffer loss if this application is allowed as he will only be kept from enjoying the fruits of his judgment.

26. Further, the appeal lodged by the Applicant is incompetent and it therefore cannot be rendered nugatory reference is made to the case of **Kenya Shell Limited vs Kibiru (19861 KLR 410)**, the Court held that:

"It is usually a good rule to see if Order XLI Rule 4 (now Order 42 Rule 6 (2) of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. 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".

27. Additionally, that this application has been filed 6 months after judgment was delivered which delay is unreasonable and unexplained.

Analysis and Determination

28. Upon consideration of the instant Notice of Motion application and Preliminary Objection, in the replying affidavit by Michael Rotich and Respondent's submissions, the only issue for determination is whether this Application is *sub-judice* Nakuru HCCOMM No. E008 of 2025 and Nakuru HCMisc No. E005 of 2025.

29. On raising of a preliminary objection, the court in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** held that:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

30. On the issue whether this suit is *sub-judice*, I wish to rely on the legal provisions governing the same as contained in Section 6 of the Civil Procedure Act, which provides as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

31. The Supreme Court in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) [2020] eKLR** stated that:

“The term sub-judice is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter, that one suit was instituted

before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

32. In the current scenario, Nakuru HCCOMM No. E008 of 2025 the Applicant instituted this interlocutory Appeal and interlocutory Application on the 6th October 2025 seeking stay orders against a ruling dated 18th September 2025. In its Memorandum of Appeal, the fulcrum of the dispute revolved around execution of the judgment dated 18th September 2025 and resultant ruling lifting the corporate veil. Further, the parties in both Applications Nakuru HCCOMM No. E008 of 2025 and Nakuru HCMisc No. E005 of 2025 are the same. The Applicant's Advocate are the same.

33. The only distinction between the two matters is the stay against execution of judgment/Decree is sought in Nakuru HCMisc No. E005 of 2025 that is pending ruling on the 18th March 2026 while the instant Application seeks stay against execution of the Orders lifting the corporate veil and compelling the directors to personally appear before court.

34. To this court the effect of the stay orders sought shall be to deprive off the Respondent from enjoying his fruits of judgment.

35. This court takes a dim view of an applicant who moves court for an equitable relief with unclean hands, in this instance the Applicant deliberately failed to disclose to the court of the pending Application

which he continued to prosecute during the pendency of this Application and thus undeserving of any equitable relief(s).

36. The Respondent has show-cased and persuaded the court that this instant Application offends the sub-judice rule, and thus this court's jurisdiction is ousted from considering the same.

37. This court is further persuaded that the Applicant was all along aware of the two similar Applications before the court by dint of effectively prosecuting the Nakuru HCMisc No. E005 of 2025 currently awaiting ruling.

38. I thus find the Application dated 6th October 2025 to be offending the sub-judice rule and to be without any merit whatsoever and the same is accordingly dismissed with costs to the Respondent.

It is so ordered.

**Dated signed and delivered
on this 16th day of December 2025**

**Mohochi S.M
JUDGE**