

REPUBLIC OF
KENYA IN THE COURT
OF APPEAL

AT NAIROBI

[CORAM: MUSINGA (P), TUIYOTT &
NYAMWEYA JJ. A]

CIVIL APPEAL (APPLICATION) NO. 136 OF
2020 BETWEEN

DINIZ HOLDINGS LIMITED.....APPLICANT
(formerly Safari Holdings Limited)

AND

KENYA POWER & LIGHTING COMPANY LIMITED

.....
RESPONDENT

*(An application for an injunction and the stay of execution
pending the hearing and determination of the appeal from the
Judgment and Decree of the High Court of Kenya at Nairobi
(Grace Nzioka, J.) dated and delivered on 27th February 2019
in*

Commercial Civil Suit No. 142 of 2007)

RULING OF THE COURT

1. It is trite law that in an application for stay of execution of a judgment pending appeal or an injunction pending appeal, the applicant must demonstrate, firstly, that the intended appeal is arguable, and secondly, that unless the orders sought are granted, the appeal, if successful, will be rendered nugatory as set out by this Court in **Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR**. The applicant herein, Diniz Holdings Limited (formerly Safari Horticulture Limited) in this respect, seeks such an

injunction and stay of execution in a Notice of Motion application he has filed in this Court dated 23rd July 2025. Specifically, that

this Court grants a stay of execution of the judgment dated 27th February 2019 and the decree emanating therefrom issued in **Nairobi HCCC 142 of 2007** by the High Court at Nairobi (**G. Nzioka, J.**), and an injunction restraining Kenya Power and Lighting Company Ltd (the respondent herein), from interfering with the applicant's use, supply and enjoyment of power connection.

2. The application is supported by an affidavit sworn on the same date by Maurine Bosibori, the applicant's Group Administrator, and submissions dated 2nd October 2025 filed by Kemboy Law, the applicant's advocates on record. The respondent did not file any response to the applications nor submissions.
3. The applicant detailed the events leading to the appeal and the current application it has filed in this Court. In summary, in May 2018, Kenya Power and Lighting Company, the respondent herein, installed electric power on the applicant's property namely Plot Number 10854/39 Moi South Lake, Naivasha, including installation of a transformer and a meter, and the two parties entered into a power supply contract. Subsequently, the respondent by letter dated 26th March 2004 and received by the applicant on 23rd January 2007, indicated it had conducted an inspection on the applicant's power installation system and found that the applicant's consumption was beyond the capacity ratio, and

adjusted it to reflect the

consumption from May 1998. Accordingly, the respondent indicated that it would, with effect from December 2006, recover the amount for the undercharged units from May 1998 amounting to Kshs 13, 718,720.26/-, and threatened to disconnect the power supply if its demand for immediate payment was not met.

4. The applicant consequently filed the suit in the High Court in **Nairobi HCCC 142 of 2007** seeking permanent injunctions to bar the respondent from disconnecting its power supply due to non-payment of the 2nd December 2006 bill which was inclusive of the impugned units and to bar the respondent from imposing the debit running from May 1998 to March 2004, as well as for general damages. The respondent in its defence denied that a contract of supply of power was entered into with the applicant, or that the applicant had been paying its bills, and further denied that it was in breach of the contract.
5. After hearing the parties, **G. Nzioka, J.** delivered the impugned judgment on 27th February 2019 and held that the applicant had provided evidence of a copy of the power supply agreement dated 24th November 1997, and the respondent was therefore under a contractual duty to supply and install the applicant's property with the proper instruments for power reading and send the applicant correct bills as and when they felt due, and that the

applicant was under contractual duty to pay the power supplied and

consumed. The Judge consequently issued a permanent injunction barring the respondent from disconnecting the power supply and ordered that, in the interest of justice, each party meet 50% of the bill due, which was Kshs 6,252,641.95/- each.

6. The applicant being aggrieved by the finding of liability to pay 50% of the amount due filed an appeal in this Court, and hence the application that is now before us. On the requirement of arguability and whether its appeal will be rendered nugatory if its application is not granted, the applicant referred to its Memorandum of Appeal dated 17th March, 2020 in which it has set out two grounds of appeal challenging the trial court's finding of 50% liability of the total undercharge of Kshs. 12,505,283.90 against the applicant, despite expressly acknowledging that the respondent installed a faulty meter and had failed to notify the applicant of billing discrepancies in a timely manner. While citing the decisions of this Court in **Llyod Masika Ltd vs Stanbic Bank Ltd [2024] KECA 72**, **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR** and **Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] KECA 378 (KLR)**, the applicant submitted that its Memorandum of Appeal raises substantial and *bona fide* grounds, and if stay is denied, the respondent will proceed to enforce the decree, including through unlawful

levies on unrelated electricity accounts and interruption of power supply to premises not subject to the

suit, which will cause irreparable harm to its operations and render the appeal nugatory.

7. The applicant pointed out that the respondent had already levied execution against unrelated electricity accounts that are not the subject of the suit, and that the application was filed promptly on 23rd July 2025, immediately following the respondent's renewed threats of enforcement and interruption and it had acted with diligence and good faith. Lastly, the applicant averred that it is willing to deposit the decretal sum in a joint interest-earning escrow account to secure the respondent's interests pending appeal, and had already remitted Kenya Shillings One Million Five Hundred Thousand (Kshs.1,500,000/=) under duress, arising from persistent threats of power interruption on separate and independent electricity accounts.
8. We heard the application on 27th August 2025 on the Court's virtual platform, and learned counsel, **Ms. Mellyne Okina**, holding brief for learned counsel **Mr. Kemboy**, was present, appearing for the applicant, while learned counsel **Mr. Donald Kipkorir** appeared for the respondent. Ms Okina reiterated their submissions dated 2nd October 2025, while we granted Mr. Kipkorir leave to make oral submissions. In brief, Mr Kipkorir urged that despite the applicant having been given time from 1st April 2019 to pay the reduced bill it has not done so, and instead filed the application

for stay seven years after issue of the decree, which is an unreasonable delay. In addition, that the offer to deposit the decretal sum is being made too late in the day.

9. The law is settled that an arguable appeal is not one that must ultimately succeed, but one that raises at least a single *bona fide* issue that deserves full consideration on appeal. The applicant's contention that it was found liable to pay 50% of the sums due despite concurrent findings of fault and negligence on the part of the respondent is, in our view, not a frivolous ground, and we accordingly find that the applicant has demonstrated that the intended appeal is arguable. Turning to the nugatory aspect, this Court stated in **Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others (supra)** that whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen is reversible, or if it is not reversible, whether damages will reasonably compensate the party aggrieved. The applicant's grievance is that it has been condemned to pay a sum of Kshs 6,252,641.95/-, which is a monetary claim. It has not averred nor demonstrated that the respondent is unable to refund the said sum of money in the event that the appeal succeeds, and we are therefore not satisfied that the appeal will be rendered nugatory.

10. Consequently, although its appeal is arguable, the applicant

has not established that it will be rendered nugatory in the event the injunction or

stay orders that it seeks are not granted. The applicant was required to satisfy both limbs and has not, and the Notice of Motion dated 23rd July 2025 is accordingly dismissed with no order as to costs, since the respondent did not file any pleadings.

11. Orders accordingly.

Dated and delivered at Nairobi this 19th day of December 2025.

D. K. MUSINGA, (PRESIDENT)

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**JUDGE OF APPEAL
F. TUIYOTT**

.....
**JUDGE OF APPEAL
P. NYAMWEYA**

.....
JUDGE OF APPEAL

*I certify that this
is a true copy of the
original*

Signed

DEPUTY REGISTRAR