

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. E021 OF 2025

SIDIAN BANK LIMITED.....APPELLANT

-VERSUS-

GRIFFON

CONSTRUCTION

LIMITED.....RESPONDENT

JUDGMENT

1. The Applicant approached the court through an application dated 20th May, 2025, seeking orders thus;

1) Spent.

2) Spent.

3) That this honorable court be pleased to order a stay of execution of the Ruling of court and all other subsequent orders thereto pending the hearing and determination of the appeal filed in the High Court of Kenya being Nyahururu HCCA E021 of 2025.

4) That the costs of this application be provided for.

2. The application is premised on grounds that the Ruling was delivered in favour of the Respondent on 15th May, 2025, in relation to an application dated 30th May, 2024 and the Applicant being aggrieved has opted to file an appeal against the entire Ruling.

3. That the Respondent has already commenced execution of the order of court and if orders of stay of execution pending the hearing and determination of the appeal are not granted then execution will be levied based on an erroneous order which will expose the Applicant to suffer irreparable loss and render the appeal nugatory and an academic exercise.
4. The application is supported by an affidavit deposed by Jackline Ndung'u, a legal officer in employment of the Applicant who deposes that the Ruling in favour of the Respondent ordered release of motor vehicle KDH 646D which is being held by the Applicant as security for defaulted loan facility issued to the Respondent. That the Respondent is heavily indebted to the Applicant through various loan and credit facilities.
5. The Respondent through its Director/Shareholder, Freshia Njoki Njeri in response, deposes that the Applicant financed the Respondent to purchase motor vehicle registration number KDH 646D Toyota Landcruiser Prado TX at Kshs.5,186,650/- on 15th September, 2022, with the Respondent paying Kshs.2,000,000/- a vehicle that was registered in joint names of the Applicant and Respondent as security thereof and the Respondent commenced repayment of the credit facility by monthly instalments.
6. That on 18th April, 2024 the Respondent applied for an overdraft credit facility for a sum of Kshs.750,000/- an amount that was repayable within a period of one(1) month from the date of disbursement of the facility. On 20th May,

2024 the Applicant moved and attached the subject motor vehicle attached on the ground that the Respondent defaulted in repaying the overdraft on 19th May, 2024, a day that fell on a Sunday.

- 7.** That before the attachment, no statutory notice was given showing the nature and extent of the default as required by the law, **Moveable Property Security Rights Act No. 13 of 2017** and no proclamation and notification of sale were served on the Respondent.
- 8.** That on 7th June, 2024, nineteen (19) days after the overdraft fell due, the Respondent received a delayed payment notice that it was expected to pay Kshs.5,978,148 on the same day, the Respondent paid the Applicant the overdraft that caused the attachment of the motor vehicle. Despite that the Applicant continues to hold the motor vehicle.
- 9.** That the Respondent has continued to repay the loan which stands at Kshs.2,998,583.55/-. That the Applicant failed to demonstrate before the lower court why it has continued to hold the motor vehicle.
- 10.** That the Applicant has acted maliciously an act that has made the Respondent incur transport expenses of Kshs.4,000/- per day for lack of use of the said motor vehicle. That the Applicant's application for review of the impugned Ruling dated 16th May, 2025 seeking temporary stay of execution was denied hence the Applicant withdrew it and filed the instant appeal.

11. That upon the Respondent going to collect the vehicle following the Ruling of the trial court, he was presented with a letter from KRA purporting to place a restriction on the subject vehicle hence the Applicant declined to release it.

12. The application was canvassed through written submissions. I have considered the application, affidavits in support and opposition, annexures thereto, and rival submissions alongside the authorities cited.

13. The verge of granting stay of execution pending appeal is detailed in **Order 42 Rule 6(1)(2) of the Civil Procedure Rules** as follows;

(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 from whose decision the appeal is preferred may apply to the appellate 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.

14. These principles are available for use at the discretion of the court, therefore, must be exercised judiciously. In considering circumstances of the case, the court must have in mind the interest of justice. The conditions set out hence necessitates the court to satisfy itself of the existence of the three conditions namely; whether the application has been brought without undue delay; whether substantial loss may result if the order of stay of execution is not granted, and, if the Applicant is willing to provide security for due performance.

15. In **Butt vs Rent Restriction Insurance [1982], KLR 417** it was held thus;

“It is the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court

as a general Rule ought to exercise its best discretion in a way so as not to prevent the Appeal if successful being nugatory.”

16. On the issue whether the application was filed timeously without unreasonable delay, the Ruling was delivered on 15th May, 2025 and the application was filed on 20th May, 2025. Certainly, the application was made promptly.

17. On substantial loss, the Applicant urges that it has a meritorious and arguable appeal with a high chance of succeeding. And, the Respondent may levy execution against them rendering the appeal nugatory yet the Respondent is heavily indebted to the Applicant and the only security they have is the motor vehicle.

18. On its part the Respondent argues that the argument raised by the Applicant does not establish if the alleged loss is really worth of value. That the mere fact that execution of the trial court’s order has been put in motion does not amount to substantial loss which is not a ground for granting stay of execution.

19. In **Wangalwa & Another v Agnes Naliaka Chesoto [2025] eKLR** it was held that;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached

properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

20. The bank statement annexed shows that the Respondent is indebted to the Applicant but continues to make payments as agreed, of course having settled the overdraft facility. The

Respondent has endeavored to stay current which indicate low risk of default. The loss to be incurred if any would not be of significant material detriment.

21. It is argued by the Appellant/Applicant that if orders sought are not granted the appeal shall be rendered nugatory. Whether or not the appeal shall be futile if successful hence serve no real purpose would depend on the nature of the case. In the cited case of **Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR** the Court of Appeal stated that;

“Whether or not an appeal will be rendered nugatory depends on whether or not 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.”

22. The argument put forth by the Applicant is that the money owing is in millions hence substantial loss shall be suffered therefore allowing release of the motor vehicle may expose it to heavy financial losses. But, it is urged by the Respondent that if the appeal succeeds the Respondent will be in a position to hand over the vehicle and the Respondent being a construction company has means to pay the damages if any.

23. A perusal of the loan statement shows evidence of the loan being serviced though not regularly. The loan is supposed to be fully paid in August 2026 and it is demonstrated that the Respondent is a construction company with some means.

24. The Applicant is ready and willing to furnish such reasonable security as the court may order. The purpose of security is to ensure the judgment debtor meets the decree incase the appeal succeeds which ideally can be done by the Applicant. But, the question to be grappled with is where the balance of convenience lies.

25. Notably, the subject motor vehicle is registered in the name of both the Applicant and Respondent and the duration within which the loan was to be serviced has not lapsed. The Respondent is in construction business, he will be capable of compensating the Applicant incase the appeal is successful. As a result, the Applicant has failed to adduce empirical evidence to meet conditions required for grant of stay of execution.

26. For those reasons, the application lacks merit. Accordingly, it is dismissed with costs to the Respondent.

27. It is ordered.

Dated, signed and delivered virtually this 4th day of February, 2026.

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L.N. MUTENDE
JUDGE

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