



Commissioner of Customs and Border Control v Pesapal Limited (Customs Tax Appeal E012 of 2024) [2026] KEHC 1199 (KLR) (Commercial and Tax) (5 February 2026) (Ruling)

Neutral citation: [2026] KEHC 1199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E012 OF 2024**

F GIKONYO, J

FEBRUARY 5, 2026

BETWEEN

COMMISSIONER OF CUSTOMS AND BORDER CONTROL APPELLANT

AND

PESAPAL LIMITED RESPONDENT

RULING

Stay pending appeal

1. Through the judgment of 8.8.2025, the court upheld the appellant/ respondent's review decision of 21.9.2022 imposing additional taxes amounting to Kshs.2,837,476.00/- on the applicant's imported Mobile Point of Sale "MPOS" devices.
2. By way of a letter dated 20.8.2025, the appellant sent the respondent/ applicant a demand notice for the immediate payment of alleged duty of Kshs.4,960,751 to avoid recovery measures.
3. The respondent/ applicant filed a notice of appeal dated 21.8.2025 against the decision. It also filed the notice of motion dated 22.8.2025 seeking stay of execution of the judgment delivered on 8.8.2025 and any enforcement actions arising therefrom, pending the hearing and determination of its intended appeal to the Court of appeal.
4. The application is supported by the affidavit sworn by the respondent/ applicant's director, Agosta Malava Liko on 22.8.2025 and written submissions dated 26.9.2025.
5. There was no response filed by the appellant/ respondent despite service.
6. Relying on *Mwangi v Kenya Airways Ltd* [2003] KLR, the applicant submitted that it has met the conditions for the grant of a stay pending appeal.



7. The applicant asserted that if a stay is not granted, the appeal will be rendered nugatory by imminent enforcement measures. It relied on *Butt v Rent Restriction Tribunal* [1982] KLR 417 where the court held that a stay should be granted so that an appeal is not rendered nugatory. It also relied on *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.
8. The applicant relied on *Silverstein v Chesoni* [2002] 1 KLR 876 where the court held that substantial loss must be prevented to preserve the appeal. It highlighted that it is a licensed payment services provider regulated by the Central Bank of Kenya and any enforcement action such as agency notices, distress order or freezing of accounts will cripple its business, disrupt service to thousands of merchants and customers, and expose it to regulatory sanctions.
9. The applicant went on to state that such enforcement will cause irreparable financial damage and erode public trust in the financial sector. It asserted that the risk of losing its business license and operations cannot be compensated by damages.
10. The applicant relied on *Absalom Dova v Tarbo Transporters* [2013] eKLR on security. It submitted that it is willing to abide by any conditions of security that the court may impose.

Analysis and Determination

Issue

11. The question before the court is whether the court should grant stay of execution and/ or enforcement of the judgment pending appeal.

Legal threshold

12. The application is anchored in Order 42 Rule 6 of the Civil Procedure Rules which governs stay of execution pending appeal.
13. Under the section, ‘stay of execution shall be made... unless the court is satisfied that: a) substantial loss may result to the applicant unless the order is made; b) the application has been made without unreasonable delay; and c) 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. Therefore, stay of execution pending appeal is at the discretion of the court-the exercise of which is guided by principles and not whims or caprice, considering all the material circumstances of a case.

Filing of application

15. The application for stay pending appeal should be brought without undue delay. The application is dated 22.8.2025 and is seeking stay of execution of the judgment dated 8.8.2025. Therefore, the application has been filed timeously.

Substantial loss

16. The applicant claims that enforcement measures are underway and will cause substantial loss to the applicant’s business.
17. Nonetheless, it is fit to emphasize that, ‘... 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. ...’ *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR),



18. Substantial loss is essentially the routing of the right of appeal which includes deprivation of the possibility of realizing the benefit and fruits of the judgment of a successful appeal. This loss to the appellant has been referred to by some court as holding 'barren result' (Shivabhai Nathabhai Patel vs. Manibhai Nathibhai Patel [1959] EA 907), and by others as being reduced to 'a pious aspiration or explorer' (Absalom Dova v Tarbo Transporters). This is the loss that must be avoided or averted through a stay of execution pending appeal.

Applying the test...

19. The commissioner issued a demand notice for the immediate payment of alleged duty of Kshs.4,960,751 to avoid recovery measures.
20. The applicant submitted that it is a licensed payment services provider regulated by the Central Bank of Kenya and any enforcement action such as agency notices, distress order or freezing of accounts will cripple its business, disrupt service to thousands of merchants and customers, and expose it to regulatory sanctions.
21. The applicant went on to state that such enforcement will cause irreparable financial damage and erode public trust in the financial sector. It asserted that the risk of losing its business license and operations cannot be compensated by damages.
22. Flowing from the grounds argued, the applicant should show that 'its financial position is imperiled... by enforcement of the Tribunal's decision...' Africa Oil Kenya BV v Commissioner of Domestic Taxes ML HC TA No. E024 of 2020 [2020] eKLR,
23. Of value too; mere statements in the affidavit that the applicant is undergoing financial statements are not enough. They should be supported by evidence. Monaco Engineering Limited v Commissioner of Income Taxes 2021 KEHC 9698 (KLR)
24. In this case, the applicant did not substantiate the claim that its business will be imperilled by the enforcement by the respondent. This is ordinarily referred to as substantial loss.
25. However, the applicant submitted that it is willing to abide by any conditions on provision of security that the court may impose.
26. Therefore, the court finds that, it is in the interest of justice to allow the stay orders on the condition that the applicant provides a bank guarantee for the Kshs.4,960,751/- demanded.

Disposition

27. The respondent/ applicant's application 22.8.2025, is allowed in the following terms: -
 1. A stay of execution judgment dated 8.8.2025 together with the demand notice for Kshs.4,960,751 is issued pending the hearing of the appeal or further orders of the court on condition that the applicant shall provide a bank guarantee from a reputable bank for Kshs.4,960,751 within 60 days from today to the commissioner/ respondent and shall provide a copy to Court through the DR Commercial & Tax Division.
 2. If the applicant fails to comply with these orders within the time allowed, the stay order will lapse automatically.
 3. No orders as to costs as there was no response.



**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE
APPLICATION THIS 5TH DAY OF FEBRUARY, 2026**

F. GIKONYO M

JUDGE

In the presence of: -

Maina for Odhiambo for respondent

Muhoro h/b Ochieng for Applicant

CA- Kinyua

