

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(CIVIL DIVISION)**

HCCA NO. E010 OF 2025

KENYA PORTS AUTHORITYAPPELLANT

VERSUS

BASLIZA SARU HAMISI.....RESPONDENT

RULING

1. Vide a notice of motion dated 22nd July 2025, the appellant, at this juncture, seeks a stay of execution of the judgment delivered by the Hon Gatambia S. Ndungu on 26th June 2025, pending the hearing and determination of the appeal, and in the alternative, an injunction pending appeal.
2. The grounds, as disclosed in the body of the motion and the affidavit of Mr. Stephen Kyandih, the Corporation Secretary and the Principal Legal Officer of the appellant, is that the Small Claims Court exceeded its jurisdiction, that there was an attempt to attach and remove the property of the appellant, which he deemed as irregular, as they are the tools of trade and that execution as proposed was unlawful, as under section 21 of the Government Proceedings Act, and section 67 of the Kenya Ports Authority Act the property of the appellant was not available for attachment in execution of decrees, in the manner proposed.
3. The application was opposed. The respondent filed grounds of opposition dated 14th October 2025, in which her counsel stated that the award of the

Small Claims Court was lawful. She contended that the challenge was based on speculative computation, not reflected in the decree or the record of the court. Further, the appeal offends section 38 of the Small Claims Court Act, as under the said provision, appeals are restricted to issues of law only. It was contended that the application was frivolous and vexatious, was without merit, and meant solely to delay and frustrate the satisfaction of a lawful decree.

4. On 14th October 2025, this court permitted the parties to file skeleton submissions in support of or in opposition to the application. The application was argued on 15th December 2025. Although parties had leave to file skeleton submissions, none did. The appellant filed written submissions dated **30th November 2025**, which are in respect of the main appeal.
5. The foregoing notwithstanding, I will consider the oral submissions of the parties.
6. The conditions that an applicant seeking a stay of execution pending appeal must meet are well understood. Order 42 Order 6 (2) of the Civil Procedure Rule states that:

“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.”

7. An applicant must therefore show:

- a. That it will suffer substantial loss unless a stay is granted;
- b. The application was filed without undue delay; and
- c. Provide security for the due performance of the decree that may ultimately be binding.

8. **Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR)**, Madan, JA (as he then was), stated as follows:

“It is in 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, from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

Megarry J, as he then was, followed *Wilson* (supra) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in

granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision being rendered nugatory should that court reverse the judge's decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others* 24 QBD (1889) 56 at p 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties, and the appellant has an undoubted right of appeal.”

9. In the case of **JAMES WANGALWA & ANOTHER V AGNES NALIKA CHESETO [2012] KEHC 1094 (KLR)**, it was stated that:

“11.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.”

10. I have perused the memorandum of appeal. In my view, the same raises arguable questions of law. The appeal is not idle. If execution is permitted to proceed, the respondent will recover the decretal amount. There is no assurance that she will be able to pay back the said amount if the appellant is successful on appeal.

11. In the case of **Absalom Dova v Tarbo Transporters [2012] eKLR**, the Court stated that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such an order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant has right of appeal, which includes the prospect that the appeal will not be rendered nugatory; and the decree holder has right to the decree, which includes full benefits under the decree. The court, in balancing the two competing rights,

focuses on their reconciliation, which is not a question of discrimination.”

- 12.** The appeal was filed on 22nd July 2025, as was the application. In my view, there was no undue delay.
- 13.** What of security for the due performance of the decree? In my view, justice in this case calls for the decretal sum to be deposited in court in full. Deposit of the decretal sum will balance the interests of the appellant and the respondent.
- 14.** In the circumstances, the orders that commend themselves to me are the following: -
- a.** The notice of motion dated **22nd July 2025** is hereby allowed on condition that **the entire decretal sum be deposited in court within 30 days of the date of this ruling**. In default execution to issue; and
 - b.** Costs shall be costs in the appeal.
- 15.** It is so ordered.

Dated and signed in Mombasa, this 17th day of February 2026.

Delivered virtually through **Microsoft TEAMS**.

Gregory Mutai

JUDGE

In the presence of:

Mr. Muge, for the Appellant;

Ms. Ombat, for the Respondent; and
Bancy – Court Assistant.

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