

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPELLATE DIVISION
CIVIL APPEAL NO. E950 OF 2025

VIRJI VISHRAM PATEL & SONS CO. LTD
APPELLANT/APPLICANT
VERSUS
JAMES HENRY NYABUTO
RESPONDENT

RULING

Background

1. Judgment was entered in favour of the Respondent against the Appellant for Kshs. 2,902,215, together with interest and costs, which the Respondent contends have accrued to approximately Kshs. 4,698,173.
2. Aggrieved by the judgment, the Appellant lodged the present appeal and filed the instant application apprehensive that execution would issue and render the appeal nugatory.

The Application

3. This ruling concerns the Appellant's Application dated 19th September 2025 seeking orders of stay of execution of the judgment and decree delivered on 21st August 2025 in

Milimani CMCC No. E8326 of 2021, pending the hearing and determination of Civil Appeal No. E950 of 2025.

4. The application is supported by the affidavit of **Manish Valji Kanji Patel**. The Respondent opposed the application through a replying affidavit sworn on 13th October 2025 and written submissions.
5. The Respondent maintains that the appeal is frivolous, execution lawful, and that the Appellant has failed to meet the statutory threshold for the grant of stay.
6. The application was canvassed by way of written submissions which I have considered.
7. I find that the main issue for determination is whether the Applicant has made out a case for the granting of orders for stay of execution pending appeal.

Analysis and Determination

8. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows: -

“No order for stay of execution shall be made 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.”

9. The above conditions are conjunctive and must all be satisfied.

Unreasonable Delay

10. The judgment was delivered on 21st August 2025, while the present application was filed on 19th September 2025, approximately one month later.

11. Both parties are in agreement that the application was filed timeously. I find that the application satisfies the requirement under Order 42 Rule 6(2)(a) regarding absence of unreasonable delay.

Substantial Loss

12. The cornerstone of stay is substantial loss. In ***Kenya Shell Ltd vs. Kiburu [1986] KLR 410***, the Court of Appeal held that: -

“Substantial loss in its various forms is the cornerstone 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.”

13. The Appellant contends that execution will occasion substantial loss on account of the Respondent’s alleged inability to refund the decretal sum should the appeal succeed.

14. The Respondent, on the other hand, disputes this assertion, stating that he is a man of means capable of refunding the decretal sum and that mere allegations of poverty cannot justify denial of the fruits of judgment. He further argues that the Appellant has not furnished any empirical or documentary evidence to prove his inability to refund the decretal sum.
15. My finding is that the Appellant's apprehension is founded on bare assertions without evidentiary support. While the law recognises that once a reasonable fear is raised the evidentiary burden may shift, the initial burden to demonstrate likelihood of substantial loss remains with the applicant.
16. My take is that mere statements that the decretal sum is substantial or that execution will issue do not, without more, amount to proof of substantial loss. This court is not persuaded that the Appellant has sufficiently demonstrated that execution would irreparably affect the substratum of the appeal or render it nugatory.

Whether the Intended Appeal Is Arguable

17. The Appellant submitted that the appeal raises serious issues of law and fact, including alleged contradictions in the trial court's findings and legality of the underlying contract.

18. The Respondent, on his part, countered that the appeal introduces issues not pleaded or canvassed before the subordinate court and is therefore frivolous.

19. My finding is that while arguability is not a strict requirement under Order 42 Rule 6 of the CPR, the existence of an appeal alone does not entitle an applicant to stay. The arguability of the appeal cannot, by itself, override failure to meet the mandatory statutory conditions.

Balance of Justice

20. The Court is guided by the overriding objective under Sections 1A and 1B of the Civil Procedure Act to do justice to both parties. A successful litigant is prima facie entitled to enjoy the fruits of judgment, and stay of execution should not be granted merely to delay satisfaction of a lawful decree.

Security

21. The Appellant proposed to furnish a bank guarantee as security. However, no bank was disclosed, nor was any guarantee, bank statement, or proof of funds annexed.

22. In ***Gianfranco Manenthi & Another vs. Africa Merchant Assurance Co. Ltd*** [2019] eKLR, the Court observed:

“The applicant must show and meet the condition of payment of security for due performance of the decree. The issue of security is not a matter of willingness but for the court to determine.”

23. Order 42 Rule 6(2)(b) of the CPR makes provision of security mandatory. In ***Focin Motorcycle Co. Ltd vs. Ann Wambui Wangui [2018] eKLR***, it was held that the purpose of security is to guarantee the due performance of the decree and not to punish the judgment debtor.
24. In ***Carter & Sons Ltd v Deposit Protection Fund Board & 2 Others (CA No. 291 of 1997)***, the Court of Appeal held the offer for security must come from the applicant as a price for stay.
25. In the instant case, the Applicant offered to furnish a bank guarantee as security without indicating the particulars of the bank and the amount offered as security. I however find that the court still retains discretion to determine appropriate security. In doing this, the court is required to balance the Applicant's right of appeal and the Respondent's right to enjoy the fruits of its decision and property.
26. In ***Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR***, the Court held that security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant.
27. Given the nature of this case and the fact that the decree in question is a money decree, I am persuaded that a conditional stay for partial payment to the Respondent and a deposit of the remaining sum in a joint interest earning account will best serve the interests of justice.

28. The Court is guided by the overriding objective under Sections 1A and 1B of the Civil Procedure Act. In ***Machira t/a Machira & Co. Advocates vs. East African Standard [2002] KLR 63***, the Court held that the ordinary principle is that a successful party is entitled to the fruits of his judgment and that applications for stay should not be used to delay execution or deny enjoyment of a lawful decree.

29. The Respondent is a successful litigant and is prima facie entitled to enjoy the fruits of his judgment.

30. Consequently, I make the following final orders: -

a) There shall be a stay of execution of the judgment delivered on 21st August 2025, pending the hearing and determination of the appeal, on the following conditions: -

i) The Appellant shall pay half ($\frac{1}{2}$) of the decretal sum, together with accrued costs and interest, to the Respondent within 30 days of this ruling;

ii) The balance of the decretal sum shall be deposited in a joint interest-earning account in the names of counsel for the parties within the same period;

iii) In default of compliance with any of the above conditions, the stay shall automatically lapse;

b) Costs of the application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH
DAY OF FEBRUARY 2026.**

**HON W. A. OKWANY
JUDGE**

**In the presence of
Ms Wanjiru for Nganga for Applicant
Orege for Mageto for Respondent
Abdirzak - Court Assistant**