

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(COMMERCIAL & ADMIRALTY DIVISION)
HCCOMMA NO E 003 OF 2026

LUI WAGUDE OMOLO.1ST
APPELLANT
LEO LUBANGA2ND APPELLANT
VERSUS
LIGHTWARES COMPANY LTDRESPONDENT

RULING

1. Before me is a notice of motion application dated 12th February 2026 vide which the appellants seek a stay of the warrants of arrest issued on 4th February 2026 in **Mariakani CMCC No. E155 of 2021** pending the hearing and determination of the appeal, and for the costs to be provided for.
2. The applications contend in an affidavit sworn by **Lui Wagude Omollo** on **12th February 2026** that the decretal sum as per the consent was to be paid by Interfund and Cissabi Associates East and Central Africa and that default was as a result of factors beyond their control. The deponent stated that grant of orders sought would not occasion prejudice to the respondent.

3. The appellant annexed a copy of the consent order between the parties, which I have noted was adopted by the court on 14th November 2025.
4. The application is opposed. The respondents contend that the appeal was filed without leave of the court and is thus fatally defective.
5. The application was canvassed before me on 17th February 2026. Ms. Maina, for the appellant, contended that the court should issue stay orders as the appeal is arguable. In her view, what is sought in the appeal is the interpretation of the consent. She urged that if the appellants are committed to civil jail, they would suffer substantial loss. Counsel submitted that the application was filed without undue delay and that the court should exercise its discretion favorably
6. Ms. Mulongo opposed the application. She contended that this court lacked jurisdiction as no leave was sought before the appeal was filed. In support of the said contention, she referred the court to the provisions of section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules.
7. Ms. Mulongo contended that the consent bound the applicants and that it was their duty to pay the debt and not that of a third party.
8. This is an application for a stay of execution pending appeal. Conditions governing the grant of such orders are set out in Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. These are that:

- a. The applicants must show that they will suffer substantial loss unless a stay is granted;
 - b. That the application was filed without undue delay; and
 - c. Provided security for the due performance of the decree that may ultimately be binding.
9. These conditions are conjunctive, in a manner of seeking. Where money decrees are concerned, as in this case, all the 3 elements must exist for a stay to be granted. In this case, there can be no doubt that the application was filed without undue delay. The impugned decision was delivered on **4th February 2026**. Clearly, the applicants acted with dispatch.
10. What of the other 2 conditions? The first is whether they will suffer substantial loss.
11. As has already been stated, the parties agreed on how the decretal sum was to be paid, and their consent was adopted by the court on **14th November 2025**. I have read the consent carefully. I note that the obligation to pay the decretal sum lay with the appellants. Paragraph 2 of the consent stated that:

“The defendant shall, on or before 24th October 2025, pay the said total amount of Kes 11,924,647/24 to Mr. Kishore Nanji, the plaintiff’s advocate, in full and final satisfaction of the debt...”

12. Mr. Nanji's client account number was set out in black and white therein. Given the clear provision of the consent, I am unable to understand the arguments made that the funds with which to pay the decretal sum were to come from a third party, or that Mr. Nanji was to open an account in South Africa. Whereas the headquarters of the Standard Bank of South Africa (which Stanbic Bank is a member of) is in South Africa, the notion that Mr. Nanji was required to open a bank account in South Africa is, with respect, unserious.

13. There is no doubt that the appellants are in default. The consent had a default clause. It was stated in black letter that if they defaulted, they would be liable to committal to civil jail.

14. In the case of **JAMES WANGALWA & ANOTHER V AGNES NALIKA CHESETO [2012] KEHC 1094 (KLR)**, Gikonyo, J observed 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.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory.” (emphasis added).

- 15.** Applying the foregoing decision to this case, and taking into account the fact that the impugned decision arose out of the execution of a consent order, I am unable to see how the appeal in this case will be rendered nugatory, given its dearth of weight.
- 16.** The appellants did not offer security. That being the case, the 3rd conditions was not established as well.

17. The application is clearly without merit. The same is an abuse of the process of the court. I dismissed the application dated 12th February 2026 with costs, which are assessed at Kes 30,000.

18. Orders accordingly.

Dated and signed in Mombasa, this 19th day of February 2026.

Delivered virtually through **Microsoft TEAMS.**

Gregory Mutai

JUDGE

In the presence of:

Ms. Maina, for the Appellants/Applicants;

Ms. Mulongo, for the Respondent; and

Ms. Bancy- Court Assistant.