



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL NUMBER E145 OF 2025

FIDELITY SHIELD INSURANCE COMPANY LTD...
APPELLANT

VERSUS

PAUL K. OLE YAILEN T/A NASIOKI AUCTIONEERS
..... RESPONDENT

RULING

1. By Notice of Motion dated 12th June 2025 the Appellant seeks these orders;-

- i. Spent.**
- ii. Spent.**
- iii. Stay of execution of the Ruling and Order of 29th May 2025 in Nakuru Miscellaneous Application Number E074 of 2025 pending hearing and determination of this Appeal.**

iv. That the costs of the Application be in the Cause.

2. The Application is supported by Affidavit evidence of the Appellant's Claims Manager (Sammy Kamau Wanjiku). It is averred that the Appellant is dissatisfied with the lower court's order and if stay of execution is not granted the Appeal would be rendered nugatory.
3. The court is further told *inter alia* that the Respondent's assets are unknown and so he may not refund the decretal sum were the Appeal to succeed. On its part, the Appellant expresses willingness and ability to provide security for the due performance of any decree that would ultimately become binding on it. The Appellant offers such security in the form of a bank guarantee.
4. The Respondent replies by affidavit that the Application lacks in merit and is for dismissal. He deposes that his Application dated 27th February 2025 for taxation of his Bill of Costs was heard on merits and the Bill was taxed in the sum of Kshs. 125,810/= . The Appellant is

accused of attempting to deny the Respondent enjoyment of the fruits of his labour.

5. The Respondent further avers that the Appellant has not demonstrated his inability to refund the taxed amount of Kshs. 125,810/=. On the contrary, he expresses his ability to refund the sum if the Appeal succeeds, stating that he is a registered Auctioneer with offices in Nakuru and Nairobi.
6. The Respondent therefore wants the Application to be dismissed, saying that it does not meet the legal threshold to merit stay of execution pending hearing and determination of an Appeal.
7. Learned Counsel for the parties filed written submissions which I have perused against the rival affidavit evidence and the record.
8. **Order 42 rule 6 (1) (2) of the Civil Procedure Rules 2010** governs disposal of an Application such as before me for stay of execution pending appeal. The legal

provisions stipulate that such order may not be granted;-

“a. unless 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 Appellant asserts that it has brought the Motion without unreasonable delay. It is trite law that even delay of one day, if unexplained, is bad enough.

10. Provision of security for costs is a crucial condition precedent to grant of an order of stay of execution pending hearing and determination of an Appeal. This is a mandatory legal requirement that has to be complied with. The court has power to determine the appropriate security for costs but the Applicant must first express willingness and readiness to offer security.

11. In **John Odungo vs Joyce Irungu Muhatia [2014]**

eKLR the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows “preparedness as well as readiness to provide security should one be called upon to do so”.

12. Determination of such an application really turns on the question of substantial loss, if any, the Appellant might suffer if stay of execution is not ordered. The case of **Nyatera vs Nyakundi (Civil Appeal E033 of 2022) [2023]KEHC 3086 KLR) (16 March 2023) (Ruling)** is relevant for the proposition that the Applicant ought to show the manner in which his appeal would be rendered nugatory if stay of execution is not ordered.. The court opined in the case that it is not enough to say that because the Respondent intends to proceed with execution, he should be stopped because of the Appeal. The court is therefore required to tread a delicate balance of the parties’ interests. As it is now the established legal position, this is the cornerstone of the

court's discretion to grant or refuse stay of execution pending Appeal. The onus is on the Appellant to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the Appeal eventually succeeds.

13. **In RWW vs EKW [2019] eKLR and Re Global Tours & Travel Ltd HCWC No. 43 of 2000****In Milimani HCMCA No. 1561 of 2007, Century Oil Trading Company Ltd vs Kenya Shell Ltd**, this court again explained that;-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes when, it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the

appeal so that his appeal is not rendered nugatory, and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

14. In **Shell Ltd vs Kibiru & Another (1986) KLR 410** it was famously postulated that “substantial loss in its various forms is the cornerstone of the court’s jurisdiction to grant stay pending appeal. 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.”

15. Regarding the burden of proof, the Court of Appeal held in **National Industry Credit Limited vs Aquinas Francis Wasike & Another [2006] eKLR** that;-

“once an applicant expresses a reasonable fact that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

16. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including

Matata & Another vs Rono & Another (Civil Appeal No. E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling) and Muinde Mulatya & Another (2021) eKLR and Kenya Commercial Bank Limited V. Sun City Properties Limited 7 & 5 Others (2012) eKLR.

17. Based on the affidavit evidence of the parties neither of them has disclosed their financial position. The Appellant who shoulders the burden of proof has in particular not made out a *prima facie* case of the Respondent's inability to pay back the sum in contention to warrant the latter to debunk the claim.
18. In the particular circumstances of this case, therefore, the Appellant has not satisfied the key substantial loss test as well as the requirements to institute such application without inordinate, unexplained and/or unreasonable delay. This Application was brought on 12/6/2025 or thereabouts while the impugned order was issued on 29th May 2025, delay of about 13 days or thereabouts. The long delay is unexplained. Regarding

the issue of substantial loss, the Appellant merely states that the Respondent's assets are unknown. This test is not therefore satisfied and there is no basis to require the Respondent to prove that he is a man of means.

19. The Appellant has expressed readiness and willingness to offer security for cost and therefore this condition has been satisfied.
20. The Appellant has not therefore substantially complied with the conditions under **Order 42 rule 6 Civil Procedure Code Rules 2010.**
21. The Application is accordingly dismissed but the costs thereof shall abide the Appeal.

J. M NANG'EA, JUDGE.

Ruling dated, signed and delivered virtually this 18th day of March, 2026.

In the presence of:

Appellant's Advocate, Mr. Muma

Respondent's Advocate, Mr. Ouma

Court Assistant (Jeniffer)

J. M NANG'EA, JUDGE.