

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. E 031 OF 2023

BENEDICT MTOTO MWABILI.....CLAIMANT

VERSUS

SAMRUDDHA RESOURCES [K] LIMITED.....RESPONDENT

RULING

1. The application before this Court, dated 31<sup>st</sup> October 2025, by the Respondent/ Judgment Debtor seeks a stay of execution of the decree herein pending the hearing and determination of an intended appeal against the Judgment of this Court delivered on 25<sup>th</sup> July 2024. The Application is premised on the grounds set out on the face thereof and the supporting affidavit sworn by Mr Parag Pawar.
2. The Claimant opposed the application based on the grounds set out in his replying affidavit filed herein.

## **The Application**

3. The Applicant stated that judgment was delivered in this matter against it on the 25<sup>th</sup> July 2024, in favour of the Claimant, for the sum of KShs. 3, 750,000, costs and interest.
4. Aggrieved by the Judgment, it requested, on the 31st July 2024, typed copies of the proceedings and judgment of the court. The application letter was served on the Claimant. Further, it filed a notice of appeal on the same date.
5. Without any prior notice, the Claimant sought and obtained warrants of attachment against it. Consequently, instructed auctioneers proclaimed their property for seizure and sale in execution of the decree herein.
6. The Respondent argues that, considering the totality of the Judgment, the intended appeal has high chances of success, and should the court fail to grant the orders sought, the success in the appeal shall, at the end of the day, be rendered nugatory.

7. It was further argued that if the stay order is not granted, the Respondent will suffer substantial and irreparable loss, as it is unlikely to recover the decretal sum from the Claimant if paid over to him. The Claimant's assets, or means to pay the decretal amount, are unknown.
8. The Respondent stated that the instant application has been filed timeously without undue delay, and that it is ready and willing to offer any security for the due performance of the decree, that this Court shall direct.

### **The Response**

9. The Claimant stated that the Respondent has not put forth any good and or reasonable basis for granting a stay of execution.
10. He further stated that the application herein has been brought 1 year and 99 days after the Judgment was delivered. The inordinate delay has not been explained. The application is an afterthought and an abuse of the court process.

11. The current application has been filed only as a reaction to his initiation of the execution proceedings. The application is only intended to impede him from enjoying the fruits of his Judgment.

### **Analysis and Determination**

12. I have thoroughly examined the Respondent's application, the basis on which it is founded, the supporting affidavit, the replying affidavit from the Claimant, and the submissions presented by the parties. Consequently, a single issue arises for determination: whether the application possesses merit and is suitable for granting.

13. It is a well-established principle of law that an application for a stay of execution pending appeal can only be considered meritorious and suitable for granting if the applicant demonstrates the conditions specified in Order 42 Rule 6.

The provision provides;

***“No order for stay of execution shall be made under the sub-rule [1] unless-***

***a) The court is satisfied that a 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 intimately be binding on him has been given by the Applicant.”***

14. The architecture of Order 42[6] is constructed to maintain a balance, ensuring that the rights of the Applicant, who is exercising their undisputed right of appeal, are preserved and that the appeal, if successful, remains meaningful. Simultaneously, it seeks to protect the rights of a prevailing litigant, who should benefit from the fruits of their judgment or order, from unwarranted obstacles.

15. Undoubtedly, the three conditions, as they arise from the provision, must all be met by the Applicant. If any are not fulfilled, the application fails. It does not matter if only one of the three is not satisfied.

16. It is undisputed that the instant application was filed after 464 days [1 year and 99 days] from the date of the Judgment. I have carefully examined the Respondent's application and the supporting affidavit, and conclude that the Respondent did not adequately or at all explain this delay. The Respondent did not clarify in the application why it did not file the application within a reasonable period from the date of the Judgment or the filing of the notice of appeal.
17. I have noted the Respondent's submissions that it did not lodge the application on an earlier date than it did, simply because a decree hadn't been extracted, and as such, there was no threat of execution to necessitate an application for stay of execution. From whatever angle the stipulations of Order 42 Rule 6 are viewed, one cannot see an implicit or explicit requirement that an application for a stay of execution be filed only when there is a threat of execution.
18. In fact, a critical analysis of the provision and judicial precedents on its implications demonstrates that the application should be filed within a reasonable period from

the date of the Judgment sought to be challenged, and the formation of the Applicant's intention to challenge the Judgment by way of an appeal. It is for this reason that I am not persuaded by the decision in **The Estate of Margret Njambi Thuo [Deceased] [2019] KEHC 733[KLR]**, cited by the Respondent.

19. Furthermore, based on the premises, I am not convinced by the Respondent's argument that, for the purposes of the current application, the crucial date is the day when the decree was extracted, 20th August 2025, and not the date when the Judgment was delivered or a Notice of Appeal was submitted.

20. Lastly, it has not been demonstrated that the Applicant has filed an Appeal in the Court of Appeal within the requisite period or sought leave for extension of time for the filing. Rule 85 of the Court of Appeal Rules provides;

***“Effect of default in instituting appeal***

***a) If a party who has lodged a notice of appeal fails to institute an appeal within the***

***appointed time, that party shall be deemed to have withdrawn the notice of appeal, and the Court may, on its own motion, or on application by any party, make such an order”***

21. Having regard to the foregoing premise and the provision, I am not convinced that there is a valid notice of appeal that an order for stay of execution pending appeal can be based on.

22. Based on the foregoing premises, and without utilising additional judicial time to consider other conditions, I conclude that the Respondent’s motion should be denied, as it has not sufficiently met the legal threshold for granting. The application is hereby dismissed.

23. Orders accordingly.

**Read Signed and Delivered this 19<sup>th</sup> Day of March 2026.**

**OCHARO KEBIRA**

**JUDGE**

ORIGINAL