

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMM. CASE NO. E105 OF 2019

BETWEEN

MASHIN CONSTRUCTION LIMITED.....1ST

PLAINTIFF

ABDINASIR MOHAMMED SHEIKH.....2ND

PLAINTIFF

MOHAMMED SHEIKH NUR.....3RD

PLAINTIFF

AND

GULF AFRICAN BANK

LIMITED.....DEFENDANT

RULING

Introduction and Background

1. By the court's judgment dated 28th April 2025, the Plaintiffs' suit was dismissed, the Bank's counterclaim was allowed and judgment was entered in its favour against the Plaintiffs for the sum of Kshs.327,361,852.21/=. The Plaintiffs have evinced their intention to appeal against this judgment at the Court of Appeal and they

have now approached the court by way of the Notice of Motion dated 3rd June 2025 made, inter alia, under **Article 159** of the **Constitution; sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act(Chapter 21 of the Laws of Kenya); Order 9 Rule 9, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1** of the **Civil Procedure Rules** (“the **Rules**”) principally seeking to stay the execution of the judgment pending hearing and determination of their intended appeal.

2. The application is supported by the grounds set out on its face and the supporting affidavit of the 2nd Plaintiff sworn on 3rd June 2025. It is opposed by the Bank through the Grounds of Opposition dated 10th June 2025. The application was disposed by way of written submissions and I will make relevant references to the same in my analysis and determination below.

Analysis and Determination

3. It is common ground that the principles that guide the court in an application for stay of execution and proceedings pending an appeal are grounded in **Order 42 Rule 6 (2)** of the **Rules**. In order to succeed, the applicant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application has been brought without undue

delay and lastly, the applicant must give such security as the court may order for the due performance of the decree or order as the case may be. These principles have been buttressed by decisions of superior courts where it was added that the power to order stay of execution is discretionary and must be exercised in such a way that the appeal is not rendered nugatory and that this discretion is based on the facts and circumstances of each case (see ***Halai & Another v. Thornton & Turpin [1990] KECA 65 (KLR)*** and ***Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR)***).

4. The Plaintiffs aver that their application is properly before the court and filed in good faith. They explain that although judgment was delivered on 28th April 2025, their previous advocates only notified them a month later, on 29th May 2025 but that upon learning of the decision, they apparently moved with promptness and diligence, instructing new counsel and filing this application within four days. On their lateness to file a Notice of Appeal, the Plaintiffs state that the effective delay attributable to them is less than one week after discovering the judgment, that an innocent litigant should not be penalized for an advocate's failure to communicate a judgment and that the intended appeal is not frivolous. They state that paying the colossal sum of Kshs.327,361,852.21/= would financially cripple

their business operations and render any successful appeal nugatory. The Plaintiffs have expressed their readiness to provide security for the performance of the decree as the court may direct and that the court should ensure the subject matter of the dispute is preserved until the appeal is heard.

5. In response, the Bank argues that because there is no competent appeal currently before the court, there is no legal substratum upon which a stay of execution can be granted, it asserts that providing security for the due performance of the decree is a mandatory legal requirement under **Order 42 Rule 6** of the **Rules**, that a successful litigant should not be denied the fruits of their judgment and since the Plaintiffs have not offered or proposed any security for the Kshs.327,361,852.21/=, the Bank contends a stay should not be granted. The Bank highlights its status as a regulated commercial entity, noting that if the Plaintiffs eventually succeeded on appeal, it is fully capable of refunding the decretal amount. As such, the Bank urges the court to dismiss the application with costs, arguing it is founded on falsehoods and lacks merit.
6. I have noted the parties' rival arguments and in the exercise of the court's discretion, I am inclined to allow the Plaintiffs' application and grant a conditional stay of execution seeing that the Plaintiffs

have offered to provide security as the court may direct. I am also inclined to allow them to file their Notice of Appeal out of time as no prejudice will be suffered by the Bank.

Conclusion and Disposition

7. In the upshot, leave is granted to the Plaintiffs to file their Notice of Appeal out of time and I grant the stay of execution of the judgment dated 28th April 2025 pending the hearing and determination of the appeal on condition that the Defendant deposits the sum of Kshs.327,361,852.21/= in a joint interest-earning account in the names of the parties' advocates within thirty (30) days and costs be deposited in the same account within 30 days of taxation. In default, the order of stay will lapse and the Bank will be at liberty to execute.

**DATED SIGNED and DELIVERED virtually at NAIROBI this
19TH DAY of MARCH 2026**

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. N/A for the Plaintiff/Applicant.

2. Ms. Chege holding brief for Mr. Ogunde for the Defendant/Respondent.
3. Amos - Court Assistant

ORIGINAL