

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO. E1225 OF 2025**

**KISAAN EXPORTS**

**LIMITED.....1ST APPELLANT**

**RAKESH**

**GURJAR.....2ND**

**APPELLANT**

**VERSUS**

**FLUNA**

**INC.....RESP**

**ONDENT**

***(Being an application for stay of execution of the Order and Ruling of the Chief Magistrate’s Court at Milimani delivered on 26 November 2025 in Milimani MCOMMSU No. E482 of 2024)***

**RULING**

**Background**

1. The Respondent obtained interlocutory judgment on 23rd September 2024 after the Appellants failed to file a defence despite entering appearance through counsel.

2. On 6<sup>th</sup> November 2024, a decree was issued in favour of the Respondent for USD 33,091.06 together with interest and costs, which remains unsatisfied.
3. On 4<sup>th</sup> February 2025, auctioneers proclaimed motor vehicles KDG 388J and KCZ 303L in execution of the decree.
4. The Respondent contends that immediately after proclamation, the 2<sup>nd</sup> Appellant transferred the vehicles to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents on 5<sup>th</sup> February 2025, a day after the attachment.
5. The Respondent thereafter moved the trial court through an application dated 20<sup>th</sup> March 2025 seeking declarations that the transfers were null and void and orders compelling surrender of the vehicles.
6. The Appellants subsequently filed an application dated 4<sup>th</sup> June 2025 seeking to set aside the interlocutory judgment and raised a preliminary objection challenging the Respondent's standing.
7. In a Ruling delivered on 26<sup>th</sup> November 2025, the trial court, dismissed the Appellants' application to set aside the default judgment and allowed the Respondent's application declaring the vehicle transfers void and directing surrender of the vehicles.
8. Aggrieved by the said ruling/decision, the Appellants filed the present appeal and the application that is the subject of this ruling.

## **The Application**

9. This ruling is in respect to the Appellants' Notice of Motion dated 27<sup>th</sup> November 2025 seeking, inter alia, an order of stay of execution of the ruling and consequential orders delivered on 26<sup>th</sup> November 2025 pending the hearing and determination of the intended appeal. The impugned ruling dismissed the Appellants' application to set aside the interlocutory judgment and allowed the Respondent's application declaring transfers of motor vehicles KDG 388J and KCZ 303L null and void, directing surrender of the vehicles to the OCS Kileleshwa Police Station, and ordering NTSA to cancel the transfers and reinstate the 2nd Appellant as registered owner for purposes of execution.
10. The Appellants contend that there is imminent execution as the trial court imposed a strict 72-hour deadline for surrender of the vehicles, which was about to lapse, thereby exposing the Appellants to immediate enforcement action.
- 11.** The Appellants contend that there is a risk that the appeal may be rendered nugatory if the execution proceeds as the vehicles may be seized and their ownership records altered by National Transport and Safety Authority (NTSA) thereby irreversibly affecting the subject matter of the appeal. The Appellants state that enforcement of the orders will cause substantial and irreparable prejudice, including police enforcement actions, administrative cancellation of ownership records, and disruption of proprietary interests relating to the vehicles.

12. They assert that the vehicles had already been sold to third-party purchasers, who would suffer prejudice if compelled to surrender them.
13. The Appellants contend that their intended appeal raises substantial issues, including:
  - a) ***whether the trial court properly exercised its discretion in declining to set aside the default judgment;***
  - b) ***whether the court properly considered the effect of alleged inadvertence by counsel;***
  - c) ***whether the delay in seeking to set aside judgment was properly evaluated; and***
  - d) ***whether the draft defence disclosed triable issues.***
14. They argue that the Respondent would suffer no prejudice incapable of compensation by costs, whereas the Appellants face prejudice not capable of monetary compensation.
15. The Appellants state that they are willing to provide security as the Court may direct.

### **The Respondent's Case**

16. The Respondent opposed the application through the Replying Affidavit sworn by its Legal Officer, **Ms. Judith Eyo**, who urged the Court to dismiss it.
17. According to the Respondent, interlocutory judgment was properly entered on 23<sup>rd</sup> September 2024 after the Appellants failed to file a defence despite entering

appearance after which a decree was issued and the motor vehicles attached in execution of the said decree.

18. The Respondent further states that the vehicles were transferred to the 3rd and 4th Respondents.
19. The application was canvassed by way of written submissions which I have considered.

### **The Appellants' Submissions**

20. The Appellants submitted that unless stay is granted the appeal will be rendered nugatory as the impugned orders require surrender of the vehicles to police custody, cancellation of NTSA ownership records and enforcement measures that will irreversibly alter the legal position before the appeal is heard.
21. The Appellants contended that execution would expose them to third-party claims by purchasers of the vehicles, resulting in contractual liabilities and financial exposure incapable of compensation by damages.
22. They submitted that they have satisfied the statutory conditions under Order 42 Rule 6(2) of the Civil Procedure Rules.
23. On substantial loss, the Appellants relied on the decision in ***James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR**, where the Court stated:

***“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... 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.”***

24. The Appellants submitted that execution will irreversibly affect proprietary rights and therefore constitutes substantial loss.
25. On delay, they submit that the application was filed one day after delivery of the ruling, demonstrating promptness.
26. On security, the Appellants argued that the orders are non-monetary in nature, involving surrender of vehicles and administrative cancellation of records, and that the Court may dispense with the requirement for security. They nevertheless expressed willingness to abide by any security conditions that the Court may impose.
27. The Appellants further submitted that the appeal raises arguable issues, including whether the trial court erred in refusing to set aside the default judgment; whether the Respondent had the requisite standing and whether the court exceeded its jurisdiction by nullifying transfers without a full evidentiary hearing.
28. They relied on the decision in ***Stanley Kang’ethe Kinyanjui vs. Tony Keter & 5 Others*** [2013] eKLR, where the Court held that an arguable appeal is not one which must necessarily succeed, but one which ought to

be argued fully before the court and further, one which is not frivolous.

29. The Appellants therefore urged the Court to preserve the subject matter of the appeal by granting stay.

### **The Respondent's Submissions**

30. The Respondent opposed the application and submitted that the Appellants have failed to meet the statutory threshold for stay. They contended that the decree remains unpaid for more than a year and that the Appellants undertook a post-proclamation transfer of attached assets in a bid to defeat execution.

31. The Respondent submitted that the Appellants have not demonstrated substantial loss. Reference was made to ***Pan African Insurance Co. Ltd vs. International Air Transport Association*** HCCC No. 86 of 2006, where the Court stated:

***“The deponent should go a step further to lay the basis upon which court can make a finding that the applicant would suffer a substantial loss as alleged. The applicant should go beyond vague and general assertion of substantial loss in the event a stay order is not granted.”***

32. The Respondent further submitted that the Appellants have not satisfied the requirement for security under Order 42 Rule 6 and have approached the Court with

unclean hands, citing their conduct including failure to file a defence, delay in seeking to set aside the judgment and transferring attached property after proclamation.

33. The Respondent submitted that granting stay would effectively aid the continuation of an illegality contrary to Section 47 of the Civil Procedure Act and Rule 14 of the Auctioneers Rules, which render transfers of attached property void.

### **Issues for Determination**

34. From the pleadings and the submissions, I find that the application raises the following issues for determination: -

- a) Whether the Appellants have demonstrated substantial loss.***
- b) Whether the application was filed without unreasonable delay.***
- c) Whether the Appellants have provided security for due performance of the decree.***
- d) Whether the Court should exercise its discretion to grant stay.***

### **Analysis and Determination**

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

**“No order for stay of execution shall be made under subrule (1) unless—**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is**

**made;**  
**(b) the application has been made without unreasonable delay; and**  
**(c) 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.”**

**36.** The conditions for the granting of orders for stay of execution are conjunctive and must all be satisfied.

### **Substantial Loss**

37. Substantial loss is the cornerstone of the jurisdiction for grant of stay. In ***James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR***, it was held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

38. In the present case, the Appellants’ alleged loss is premised on the assertion that surrender of the vehicles and cancellation of NTSA records will irreversibly prejudice them and third-party purchasers. The record however reveals that the vehicles were proclaimed on 4<sup>th</sup> February 2025 and the transfer occurred on 5<sup>th</sup> February 2025 after proclamation. The trial court found that the transfers were null and void under Section 47 of the Civil Procedure Act.

39. My finding is that the surrender of the vehicles does not extinguish ownership rights but preserves the subject matter for execution. The Appellants have also not

demonstrated that the Respondent would be unable to refund the decretal amount in the event the appeal succeeds.

40. In the circumstances of this case, the Court is not persuaded that substantial loss has been established.

### **Delay**

41. The impugned ruling was delivered on 26<sup>th</sup> November 2025, and the present application was filed on 27<sup>th</sup> November 2025. I find that the application was filed without unreasonable delay.

### **Security for Due Performance**

42. The requirement for security is mandatory. The Appellants merely state that they are willing to comply with any conditions the Court may impose but have not proposed or offered any concrete form of security.

43. I note that the decree in question is a monetary decree, and the vehicles in dispute are attachable assets. In ***Arun C Sharma vs. Ashana Raikundalia [2014] eKLR***, the Court emphasized that security serves to guarantee due performance of the decree.

44. I find that the Appellants have not satisfied this requirement.

### **Discretion of the Court**

45. It is trite that stay of execution is an equitable and discretionary remedy. This means that the court is entitled to consider the conduct of the applicant.

46. The record shows that the Appellants did not file a defence despite entering appearance, delayed four months before seeking to set aside the judgment and transferred attached assets after proclamation.

47. Section 47 of the Civil Procedure Act (CPA) stipulates as follows: -

**47. Private alienation of property after attachment to be void**

**Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein, and any payment to the judgment debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.**

48. Rule 14 of the Auctioneers Rules, 1997 on the other hand, provides as follows: -

**14. Non-removal or alteration of attached goods**

**A person who removes, alters, damages, substitutes or alienates any goods comprised in the proclamation, before they are redeemed by payment in full of the amount in the court warrant, or letter of instruction, or in such lesser amount as the creditor or his advocate may agree in writing, commits an offence.**

49. A simple reading of Section 47 CPA shows that once property has been attached in execution of a decree, the debtor cannot privately transfer or dispose of it as such transactions are legally void.
50. Under Rule 14 Auctioneers Rules, anyone who interferes with goods that have been proclaimed (attached) before paying the debt commits an offence. In ***Bai Hira Devi & Others vs. Official Assignee of Bombay (AIR 1958 SC 448)*** the court held that once property is attached, the judgment debtor loses the legal capacity to transfer that property privately in a way that defeats the attachment.
51. Similarly, in ***Precast Portal Structures vs. Kenya Pencil Company Ltd & Another [1993] eKLR***, it was held that attachment of property creates a legal restriction on disposal of that property.
52. In ***National Industrial Credit Bank Ltd vs. S K Ndegwa Auctioneer [2006] eKLR***, the court emphasized that attachment protects the decree holder's interest in execution proceedings.
53. In ***Kuria Kanyoko t/a Amigos Bar & Restaurant vs. Francis Kinuthia Nderu & Others [1988] eKLR***, the court held that Proclamation creates legal control over the goods even if they remain physically with the debtor. This means that the debtor becomes a custodian of the goods and cannot remove them, substitute them, damage them or dispose of them until the decree is satisfied.
54. In the present case, it was not disputed that the Appellants transferred the motor vehicles after the

proclamation. I find that such disposal/transfer was legally void. The Appellants' conduct weighs heavily against the exercise of the Court's discretion in their favour and further offends the maxim that *he who comes to equity must come with clean hands*.

55. Having considered the application, the affidavits, the submissions of counsel, and the applicable law, I find that the Appellants have not satisfied the statutory threshold for grant of stay of execution pending appeal.

56. Accordingly, I make the following orders:

- a) ***The Appellants' Notice of Motion dated 27<sup>th</sup> November 2025 is dismissed.***
- b) ***The Ruling and consequential orders of the Chief Magistrate's Court delivered on 26<sup>th</sup> November 2025 shall remain in force.***
- c) ***The Respondent shall have the costs of the application.***

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF APRIL, 2026.**

**HON. W. A. OKWANY**

**JUDGE**

**16/04/2026**

**FOR APPELLANT** Ongwen

**FOR THE RESPONDENT** Kiragu

**COURT ASSISTANT** Abdirizak

Mention before the Deputy Registrar

ORIGINAL