



**Nakuru Cannery Limited & another v Nyamweya & 5 others
 (Environment and Land Case 40 of 2019 & Civil Case 1588 of 1999
 (Consolidated)) [2026] KEELC 2426 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KEELC 2426 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
 ENVIRONMENT AND LAND CASE 40 OF 2019
 & CIVIL CASE 1588 OF 1999 (CONSOLIDATED)**

OA ANGOTE, J

APRIL 30, 2026

BETWEEN

NAKURU CANNERS LIMITED PLAINTIFF

AND

PATRICK OMANI NYAMWEYA 1ST DEFENDANT

**GEOFFREY MAKANA ASANYA T/A AS PAGE INVESTMENT
 COMPANY 2ND DEFENDANT**

KURKAN COMPANY LIMITED 3RD DEFENDANT

COMMISSIONER OF LANDS 4TH DEFENDANT

AS CONSOLIDATED WITH

CIVIL CASE 1588 OF 1999

BETWEEN

INTERNATIONAL TRADE AGENCIES LIMITED PLAINTIFF

AND

PATRICK OMANI NYAMWEYA 1ST DEFENDANT

**GEOFFREY MAKANA ASANYO T/A AS PAGE INVESTMENT
 COMPANY 2ND DEFENDANT**

KURKAN COMPANY LIMITED 3RD DEFENDANT

AND



RULING

1. Before this court is the Notice of Motion dated 31st October, 2025 brought pursuant to the provisions of Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, 2010, and Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010. The 1st and 2nd Defendants/Applicants seek the following reliefs:
 - i. That there be an order of stay of execution or enforcement of the judgment and decree delivered on 9th October, 2025 or any part thereof pending the hearing of the intended appeal and/or until further orders of this Court.
 - ii. That costs of this application be granted to the applicant herein.
2. The Motion is based on the grounds on the face thereof and supported by the affidavit of Geoffrey Makana Asanyo, the 2nd Defendant/Applicant herein.
3. He deponed that the consolidated suits were heard and subsequently determined by a judgment delivered on 9th October 2025, in which the Plaintiffs/Respondents were awarded a sum of Kshs. 129,550,000 together with costs as against them. Being dissatisfied with the said judgment in its entirety, they lodged a notice of appeal and, on 15th October 2025, formally applied for typed proceedings with a view to pursuing the intended appeal.
4. As a consequence, he urged, it is only fair and just that an order for stay of execution be granted pending the hearing and determination of the intended appeal. Absent such stay, they stand to suffer substantial and irreparable loss.
5. In particular, it was deposed that the decretal sum, exclusive of costs, amounts to Kshs. 129,550,000, a sum that is undeniably substantial. Further, that the financial standing of the Respondents remains unknown, and there is no assurance that, should the appeal ultimately succeed, they will be in a position to refund the said amount, thereby exposing them to the real risk of irrecoverable loss.
6. Mr. Asanyo deponed that the intended appeal is meritorious, arguable, and raises substantial questions of law and fact and that the court erred in law by invoking equitable principles to permit recovery of sums paid beyond the agreed purchase price, contrary to the principle that equity does not relieve a party from a bad bargain. Further, it was deposed that the award of interest was excessive, unreasonable, and unjustified both in fact and in law.
7. According to Mr. Asanyo, the present application has been brought without delay and the Defendants are ready and willing to furnish such security as the court may deem appropriate.
8. Finally, he deponed, a refusal to grant stay orders in the circumstances would undermine the overriding objective of civil litigation, which obligates the court to administer justice in a proportionate manner and, as far as practicable, to place the parties on an equal footing pending the hearing and determination of the intended appeal.
9. In response to the Motion, the 1st and 2nd Plaintiffs/Respondents, through their respective directors, Shantilal V. Shah, and Jaswinder Bedi, swore replying affidavits both dated 5th November 2025. They deponed that although the Applicants filed the present application and obtained interim orders, they failed to effect prompt service, instead waiting until the eve of the hearing to do so. This, it was stated, is indicative of bad faith and demonstrates that they approached the court with unclean hands.



10. They deponed that the suit concerns substantial sums of money paid by them to the Applicants between March and April 1996, some 29 years ago in respect of a land purchase transaction that was never completed due to breaches on the part of the Applicants.
11. It was deposed by the Plaintiffs/Respondents that the judgment merely directed the Applicants to refund monies they admittedly received, a position firmly grounded in the evidence on record. In the circumstances, it is only fair and just that they be allowed to enjoy the fruits of their judgment, particularly given the inordinate period of 29 years they have had to wait despite their efforts to prosecute the suit diligently.
12. It was further contended that it would be manifestly unjust to require them to wait any longer while the Applicants continue to retain and benefit from monies received nearly three decades ago. It was pointed out that the Applicants, in their pleadings and evidence, admitted receiving at least Kshs. 6,250,000 out of the total sum claimed being Kshs 31, 525,000, yet they have neither refunded that admitted amount nor accounted for its continued use.
13. Even following the delivery of judgment, they noted, the Applicants have failed to settle the admitted sum together with the interest awarded by the court. This, they maintain, demonstrates continued bad faith. The Respondents further observed that the Applicants now seek a stay of execution of the entire decree “or any part thereof,” which, in their view, underscores their intention not to satisfy even the undisputed portion of the decretal sum.
14. It is telling, it was stated, that the Applicants have not offered any security for the due performance of the decree, a factor which militates against the grant of stay and that the intended appeal is frivolous, the judgment having been founded on clear evidence, admissions, and settled legal principles.
15. They maintained that the Applicants would suffer no prejudice if stay is denied, as they have had the benefit of their monies for over 29 years. On the other hand, the intended appeal would not be rendered nugatory if execution proceeds, as they are financially capable of refunding the decretal sum, noting that they were able to raise Kshs. 31,525,000 within a span of three months in 1996.
16. Without prejudice to the foregoing, they urged that should the court be inclined to grant stay, the same ought to be conditional upon the Applicants depositing the entire decretal sum in an interest-earning account in the joint names of the advocates for the parties. All the parties filed submissions and authorities which I have considered.

Analysis and determination

17. Having considered the Motion, affidavits and submissions, the sole issue that arises for determination is whether the 1st and 2nd Defendants/Applicants have satisfactorily demonstrated the conditions warranting the grant of stay of execution pending Appeal.
18. The law with respect to stay of execution pending appeal is found in Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, which provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order



thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) No order for stay of execution shall be made under sub rule (1) unless—
 - (a) 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.”

19. In *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal, discussing the High Court’s [read ELC’s] jurisdiction under this Order stated:

“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

20. What arises from the foregoing is that the grant of orders of stay of execution is subject to the court’s discretion, the court in this respect being guided by the provisions of Order 42 Rule 6 of the Civil Procedure Rules. The question of how the court should exercise this discretion was extensively discussed by the Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 as follows:

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”



21. Further to the above, this court is now enjoined to give effect to the overriding objectives in the exercise of its powers as expressed in Section 3 of the *Environment and Land Court Act* and Section 1A of the *Civil Procedure Act* to wit the just, expeditious, proportionate and affordable resolution of disputes.
22. The subject of the consolidated matters arises from sale agreements entered into in or about March 1996 between the Respondents and the Applicants, who were partners in Page Investments Company Limited. The agreements related to parcels of land known as L.R. No. 209/12983 and L.R. No. 209/12984, which the Applicants, acting both in their personal capacities and as authorised agents of the 3rd Defendant, agreed to sell to the Respondents.
23. The Respondents alleged breached of the agreements and as a consequence sought a refund of Kshs. 31,525,000, comprising Kshs. 22,655,000 for Nakuru Cannery Limited and Kshs. 8,870,000 for International Trade Agencies Limited (ITAL). They contended that these sums were paid in excess of the agreed purchase prices pursuant to alleged oral variations of the contracts. The Plaintiffs/ Respondents further averred that they repudiated the agreements and issued notices of rescission in respect of each property.
24. In response, the Applicants admitted receipt of only Kshs. 6,250,000/=, being Kshs. 4,500,000/= from Nakuru Cannery Limited and Kshs. 1,750,000/= from ITAL. They denied existence of any oral variation and the alleged additional payments.
25. The matter proceeded for hearing and the court rendered its determination on 9th October, 2025, finding that the Plaintiffs/Respondents had established their case. Judgment was accordingly entered in their favour and against the Defendants/Applicants, including an order that the Applicants pay to Nakuru Cannery Limited the sum of Kshs. 22,655,000, being the amount found due and owing.
26. The Defendants/Applicants were further ordered to pay Nakuru Cannery Limited contractual interest on the sum of Kshs. 9,000,000 at the rate of 2% per month from 27th May 1999 until payment in full, which as at 9th October 2025 had accrued to Kshs. 56,880,000.
27. The Defendants/Applicants were also ordered to pay International Trade Agencies Limited (ITAL) the sum of Kshs. 8,870,000 together with interest on Kshs. 3,500,000 at 2% per month from 27th May 1999 until payment in full, which as at 9th October 2025 amounted to Kshs. 22,120,000.
28. In addition, the Applicants were directed to pay Nakuru Cannery Limited interest at court rates on Kshs. 13,655,000, being the difference between the amount paid and the contractual sum (Kshs. 22,655,000 less Kshs. 9,000,000), from the date of filing suit until payment in full, and to pay ITAL interest at court rates on Kshs. 5,370,000, being the difference between Kshs. 8,870,000 and Kshs. 3,500,000, from the date of filing suit until payment in full. The Applicants were ordered to bear the costs of the two suits.
29. Aggrieved by this decision, the Applicants intend to appeal to the Court of Appeal. They ask this court to stay the execution of the aforesaid judgment and the decree arising therefrom pending determination of the appeal.
30. Turning to the question of whether the parameters for grant of stay have been satisfied, the court first notes that the Applicants have placed considerable emphasis on the arguability of the intended appeal. It is, however, necessary to clarify that the jurisdiction of this court to grant a stay of execution pending appeal is grounded on Order 42 Rule 6 of the Civil Procedure Rules.
31. Notably, this provision does not make the arguability of the appeal one of the conditions precedents for the grant of a stay. This position is well-founded. It would be both procedurally improper and logically



untenable for this court to assess the arguability of an appeal arising from its own decision. The court will disregard any arguments under this head.

32. Moving to the pre-requisites under Order 42 Rule 6(2), the court will begin with the aspect of sufficient cause. What constitutes the same was explicitly discussed by the court in *Antoine Ndiaye vs. African Virtual University* [2015] eKLR, which persuasively stated as follows:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

- a) The application is brought without undue delay;
- b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; 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”.

33. The Respondents contend that the Applicants were indolent, pointing out that although the application was filed on 31st October 2025, it was only served on them on 5th November 2025, a day before the scheduled hearing, which, in their view, demonstrates a lack of diligence. They further fault the Applicants for failing to take substantive steps towards prosecuting the appeal beyond the filing of a notice of appeal, thereby evidencing a lack of seriousness in pursuing the intended appeal.

34. However, it is imperative to note that the delay contemplated under Order 42 Rule 6 of the Civil Procedure Rules, relates specifically to the timeliness of filing the application for stay of execution.

35. In this regard, the material timeline is not in dispute. The judgment was delivered on 9th October 2025, the notice of appeal was lodged on 15th October 2025, and the present application was filed on 31st October 2025, all within a span of a month. In the circumstances, the court is satisfied that the application for stay was brought within a reasonable time and without inordinate delay.

36. As regards substantial loss, the court in *Rhoda Mukuma v John Abuoga* [1988] eKLR, proffered the following definition:

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the *Kenya Shell* case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory...”

37. Similarly, in *Century Oil Trading Company Ltd v Kenya Shell Limited* (as cited in *Muri Mwaniki & Wamiti Advocates vS Wings Engineering Services Limited* [2020] eKLR, the court clarified that substantial loss does not refer to the ordinary consequences of execution, but to something additional and distinct.



38. The Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR reiterated that without proof of substantial loss, it is rare that an appeal would be rendered nugatory. In the same vein, in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court affirmed that execution is a lawful process and does not, by itself, constitute substantial loss. An applicant must demonstrate a state of affairs that would irreparably affect the core of the appeal.
39. Further, the court must balance the competing interests of the parties. As observed in *Machira t/a Machira & Co. Advocates v East African Standard* [2002] eKLR, a successful litigant is entitled to the fruits of judgment, and the court must avoid unduly favouring an appellant at the expense of that right while upholding the overriding objective.
40. A perusal of the judgment reveals that the decree sought to be stayed is, in substance, a money decree. In such cases, courts are generally slow to grant stay unless it is demonstrated that the decree-holder lacks the financial capacity to refund the decretal sum should the appeal ultimately succeed. This position was affirmed by the Court of Appeal in *Kenya Hotel Properties Limited v Willesden Investments Limited* [2007] KECA 401 (KLR), where it was held that:
- “Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a ‘man of straw’ but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.”
41. Whereas the burden remains on an applicant to demonstrate the likelihood of substantial loss, courts have held that a Respondent, being possessed of peculiar knowledge of their own financial means, bears a corresponding obligation to allay any reasonable apprehension as to their ability to refund the decretal amount in the event that the intended appeal succeeds.
42. Speaking to this, the Court of Appeal in *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another* [2006] eKLR stated:
- “While the legal duty is on the Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”
43. In the present case, the Defendants/Applicants have pointed to the magnitude of the decretal sum, Kshs. 129,550,000 and expressed concern as to the Respondents’ ability to refund the same.
44. Although the Plaintiffs/Respondents assert that they are capable of refunding the decretal amount, no evidence was tendered to substantiate that assertion. No affidavit of means or other documentary proof was placed before the court. The bare contention that they had the financial capacity to raise substantial sums as far back as 1996 does not suffice, as it neither reflects their present financial position nor provides any reliable basis upon which the court can assess their current ability to reconstitute the decretal sum should the appeal succeed.
45. Consequently, the Applicants’ apprehension cannot be dismissed as speculative, and the court is satisfied that, absent an order of stay, they are likely to suffer substantial loss.



46. Moving to the last issue regarding provision of security, its purpose was discussed by the court in Arun C Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR, thus:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

47. The Respondents contend that the Applicants have not specified the nature of the security they intend to furnish. However, the Applicants expressed their readiness and willingness to comply with such conditions as to security as this court may deem just in the circumstances. In the court’s view, this undertaking is sufficient.

48. This position finds support in Focin Motorcycle Co. Ltd v Ann Wambui Wangui [2018] eKLR, where the court held that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay.”

49. Accordingly, the court is satisfied that the Applicants have met the requirement as to security. The appropriate security in the instant case is deposit of the decretal amount in an interest earning joint account of the advocates for the two parties.

50. In the end, the court finds that the Applicants have met the threshold for the grant of a conditional stay of execution pending appeal. For those reasons, the application dated 31st October, 2025 is allowed as follows:

- a. The court does hereby issue a conditional stay of execution of this court’s judgement dated 9th October, 2025 pending the hearing and determination of the appeal before the Court of Appeal.
- b. The stay of execution is granted on condition that the Defendant/Applicants deposit the sum of Kshs 129,550,000 in a joint interest-earning account in the names of Counsel for the Defendants/Applicants and the Plaintiffs/Respondents within forty-five (45) days from the date of this Ruling.
- c. Each Party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF APRIL, 2026.

O. A. ANGOTE

JUDGE

In the presence of;



Mr. Thuo for Plaintiff/Respondent

Mr. Muriithi for Mr. Thengei for Defendant/Applicant

Mr. Allan Kamau for 3rd Respondent

Court Assistant: Tracy

