

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**HCCA NO. E245/2025**

**WADIA CONSTRUCTION COMPANY LIMITED.....APPELLANT**

**-VERSUS-**

**BENARD ONKOBA T/A BETICO AUCTIONEERS.....1 ST RESPONDENT**

**SYNERGY INDUSTRIAL CREDIT LIMITED.....2 ND RESPONDENT**

**RULING**

1. Before this Court is a Notice of Motion dated **18th September 2025**, brought by the appellant under sections **1A, 1B, 3A and 63(e)** of the Civil Procedure Act, **Order 42 rule 6** and **Order 40 rules 1 and 2** of the Civil Procedure Rules, as well as Articles 40 and 50 of the Constitution of Kenya, 2010.
  
2. The application principally sought a stay of execution of the orders issued on **4th September 2025** in **Milimani CMCC Miscellaneous Application No. E2204 of 2025**, pending the hearing and determination of the appeal. The specific orders sought were as follows: -
  - i. Spent.
  - ii. Spent.

- iii. A stay of execution of the orders issued in Milimani CMCC Miscellaneous Application No. E2204 of 2025 pending the hearing and determination of this appeal.
  - iv. An order for unconditional release of the appellant's motor vehicles registration numbers KAZ 280G, KAM 226T, KAP 563A, KBY 743E, KAV 020M, KCV 384P and KAT 317Q.
  - v. That the draft memorandum of appeal annexed be deemed as duly filed.
  - vi. Costs of the application
3. The application is premised on the grounds that the appellant obtained a loan of **Kshs. 50,000,000** on 29th August 2018 from the 2nd respondent, secured under a hire purchase agreement over several motor vehicles.
  4. It was contended that, following alleged default, the respondents initiated various execution proceedings. In particular, the appellant averred that subsisting stay orders issued on **1st April 2025** and **26th August 2025** in **CMCC Miscellaneous Application No. E071 of 2025** remained in force when the respondents instituted **CMCC Miscellaneous Application No. E2204 of 2025** and obtained further orders on **4th September 2025**.
  5. The appellant contended that the subsequent attachment of motor vehicles on 10th September 2025 was carried out in contempt of court, was unlawful, and constituted an abuse of the court process, especially in

light of parallel proceedings in High Court Commercial Case No. E604 of 2024.

6. The 2<sup>nd</sup> Respondent, on its part, opposed the application through a replying affidavit sworn on 22nd September 2025 by its legal officer and authorised agent.
7. It was deponed that the appellant was in persistent default under the hire purchase agreement from January 2019, issued dishonoured cheques, and acknowledged the outstanding indebtedness.
8. The 2nd respondent asserted that it lawfully exercised its contractual rights to repossess the secured motor vehicles and contended that similar injunctive relief had previously been sought and dismissed in **High Court Commercial Case No. E604 of 2024** by **Mugambi J** on **20th December 2024**.
9. It was further contended that the appellant had engaged in multiple proceedings in the High Court and the Court of Appeal seeking similar relief, amounting to forum shopping and abuse of the court process.
10. The application was canvassed by way of written submissions. The appellant filed written submissions dated 9th October 2025, while the respondents filed submissions dated 15th October 2025. I have considered the pleadings, affidavits, and submissions on record.

## Analysis and Determination

11. From the pleadings and submissions, the Court finds that the sole issue for determination is whether the appellant has met the threshold for the grant of stay of execution pending appeal under Order 42 rule 6(2) of the Civil Procedure Rules.

12. The applicable legal framework is Order 42 rule 6(2) of the Civil Procedure Rules, which provides that no order for stay of execution shall issue unless the court is satisfied that:

- i. Substantial loss may result to the applicant unless the order is made;
- ii. The application has been made without unreasonable delay; and
- iii. Such security as the court orders has been given.

13. In the present case, evidence on record reveals that the impugned orders were issued on 4th September 2025, while the present application was filed on 18th September 2025. I am satisfied that the application was brought without undue delay.

14. On the question of substantial loss, the Court of Appeal in **Kenya Shell Ltd v Benjamin Karuga Kibiru & Another [1986] eKLR** held that substantial loss is the cornerstone of the jurisdiction to grant stay. The Court was clear that:

15. “If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. 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.”

16. The court further observed:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted... The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay.”

17. Likewise, in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, it was held that execution, being a lawful process, does not, of itself, amount to substantial loss. The Court stated that:

“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. Even when execution has been levied and completed... does not in itself amount to substantial loss under Order

42 Rule 6 of the CPR. This is so because execution is a lawful process. 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.”

18. In the present application, the appellant did not particularise or demonstrate the nature of the substantial loss it stood to suffer if the stay was not granted. No evidence was placed before the Court to show that execution would render the appeal nugatory or irreparably affect the appellant’s core interests.

19. As was stated in **Joseph Ngoth & 2 Others v Esther Gitonga [2017] eKLR**, mere assertions of loss without proof do not meet the threshold under Order 42 rule 6.

20. Having failed to satisfy the requirement of substantial loss, the applicant has not met the conditions for the grant of stay.

21. While the appellant retains the right to prosecute the appeal, that right must be balanced against the respondents’ right to enjoy the fruits of lawful court processes, absent sufficient cause to warrant intervention.

22. In the result, the Notice of Motion dated 18th September 2025 is dismissed with costs to the respondents.

23. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI  
THIS 17<sup>TH</sup> DAY OF APRIL 2026



HON. MR. JUSTICE MOSES ADO  
*Judge of the High Court*

In the presence of: -

*C/A – Moses*

*Orimba..... for the Applicant*

*Mbabu..... for the Respondent*