

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**THE CIVIL APPELLATE DIVISION**  
***(Coram: A.C Mrima, J.)***  
**HIGH COURT CIVIL APPEAL NO. E727 OF 2025**

**-between-**

**ADVENT  
VALUERS.....APPELLANT/APPLICANT**

**-versus-**

**MIDDLE EAST BANK  
LIMITED.....RESPONDENT**

**RULING**

**Background:**

1. *Middle East Bank Limited*, the Respondent herein, instituted a professional negligence claim against *Advent Valuers Limited*, the Applicant herein, in *Milimani Chief Magistrates Commercial Court Case No. E235 of 2023* (hereinafter referred to as '**the suit**'). The Respondent alleged that the Applicant provided a grossly overvalued report for a security property, Title No. Kilifi/Mtwapa/4309, valuing it at Kshs 6,500,000/- when its actual market value was later discovered to be approximately Kshs 1,500,000/-. Relying on the Appellant's valuation, the Respondent advanced a loan of Kshs 4,500,000/-, which resulted in a financial shortfall upon the borrower's default.
2. On 17<sup>th</sup> February 2025, the trial Court, delivered a judgment finding the Appellant liable for professional negligence. The Court awarded the Respondent Kshs 5,896,119.96 and Kshs 148,295.16 alongside interest and costs. Dissatisfied, the Appellant moved the trial Court *via* an application dated 20<sup>th</sup> March 2025, seeking to set aside the judgment and stay execution. On 13<sup>th</sup> June 2025, the trial Court rendered itself granting a conditional stay of execution and the re-opening the

defence case, provided the Appellant deposited half of the decretal sum (Kshs 3,839,665.82) into Court within thirty (30) days. The Appellant failed to comply with the condition. Consequently, the Respondent re-activated execution proceedings, leading to a proclamation of attachment of the Appellant's movable assets dated 15<sup>th</sup> July 2025. In response, the Applicant instituted the instant appellate proceedings alongside a Notice of Motion dated 17<sup>th</sup> July 2025, which is the subject of this ruling. The application was heard by way of written submissions.

### **The Application:**

3. Through the application, the Appellant/Applicant moved this Court seeking the following orders: -
  1. *Spent.*
  2. *Spent.*
  3. *THAT this Honourable Court be pleased to grant a stay of execution of the ruling and orders delivered on 13<sup>th</sup> June 2025, including the order requiring the Appellant/Applicant to deposit Kshs 3,839,665.82, pending the hearing and determination of the Appellant/Applicant's appeal.*
  4. *THAT this Honourable Court be pleased to grant a stay of execution of the judgment entered on 17<sup>th</sup> February 2025, and all consequential proceedings including the proclamation of attachment dated 15<sup>th</sup> July 2025, pending the hearing and determination of the Appellant/Applicant's appeal.*
  5. *THAT this Honourable Court be pleased to cancel, set aside, recall and lift the warrants of attachment and sale herein for cancellation having been issued irregularly.*
  6. *THAT the costs of this application be in the cause.*
4. The application was supported by the affidavit of *Timothy Saruni* deposed to on 17<sup>th</sup> July 2025. It was his case that the Appellant was unable to comply with the deposit condition due to genuine financial incapacity. He further stated that the 30-day period lapsed on 13<sup>th</sup> July 2025, exposing the Appellant to imminent and irreversible harm through the attachment of its assets. He

argued that the Respondent still held the charged property as security and that the Appellant maintained a professional indemnity cover with *Sanlam Insurance*, ensuring the Respondent's interests were protected without necessitating a crippling cash deposit.

*The Submissions:*

5. In its written submissions dated 28<sup>th</sup> October 2025, the Applicant argued that the conditions for a stay under Order 42 Rule 6(2) of the Civil Procedure Rules were satisfied. On the limb of substantial loss, the Applicant submitted that the proclamation of attachment dated 15<sup>th</sup> July 2025 risked crippling its professional operations and rendering its appeal nugatory. To that end it referred to the case of *James Wangalwa & Another -vs- Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR), where it was observed that stay is grantable at the Court's discretion upon established sufficient cause. The Applicant emphasized that the security required must be reasonable and not so onerous as to stifle the right of appeal. It drew support from the case of *Arun C Sharma -vs- Ashana Raikundalia T/A Rairundalia & Co. Advocates*, where it was held that security is meant to guarantee performance, not to punish the judgment debtor.
6. The Applicant further relied on *Absalom Dova -vs- Tarbo Transporters* [2013] eKLR, where it was underscored that a Court's duty is to reconcile the competing rights of an Appellant to a meaningful appeal and a decree holder to the fruits of their judgment.
7. The Applicant then urged this Court to allow the application.

**The Respondent's case:**

8. The Respondent opposed the application through the Replying Affidavit of *Bruce Kinoti Riungu*, sworn on 7<sup>th</sup> August 2025. He stated that the Applicant had admitted to being in a financial position where it could not meet the deposit condition, which proved that the Respondent would be denied the fruits of its judgment if a stay were granted without security. He deposed that the Appellant had fully participated in the trial where professional negligence was proved on its merits.

9. The Respondent further argued that the Appellant had failed to offer any credible evidence of financial incapacity, such as audited accounts or bank statements, relying instead on baseless assertions.
10. In conclusion, it was its case that the Appellant had wilfully disobeyed the trial Court's order for deposit and was now attempting to defeat a valid judgment through dilatory tactics.

The Submissions:

11. The Respondent urged its case further through written submissions dated 28<sup>th</sup> October 2025. It maintained that the requirement for security is mandatory and represents the price for the equitable remedy of stay. It argued that the Appellant could not approbate and reprobate by accepting the benefit of a stay while rejecting its conditions. The Respondent relied on the case of *Machira t/a Machira & co. Advocates -vs- East Africa Standard (No.2)* (2002) KLR 63, asserting that a successful party is entitled to the fruits of their judgment and Courts should avoid crocodile tears from an Appellant. The Respondent further cited the case in *Mwaura Karuga t/a Limit Enterprises -vs- Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where it was observed that due performance includes the entire decree, interest, and costs.
12. As regards the requirement for security, it was its case that in *Gataka -vs- Mwangi* (Civil Appeal E013 of 2024) [2024] KEHC 14125 (KLR), the Court held that it is a mandatory requirement for granting a stay of execution. The Respondent stated that in *Carter & Sons Ltd -vs- Deposit Protection Fund Board & 2 Others*, the court took that position that mere assertions of hardship are insufficient and the applicant must demonstrate why an ordered sum is excessive.
13. Based on the foregoing, the Respondent prayed for the dismissal of the application.

**Analysis:**

1. The only issue for determination is whether the Applicant has satisfied the conditions for the grant of a stay. **Order 42, Rule**

**6** of the **Civil Procedure Rules** provides that an Applicant must satisfy the following conjunctive requirements for the grant of stay of execution pending appeal; that is to say: -

- i. The application has been made without unreasonable delay;*
- ii. Substantial loss may result to the Applicant unless the order is made; and*
- iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.*

2. It is not lost that the purpose of stay pending appeal as held in the case of **RWW vs. EKW** [2019] eKLR, is as follows: -

*... The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs... Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.*

3. In *Civil Application Nai 6 of 1979, Butt -vs- Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal crystallized the conditions for grant of stay as hereunder;

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.*
- b. Secondly, 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 the appeal court reverse the judge's discretion.*
- c. Thirdly, 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.*

*d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.*

14. This Court will now consider the above requirements in turn.

a) Delay:

15. Judgment in the suit was delivered in February 2025. Following the proclamation of attachment on 15<sup>th</sup> July 2025, the Applicant instituted the instant Application on 17<sup>th</sup> July 2025, two days later. It, therefore, acted promptly.

b) Substantial Loss:

16. On the issue of substantial loss, the Applicant claimed that the imminent attachment of office equipment and professional tools by Anfield Auctioneers would lead to operational paralysis. Annexed to the Application is indeed the proclamation of attachment enumerating 13 office equipment.

17. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the Court discussed substantial loss as follows:

*... 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, that is to say, the attached properties have been sold, as is the case here, 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... The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what*

*has to be prevented by preserving the status quo because such loss would render the appeal nugatory.*

18. Flowing from the above, it is this Court's assessment that if the Applicant's professional assets are sold before the appeal is heard, the very substratum of the appeal would be lost, rendering the process nugatory. The Applicant will, hence, suffer substantial loss if the order is not granted.

c) Security:

19. This limb of the requirements was the most contentious. The trial Court already pegged it at Kshs. 3,839,665.82/- being half the decretal sum. While the Respondent argued that this sum is reasonable to protect the decree holder, the Applicant demonstrated that as a professional firm with limited liquidity, compliance with a high cash deposit was practically impossible and effectively extinguished its right of appeal. The Applicant highlighted that the Respondent holds a registered charge over Property Title No. Kilifi/Mtwapa/4309. Additionally, the Applicant indicated that it maintained an active Professional Indemnity Cover.
20. While the Respondent claimed the above are insufficient, this Court remains alive to the fact that the Applicant did not render its defence at trial. To that end, the Court allowed the conditional re-opening of the Applicant's case. That is the essence of the pending appeal. There is, therefore, the possibility of this Court agreeing with the trial Court or reversing that decision. It is all within the ambit of the pending appeal. As such, this Court ought to, in as much as possible, be cautious and create an environment where it will carefully relook at the impugned ruling. To this Court, that balance is attainable by maintaining the *status quo* and expediting the determination of the main appeal.
21. Further, in the unique circumstances of this case, it is this Court view that the combination of the existing charge and the

professional indemnity cover, serves as adequate security in the intervening period. Needless to say, the record has no evidence impugning the running professional indemnity cover. Ultimately, therefore, this Court takes the route that balances the parties' rights.

**Disposition:**

22. The application is, hence, and the following final orders hereby issue: -

- [a] A stay of execution of the judgment dated 17<sup>th</sup> February 2025 and all consequential orders is granted pending the hearing and determination of the appeal.**
- [b] Since the appeal is in respect of a ruling, the filing of the record of appeal is hereby dispensed with. The trial Court file shall be forthwith availed.**
- [c] The Appellant shall file and serve written submissions on the main appeal within 14 days of this Order.**
- [d] Upon service, the Respondent shall file and serve written submissions within 14 days of service.**
- [e] Highlighting of submissions on a date to issue.**
- [f] The Applicant shall pay the Respondent costs of the application assessed at Kshs. 25,000/= within 14 days of this Order.**

It is so ordered.

**DELIVERED, DATED and SIGNED at NAIROBI this 15<sup>th</sup> day of May, 2026.**

**A.C. MRIMA  
JUDGE**

**Ruling virtually delivered in the presence of:**

**Miss Awuor,** Learned Counsel for Respondent.

**Mr. Mulungu,** Learned Counsel for Applicant.

**Amina** - Court Assistant.