

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. CASE NO. E158 OF 2019

BETWEEN

SUNFUNDER INC.....1ST

PLAINTIFF

BEYOND THE GRID SOLAR FUND INC.....2ND

PLAINTIFF

AND

MAYFAIR INSURANCE COMPANY LIMITED.....1ST

DEFENDANT

UNDERWRITING AFRICA LIMITED.....2ND

DEFENDANT

RULING

Introduction & Background

1. By the Notice of Motion dated 12th September 2025, the 1st Defendant (“the Defendant”) seeks to stay these proceedings pending the hearing and determination of its appeal currently before the Court of Appeal. The application is supported by the grounds on its face and the affidavits of Consolata Kiura, the

Defendant's Legal Manager sworn on 12th September 2025 and 5th December 2025. It is opposed by the Plaintiffs through the Grounds of Opposition dated 28th October 2025 and the replying affidavit of the 1st Plaintiff's Chief Financial and Risk Officer, Ritesh Shah sworn on 28th November 2025. The application has been canvassed by way of written submissions which are on record and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

2. The principles governing the grant of stay of proceedings are well settled. **Order 42 Rule 6 (1)** of the **Civil Procedure Rules** provides that an appeal shall not operate as stay unless the Court so orders and provides as follows:

No Appeal or second Appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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 subrule

(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.”

3. I am in agreement with the parties' submissions that unlike stay of execution under **Rule 6 (2)** above, stay of proceedings is governed by broader judicial discretion and is exercised sparingly. This court has laid out various principles that guide its determination of an application to stay proceedings and I am persuaded by a 3-judge

bench ruling of this court in **William Odhiambo Ramogi v Attorney General and three others 2019 eKLR**, cited by both parties where five guiding principles were set out as follows:

1. *There must be a pending Appeal.*
 2. *The application must be made expeditiously.*
 3. *The Appeal must risk being rendered nugatory.*
 4. *Exceptional circumstances must exist.*
 5. *The prejudice must be irreparable or incapable of being compensated by damages.*
4. All these factors must be considered for an order of stay of proceedings to be granted. **Halsbury's Laws of England, 4th Ed. Vol. 37 (Practice and Procedure)** at p.330 states that *"The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be*

exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The Applicant for a stay on this ground must show not merely that the Plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.” (see **Sigat v Sigat [2025] KEELC 5808 (KLR)**)

5. The Defendant states that the present suit should be stayed because it is essentially the same as another case, **HCOMM No. E205 of 2021** that was already decided on 22nd December 2021 against the borrower, *Astonfield Solesa Solar Kenya Limited* and as such, this suit is res judicata. The Defendant avers that it has already filed an appeal challenging a previous ruling dated 24th November 2022 that allowed this case to proceed despite it being res judicata. That if this case continues, the Plaintiffs could potentially recover the same loss twice, once from the borrower in the other suit where execution is already underway and again from the Defendant.
6. The Defendant states that without a stay, it will suffer substantial loss by incurring unnecessary legal costs, and its right to

subrogation will be prejudiced and its appeal will be rendered nugatory. It is also the Defendant's position that it has filed this application without delay.

7. In response, the Plaintiffs have deponed that the application is incompetent, misconceived, devoid of merit, an afterthought, and an abuse of process. That the Defendant has a well-documented pattern of delay tactics, having filed multiple unsuccessful applications to stall the case since 2019. That the ruling being appealed against was delivered on 24th November 2022 but the Defendant waited nearly three years before filing this application, which amounts to indolence that disentitles them to any discretionary relief and that the Defendant actively participated in proceedings after the November 2022 ruling.
8. The Plaintiffs stated that the Defendant filed an application for security for costs which was dismissed on 15th July 2024, attended case management conferences, and filed documents as late as May 2025 and by doing so, it has waived its right to seek a stay and are now estopped from doing so. They contend that a stay would violate the Plaintiffs' right to a fair and expeditious hearing under **Article 47** of

the **Constitution** and it would also undermine the constitutional principle that justice shall not be delayed. They aver that the suit was filed in 2019 and the Plaintiffs have had to fend off various unmeritorious applications.

9. The Plaintiffs state that this Court has conclusively determined the res judicata issue in the November 2022 ruling and the Defendant's attempt to raise the same issue again in this application is itself res judicata. That the Defendant's has failed to demonstrate that its appeal will be rendered nugatory if the trial proceeds and they urge the court to dismiss the Defendant's application in its entirety.

10. Going by the **Ramogi(supra)** principles, I am satisfied that there is a pending appeal before the Court of Appeal, that is, **Civil Appeal No. E391 of 2025** and the Memorandum of Appeal is on record. Whereas the Plaintiffs have stated that the application was filed nearly three years after the November 2022 ruling which delay is inordinate, I am persuaded by the Defendant's explanation that the delay was because the court registry took 903 days to supply the certified typed proceedings as evidenced by the Certificate of Delay. The appeal was lodged on 22nd May 2025, and this stay

application was filed on 29th September 2025 which is approximately four months later, and one month before the scheduled hearing. I therefore find that the delay is squarely attributable to the court, not the Defendant as it filed a Notice of Appeal and requested proceedings promptly in 2022. Whereas the four-month gap between lodging the appeal and filing this application was not prompt, I would not say it is inordinate and I would excuse the delay in the interest of justice.

11. On whether the appeal will be rendered nugatory if the stay is not granted, I am inclined to agree with the Defendant that if the trial proceeds and a decree is issued against it as the insurer, it will be forced to pay. Its subsequent appeal would be rendered nugatory because recovering money from a foreign plaintiff with no known Kenyan assets would be near impossible. Furthermore, the very purpose of a res judicata appeal is to stop a trial from happening at all and therefore, a final judgment would moot the main issue. Indeed, I can understand the Defendant's apprehension of multiplicity of suits and the fear of unjust enrichment on the part of the Plaintiffs as there could be risk of them executing separate decrees worth USD 4,750,000 against their claimed loss of USD

2,500,000. is a powerful equitable consideration. If the Court of Appeal later agrees this suit is res judicata, having a full trial and judgment in the meantime would be a colossal waste of judicial resources.

12.The Defendant has also cited the case of **Peri Formwork Scaffolding Engineering (PTY) Limited v Mayfair Insurance Company Limited [2021] KEHC 5106 (KLR)** where this court (Muigai J.) upheld a res judicata objection on similar facts of suing both the principal debtor and the guarantor/insurer in separate suits. This court (Okwany J.) in the November 2022 ruling dismissed the res judicata objection, stating the parties were different. However, the Court of Appeal may overrule that and the risk of two inconsistent decrees and unjust enrichment constitutes an exceptional circumstance in favour of the Defendant.

13.On the loss to be suffered, I am persuaded by the Defendant that the loss of a subrogation right is a real, specific, and potentially irreparable prejudice. The difficulty of recovering costs from a foreign entity has already been noted by the court even though the security for costs application was dismissed.

14. In summary, it is my finding that while the present application was not filed with the utmost speed, the delay is largely explained by the court's own delay in preparing the record. The overriding interests of justice, particularly the court's duty to prevent an abuse of process and a multiplicity of suits, outweigh the Plaintiffs' right to an immediate hearing. The court runs a very real risk of proceeding with a full trial on a matter that the Court of Appeal may definitively declare to be res judicata and an abuse of process and a full trial would be a massive waste of judicial time and resources for a suit that should have been struck out at the preliminary stage, potentially exposing the Defendant to an irreparable loss of its subrogation rights and the Plaintiffs to unjust enrichment. As such, the correct path is stay this proceedings, await the Court of Appeal's definitive ruling on the res judicata issue, which is the gateway to the entire dispute, and then proceed accordingly.

Conclusion & Disposition

15. The upshot is that the 1st Defendant's application dated 12th September 2025 is allowed in the following terms:

1) There be and is hereby issued an order of stay of all further proceedings in this matter pending the hearing and final determination of *Nairobi Court of Appeal Civil Appeal No. E391 of 2025: Mayfair Insurance Company Limited v Sunfunder Inc., Beyond the Grid Solar Fund LLC & Underwriting Africa Limited.*

2) The 1st Defendant shall file a status report on the progress of the said appeal before the Court of Appeal at intervals of ninety (90) days from the date hereof, with the first such status report to be filed on or before 15th August 2025 and copies thereof to be served upon the Plaintiffs' Advocates.

3) The costs of this application shall be in the cause

DATED SIGNED AND DELIVERED virtually at NAIROBI this

8th DAY of MAY 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Wachira for the Plaintiff
2. Mr. Chemwoiya holding brief for Mr. Zakayo for the Defendant
3. Amos- Court Assistant

ORIGINAL