



REPUBLIC OF KENYA



**Nyale Investments Limited v Wekesa & another (Civil Appeal
E1114 of 2024) [2025] KEHC 11462 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11462 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1114 OF 2024

TW OUYA, J

JULY 31, 2025

BETWEEN

NYALE INVESTMENTS LIMITED APPELLANT

AND

JANET NASIMIYU WEKESA 1ST RESPONDENT

MBEKI AUCTIONEERS 2ND RESPONDENT

RULING

1. The Applicant has moved this honourable court via a Notice of Motion application dated 25th September 2024 seeking substantially to restrain the Respondents from attaching, removing, alienating, advertising, disposing, selling by auction and or in any way interfering with the properties proclaimed pursuant to a proclamation by the 2nd Respondent dated 19th September 2024 pending the hearing and determination of this application. The Applicant seeks that a temporary injunction be issued in similar terms pending the hearing and determination of the Appeal herein.
2. The Application is supported by an affidavit of even date deposited by Eunice Nyakianga Chirag, a director of the Appellant.
3. It is deposed that the Appellant learnt of the proclamation made by the 2nd Respondents against the applicant's movable property in satisfaction of a decree from the Milimani Small Claims Court No. E7067 of 2024 on 19th September 2024. The applicant contends that he was never served with any pleadings relating to the said matter and therefore never had the opportunity to enter appearance or file a defence. Therefore, the failure to enter appearance or file a defence was not intentional as the applicant is keen on defending the claim once allowed to do so.



4. The deponent disclosed that the property proclaimed does not belong to the applicant as he runs a storage yard for containers and other movable property on behalf of its clients. Some of the goods proclaimed by the 2nd Respondent are subject of an ongoing dispute at Milimani Commercial Magistrates Court Case No. E330 of 2023. She further contends that the goods proclaimed are essential tools of trade and any removal thereof will not only disrupt the applicant's business but also expose the applicant to monumental financial loss and hardship. Also, the proclamation of the goods has subjected the applicant to prejudice exposing it and its clients to significant loss and damage.
5. For this reason, the Applicant is seeking a stay of execution to halt any further attachment, removal, alienation or sale of the proclaimed goods pending the hearing of this application and the main suit, to allow the matter to be determined on its merits.
6. The deponent expressed that the applicant is apprehensive that it stands to suffer substantial loss together with its clients if the orders sought are not granted.
7. In response to the application, the Respondent relied on the Replying Affidavit of 15th October 2024 deposed by Janet Nasiriya Weeks, the 1st Respondent who deposed that the applicant was sufficiently served with the relevant pleadings in Milimani SCCCOMM No. E7067 of 2024 on 11th July 2024 at its registered offices but refused to acknowledge receipt. Service was thereafter effected via the applicant's email address being info@nyale.biz which was well known and had previously been used to communicate with the applicant. Similarly, service was effected through the known WhatsApp number of Eunice Chirag.
8. It was further deposed that the Applicant had refused to attach a draft defence which would at least have demonstrated whether it has a triable defence which may be heard and determined. It is the Respondents contention that the debt owed is not disputed as the Applicants have previously made promises to pay the decretal sum and therefore this Application is a mere delaying tactic to deny the Respondent the fruit of her judgement.
9. The deponent averred that the applicant's Memorandum of Appeal is incompetent for having been filed after the lapse of the statutory 30 days in contravention of Section 79 G of the [Civil Procedure Act](#).
10. Regarding the issue that the proclaimed goods belong to third parties, the Respondent deposes that the same should be addressed in objection proceedings under Section 46 of the [Civil Procedure Act](#) by the purported persons and it is not up to the Applicant to claim on their behalf.
11. The Application was canvassed through written submissions.
12. The Applicant submitted that the trial court failed to adequately consider the proportionality and appropriateness of the relief granted. The goods that are to be attached include the applicant's tools of trade essential for its business operations, as well as property belonging to third party clients stored at the applicant's facility. As a result, the attachment disproportionately impacts the applicant and innocent third parties thus exposing the applicant to potential claims for breach of contract. Contrary to Section 44[1] of the [Civil Procedure Act](#) which protects tools of trade from execution of court decrees. The applicant relies on the case of Bora Capital Limited vs Jane Jeri Moony [2018]elk; Jonathan Wepukhuli t/a Gati Cleanin Agency Limited vs Julius Odhiambo Oduor [2019]eKLR and Victoria Pumps Limited vs Kenya Ports Authority & 4 others [2015]eKLR
13. It was further submitted by the applicant that the execution process failed to comply with statutory requirements. The 2nd Respondent failed to investigate the ownership of the goods proclaimed before attaching them, failure of which resulted to dereliction of statutory duty and consequently marred



the whole process of proclamation contrary to Section 44 [1][ii] of the *Civil Procedure Act* and the *Auctioneers Act*.

14. The Applicant further submitted that the judgment of the trial court failed to adequately safeguard the rights of third parties. The Appellant contended that the attachment of goods essential to its business operations will cripple the business, adversely affecting not only the appellant but also its clients and employees, thus establishing the tenet of irreparable harm as in the case of *Giella v Cassman Brown* [1973] EA 358.
15. Overall. The applicant submits that it is entitled to stay of execution and retrial to allow the matter to be heard on its merits as no prejudice will be occasioned to the Respondent. Also, the stay orders, according to the applicant, will help to protect and preserve the substratum of the intended appeal and the interests of the third parties whose rights are of a public interest.
16. The Respondent, while relying on the averments in the Replying affidavit submit that the applicant's intended appeal is defective as it was filed out of the statutory time frame. It is also submitted that the application is a delaying tactic meant to deny the Respondent from enjoying the fruit of judgement as the applicant, despite admitting the debt has taken the route just to frustrate the 1st Respondent. The applicant having failed to meet the principles of setting aside default judgment; the Respondent pray that the application be dismissed with costs. Reliance is placed on the case of *Oriental Commercial Bank [K] Ltd v Mendeleo Pharmacy 2006 [K]Ltd & 7 others* [2007] eKLR
17. I have considered the application, the supporting and replying affidavits and the submissions filed as well as the authorities relied upon. The main issue for determination is whether the instant application is merited.
18. The law governing the granting of orders for stay of execution pending appeal is codified under Order 42 Rule 6 [1] and 2 of the Civil Procedure Rules which stipulates as follows:
 - 6.[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 referred 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.
19. The above provision requires an Applicant seeking orders for stay of execution to establish that he/she has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for stay of execution pending appeal must be made without unreasonable delay.



20. In the instant case, the impugned Lower Court judgment was delivered on 27th August 2024 and the present application filed on 25th September 2024. I therefore find that the application was filed without unreasonable delay.
21. The Applicant has also filed an appeal which, in his view, raises triable issues. I find that the Applicant has demonstrated that he has sufficient cause for seeking orders of stay of execution pending the appeal.
22. Regarding substantial loss, the Applicant contends that the goods in the proclamation are his tools of trade and thus protected under Section 44 [1][iii] of the *Civil Procedure Act*. Also, some of the goods also belong to third parties. Therefore, if the stay is not granted, the Applicant shall be exposed to claims for breach of contract from his clients.
23. The Respondent on the other hand argued that the Applicant has not approached the court with clean hands as he has demonstrated that the Applicant was duly served despite him denying service.
24. In *Kenya Shell Limited v Kibiru* [1986] KLR 410, it was held that: -
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. 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 corner stone 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.”
- ... 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. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”
25. In *Nyatera v Nyakundi* [Civil Appeal E033 of 2022] [2023] KEHC 3086 [KLR], the High Court remarked that:
- “The general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.”
26. Also, in *Machira T/A Machira & Co. Advocates v East African Standard* [No 2] [2002] KLR 63 it was held that:
- “to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of



procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

27. In the instant case, the Applicant has proved that the goods attached in the proclamation are not only his tools of trade but also goods belonging to his clients. Though the Respondent is entitled to enjoy the fruit of his judgment, the interest of justice tilts in favor of the Applicant as he suffers to stand substantial loss if the stay order is not granted.
28. In the Nyatera Case [Supra], the High Court observed that:
- “The position taken by courts, when faced with similar applications, is that they ought to weigh the likely consequences of granting or not granting the stay and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. This is to say that the Court should place the parties before it on equal footing so as to ensure that any transitional motions before the Court do not render nugatory the ultimate end of justice. In this regard, the Court is required to exercise its discretion in a manner that opts for the lower rather than the higher risk of injustice.”
29. This position was also adopted in *Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited* [2014] eKLR where it was held that:
- “The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”
30. In *Samvir Trustee Limited v Guardian Bank Limited Nairobi* [Milimani] HCCC 795 of 1997 the court observed that:
- “For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”
31. The Applicant has annexed documents demonstrating that some of the goods proclaimed by the 2nd Respondent are also subjects of judicial consideration in *Milimani Commercial Magistrates Court Case No. E330 of 2023*. In applying the overriding objective and the need to safeguard the rights and interests of both parties, I am persuaded that granting a stay of execution is a proper balancing exercise to ensure the execution of one party’s right should not defeat or derogate the right of the other. Therefore, justice requires that I give an order of stay with certain conditions.



32. Having regard to the findings that I have made in this ruling and in balancing the interests of both parties, I will allow the instant application in the following terms:
- a. There shall be stay of execution of the decree/judgment in Milimani SCCCOMM No E7067 of 2024 delivered on the 27th August 2024 on condition that: -
 - i. The Appellant shall, within forty-five [45] days from the date of this ruling, pay to the respondent the sum of Kshs 393,649/= being part of the decretal sum.
 - ii. The Appellant shall, within thirty [30] days from the date of this ruling, provide security in the form of a Bank Guarantee from a reputable financial institution in respect to the remaining balance of the decretal sum.
 - iii. In the event of failure to comply with the conditions in [a] [i] & [ii] herein above, the stay orders issued herein shall automatically lapse and the Respondent shall be at liberty to proceed with the execution process.
 - b. The costs of the application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST JULY, 2025.

HON. T. W. Ouya

JUDGE

For Appellant...No appearance

For Respondent.....Mbugua

Court Assistant.....Brian

