



**BOM Nyakoko Secondary School v Apache Limited (Civil Appeal
E120 of 2025) [2025] KEHC 11230 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E120 OF 2025**

A MABEYA, J

JULY 30, 2025

BETWEEN

BOM NYAKOKO SECONDARY SCHOOL APPELLANT

AND

APACHE LIMITED RESPONDENT

RULING

1. Before me is a Motion on Notice dated 19/5/2025 by the appellant. The same was brought under the provisions of Section 1A, 1B, 3 & 3A and Order 42 rule 6 of the Civil Procedure Rules 2010. The appellant sought a stay of execution of the ruling dated 12/5/2025 pending the hearing of the present appeal.
2. The grounds upon which the same was brought were set out in the body thereof and in the Supporting affidavit of George Ombok sworn on 19/5/2025. These were that if the stay was not granted, the appellant stands to suffer irreparable harm and substantial loss as the respondent would execute the decree of the trial Court thereby occasioning the applicant loss to his prejudice as the appeal will be rendered nugatory.
3. It was further contended that the appeal has good chances of success. That the respondent stands to gain unjust enrichment against the appellant and therefore it is in the interest of justice and fair play that the orders sought are granted.
4. The respondent did not file any replying affidavit in response thereto. It only filed submissions. It submitted that the orders sought to be stayed are negative orders that cannot be stayed as there is nothing capable of being enforced against the appellant thus the application herein was misconceived and should be dismissed. That the appellant's application has fallen short of the provisions of Order 42 rule 6.



5. The applicant filed its submissions dated 30/6/2025. It was submitted that the applicant had met the pre-conditions for granting of the orders sought of stay pending appeal and had already paid a substantial amount of the decretal sum.
6. That the application has been brought without undue delay and in good faith thus it is in the interest of justice that the orders sought be granted.
7. This is an application for stay of execution pending appeal. Under Order 42 Rule 6 of the Civil Procedure Rules, the principles are well settled. The application must be made timeously, the applicant must establish that he/she/it will suffer substantial loss if a stay is not granted and must officer security for the due performance of the decree or order that may ultimately be found to be binding on the applicant.
8. Before considering the three principles, I note that the nature of ruling and order of the trial Court the applicant intend to appeal against was in the nature of a dismissal order and therefore a negative order.
9. The aforementioned application before the trial court sought to settle the decretal sum in installments but the same was dismissed vide the impugned ruling of 12/5/2025.
10. The position taken by the Court of Appeal in respect of such applications for stay of execution of negative orders is that they cannot be stayed. In other words, for an order of stay of execution to lie, the order or decree sought to be stayed must be positive in nature. In *Western College of Arts and Applied Sciences v Oranga & Others* [1976-80] 1 KLR 63, the Court of Appeal for East Africa stated thus on the issue:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in an application for a stay, it is so ordered.”

11. In the case of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR, the Court of Appeal held as follows: -

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984)* where it was stated: ‘..... an order for stay of execution must be intended to serve a purpose’”

12. In light of the above authorities, there is nothing to stay in the present matter, and the application is hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb



JUDGE

