



REPUBLIC OF KENYA



Nagaria & another v Savjani t/a Hardware and Homeware Suppliers (Civil Appeal E170 of 2025) [2025] KEHC 11757 (KLR) (6 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E170 OF 2025
RN NYAKUNDI, J
AUGUST 6, 2025**

BETWEEN

HIREN JAGANTILAL NAGARIA 1ST APPLICANT

ASKA INDUSTRIES LIMITED 2ND APPLICANT

AND

**PRAVAN VIJA YKUMAR SAVJANI T/A HARDWARE AND HOMEWARE
SUPPLIERS RESPONDENT**

RULING

Representation:

M/s Kiprop Luseria & Co Advocates

M/s CD Nyamweya & Co Advocates

1. What is pending before this court for determination is a Notice of Motion Application dated 24th July 2025 brought pursuant to Order 42 rule 6 of the Civil Procedure Rules where the Applicant is seeking the following orders:
 - a. Spent
 - b. That pending the hearing and determination of this Application inter-parties, this honorable court be pleased to issue orders of stay of execution of the ex-parte orders issued on 23rd July 2025 by Hon P. Areri together with all consequential orders in Eldoret CMCC Case No. E513 of 2025, Pravan Vijaykumar Savjani t/a Hardware and Homeware Suppliers v Hiren Jagantilal Nagaria & Aska Industries Limited.
 - c. That this honorable court be pleased to issue orders of stay of execution of the ex-parte orders issued on 23rd July 2025 by Hon P. Areri in Eldoret Cmcc Case No. E513 of 2025,



Pravan Vijaykumar Savjani t/a Hardware and Homeware Suppliers v Hiren Jagantilal Nagaria & Aska Industries Limited together with all consequential orders pending the hearing and determination of the main appeal.

- d. That the costs of the Application be provided for.
2. The Application is made on the following grounds on the face of it among others: -
- a. That the Chief Magistrates Court sitting in Eldoret issued orders on 23rd July 2025 in Eldoret Cmcc Case No. E513 of 2025, Pravan Vijaykumar Savjani t/a Hardware and Homeware Suppliers v Hiren Jagantilal Nagaria & Aska Industries Limited Suppliers in favour of the Respondent as against the appellants
 - b. That the Applicant/appellants being aggrieved by the said orders have since appealed the same.
 - c. That the respondent might start the process of execution anytime from now.
 - d. That the respondent in his application dated 21st July 2025 lied to the trial court that the respondents had closed their shop and left the country yet the appellants are available and ready to present themselves to court and defend the case.
 - e. That the applicants/appellants have an arguable appeal with high chances of success as they do not owe the respondent any money.
 - f. That the applicants/appellants were not granted an opportunity to be heard before the trial court before the orders were issued yet they do not owe the respondent any money and they are strangers to the documents that were relied on by the respondent.
 - g. That the applicants/appellants will suffer irreparable loss if the orders sought are not granted as the hardware where the goods are to be attached is their only source of livelihood and that if the subject orders are executed their only business will collapse thus rendering them destitute.
 - h. That the applicants/appellants shall be willing to furnish security as the court may direct.
 - i. That the Application is made in good faith with the sole aim of ensuring justice is not only done but also seen to be done.
3. The Application is supported by the annexed affidavit dated 24th July 2025 sworn by Hiren Jagantilal Nagaria who deponed on oath as follows;
- a. That I am the 1st applicant/appellant herein.
 - b. That I am informed by my advocate on record which information I believe to be true that the Chief Magistrates Court sitting in Eldoret issued orders on 23rd July 2025 in Eldoret CMCC Case No. E513 of 2025, Pravan Vijaykumar Savjani t/a Hardware and Homeware Suppliers v Hiren Jagantilal Nagaria & Aska Industries Limited attaching the appellant's goods [See annexed copy of the order marked HN/1].
 - c. That being aggrieved by the said orders we have since appealed the same.
 - d. That the respondent might start the process of execution anytime from now.
 - e. That the respondent in his application dated 21st July 2025 lied to the trial court that we had closed our shop and left the country in order to secure the subject orders yet we are available and ready to present ourselves to court as and when required and we have no plans of either closing shop and/or leaving the country.



- f. That I am advised by my advocate on record, which advice I believe to be true that we have an arguable appeal with high chances of success.
 - g. That we were not granted an opportunity to be heard before the trial court before the orders were issued yet we do not owe the respondent any money and we are strangers to the documents that were relied on by the respondent.
 - h. That we will suffer irreparable loss if the orders sought are not granted as the hardware where the goods are to be attached is our only source of livelihood and if the order is executed our only business will collapse thus rendering us destitute.
 - i. That we shall be willing to furnish any security as the court may direct.
 - j. That the Application is made in good faith with the sole aim of ensuring justice is not only done but also seen to be done.
 - k. That I reiterate all the averments contained in the Notice of Motion herein.
4. The Application is opposed by the Respondent vide a Replying Affidavit dated 28th July 2025 sworn by Pravan Vijaykumar Savjani who deponed on oath as follows: -
- a. That I am the Plaintiff/Respondent in this matter trading under the name and style of Hardware Homeware and Suppliers.
 - b. That I have read the applicant's application dated 24th July 2025 which same has also been explained to me by my advocates on record which I very well understand and I respond thereto as follows;
 - c. That this application is without merit, misconceived, frivolous, vexatious and an abuse of the process of this honorable court.
 - d. That the orders the applicant is complaining about were properly made by the trial court on interim basis and on sound basis.
 - e. That I am advised by my learned Advocates that the proper forum to deal with interim orders is with the trial court and therefore this application being raised on an appeal is misconceived and inappropriate
 - f. That I am further advised by my learned advocates on record that the trial court properly applied the provisions of order 39 of the civil procedure rules, the provisions for attachment before Judgment is properly articulated in that order.
 - g. That I am also advised that this application interferes with the trial court's hearing of the main application at which point the trial court shall render itself as to whether the continued attachment of the applicant's goods is proper or not.
 - h. That I am advised by my learned Advocates on record that the application over the subject goods is still pending before the trial court, the same has not been exhausted the orders made therein were at an interim basis and therefore do not warrant intervention by this honorable court.
 - i. That the applicants are not prejudiced by the interim orders made by the trial court given that the goods the subject matter in this suit are not for auction or sale but to safeguard the resultant decree as per Order 39 Rule 5.



- j. That the applicants had locked the store for months and disappeared to the extent that the respondent had to seek a break in order.
- k. That the applicants had admitted owing the debt.

Analysis and Determination

5. This application is based on Order 42 Rule 6[1] of the Civil Procedure Rules as construed with section 1[A], 1[B], 3, 3[A] of the *Civil Procedure Act*. The court in *Jeremia Matoke v Kenya Commercial Bank Ltd, Nairobi [Milimani] High Court civil case number 290 of 2002 [Mwera, J on 14th October 2003]* held as follows:

- [a] While entertaining an application under Order 41, Rule 4 of the Civil Procedure Rules, one in essence is asking for orders under Order 41, Rule 4 of the Civil Procedure rules but only as it is the case here, regarding stay of proceedings not execution of the decree or order, pending appeal, the issue of substantial loss need not feature or be argued. Not even security for due performance. And whether the appeal will be rendered nugatory or not belongs to the Court of Appeal not here. Of course one, as in the ordinary litigation, needs to move without unreasonable delay. But while considering whether to grant stay of proceedings or not the court will exercise its unlimited discretion and this exercise shall be exercised in no better way than that whether the interests of justice would be best served by the grant or the refusal of the order for stay. The law whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion it should be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and the cons of granting the order. And in considering those matters it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously. See *Global Tours and Travels Limited, HCWC number 43 of 2000*.
- [b] In the present case the court has endeavored to consider this application in that global aspect and it is of the mind that even with 22 October 2003 [the trial date is since passed] the first defendant nonetheless appears to have an arguable appeal to present. If the intended trial goes on and that appeal succeeds much valuable judicial time will have been wasted in the trial. If it fails, then of course to even surmise that a permanent one will be granted at the trial.

6. In addition, the court in *Butt v Rent Restriction Tribunal 1979 eKLR* held as follows:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church [No2] 12 Ch D [1879] 454*. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”



7. This application is essentially based under the provisions of Order 39 of the Civil Procedure Rules which provides as follows:

1. Where defendant may be called upon to furnish security for appearance [Order 39, rule 1.]

Where at any stage of a suit, other than a suit of the nature referred to in paragraphs [a] to [d] of section 12 of the Act, the court is satisfied by affidavit or otherwise—

- [a] that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him— [i]has absconded or left the local limits of the jurisdiction of the court; or [ii]is about to abscond or leave the local limits of the jurisdiction of the court; or [iii]has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or
- [b] that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

2. Security [Order 39, rule 2.]

- [1] Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1.
- [2] Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

3. Procedure on application by surety to be discharged [Order 39, rule 3.]

- [1] A surety for the appearance of a defendant may at any time apply to the court in which he became a surety to be discharged from his obligation.
- [2] On such application being made the court shall summon the defendant to appear, or, if it thinks fit, may issue a warrant for his arrest in the first instance.
- [3] On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the court shall direct the surety to be discharged from his obligation and shall call upon the defendant to find fresh security.



8. In this case, the decision that the applicants seek to appeal was rendered on 23rd July 2025 which had the following effects on the rights of the parties who are aggrieved with exercise of discretion of the learned trial Magistrate:
 - a. That an order be and is hereby issued against the defendant/respondents attaching assorted hardware merchandise and any other movable properties from the defendant/respondent business premises before judgment pending inter-parties hearing of this application thereafter the main suit.
 - b. That the plaintiff to keep the attached goods in a safe warehouse pending the hearing and determination of the suit.
 - c. That break in order be and is hereby issued for effective implementation of the above.
 - d. That the police officer commanding Langas police station to oversee compliance with the above.
 - i. That the defendant be served with the plaint and order through his WhatsApp number and a newspaper of national circulation
 - ii. That costs be provided for by the respondent
9. The orders that the applicants seek to stay were made in relation to assets the court found to be necessary for impounding pending the hearing and determination of the claim within the meaning of Order 39 of the Civil Procedure Rules. This application as shown above was vehemently opposed by the Respondent. This is a question of the Applicants pleading substantial loss if the appeal is not heard and determined on the merits.
10. In so far as this application is concerned, the applicants have satisfied the requirements of Order 42 Rule 6[1] of the Civil Procedure Rules, as well as the principles outlined in the relevant case law cited. The question I now pose is whether the cumulative period required to prepare the record of appeal and to determine the substantive merits of the main appeal considering the Court's current scheduling system might result in inordinate and inexcusable delay in the prosecution of the matter. The import of Sections 1A and 1B of the *Civil Procedure Act* is that the overriding objective is to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes. Dealing justly with a case includes ensuring that it is handled both fairly and without undue delay.
11. In the instance case there, is no dispute whatsoever on the facts which remain unopposed by the time I was preparing this ruling. As a matter of fact the trial court was yet to make any findings of facts on the merits as regards the claim by the Respondents as against the Applicants/intended Appellants. The right to a fair trial is enshrined in Article 50 of *the constitution* and it represents one of the most fundamental guarantees for the respect of the Rule of Law and is at the core of the national values and principles of governance in Article 10 of the Kenya Constitution promulgated in 2010 by the citizens of this country. Indeed, the costs of the trial is a basic component to ensure good administration of justice within our borders. First the right of access to justice concerns both the factual circumstances of a case and its legal substratum.
12. With regard to the present application, this Honourable Court hereby issues a stay of execution of the ex parte orders issued on 23rd July 2025 by Hon. P. Areri in Eldoret CMCC Case No. E513 of 2025 - Pravan Vijaykumar Savjani t/a Hardware and Homeware Suppliers v Hiren Jagantil Nagaria & Aska Industries Limited - together with all consequential orders, pending the hearing and determination of the main appeal. In the same breadth the intended Applicants/Appellants are directed to file written



submissions based on the grievances of the interlocutory ruling issued by the court on 23rd of July 2025. In essence the filing of the record as of necessity ought to be dispensed with as the issues on contestation flow from the interpretation of section 39 of the *Civil Procedure Act*. For those reasons the Applicants/intended Appellants have 3 days to file and serve the written submissions upon the Respondents. Thereafter the Respondents shall also file rejoinder submissions within 3 days on being served by the Applicants/intended Appellants. The costs of this application to abide the outcome of the appeal. The ruling is set down for delivery on 23rd of August 2025. It is so ordered.

**GIVEN UNDER MY HAND AND SEAL OF THIS COURT AND PUBLISHED THROUGH CTS
AND EMAILS OF LEGAL COUNSELS THIS 6TH AUGUST 2025**

.....

R. NYAKUNDI

JUDGE

xxx@gmail.com

