



REPUBLIC OF KENYA



**Ngugi v Mutua (Civil Appeal 251 of 2023) [2025] KEHC 361 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 361 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MACHAKOS**  
**CIVIL APPEAL 251 OF 2023**  
**MW MUIGAI, J**  
**JANUARY 23, 2025**

**BETWEEN**

**LABAN KARIUKI NGUGI ..... APPELLANT**

**AND**

**ELIZABETH KATUU MUTUA ..... RESPONDENT**

*(An Appeal from judgment on quantum of bon M Thibaru RM -Adjudicator  
in Machakos Small Claims Court Claim E 270 of 2023 delivered on 28/8/2023)*

**RULING**

**Notice of Motion**

1. Vide Notice of Motion dated 13<sup>th</sup> October,2023 and filed in court on 17<sup>th</sup> October,2023 brought under Section 3A, 79G & 95 of [CPA](#) (Cap 21) Order 22 Rule 22, Oder 42 Rule 4, 6& 7, Order 50 Rule 6 & Order 51Rules 1& 3 of [CPR](#) 2010 wherein the Applicant sought orders that:
  1. Spent
  2. Spent
  3. Pending the hearing and determination of the Appeal inter-partes, stay of execution of the judgment and/or Decree issued on 28<sup>th</sup> August 2023 in Machakos SCCC No. E270 of 2023 88 of 2019 be granted.
2. The Memorandum of Appeal was filed on 28/9/2023 and Notice of Motion seeking grant of stay of execution was filed on 17/1/2023. The Court granted interim stay of execution orders on 18/10/2023 extended on 5/12/2023- 9/4/2024. N 17/12/2024 parties through Counsel on record had not agreed on terms of stay of execution nor filed written submissions.



## Supporting Affidavit

1. The judgment herein was delivered on 28/8/2023 and Respondent was awarded liability at 100% and quantum general damages Ksh 550,000/- and special damages Ksh 8950/- with costs & interest.
2. The Appellant is aggrieved and hence lodged appeal on liability and quantum.
3. The Trial Court did not consider Defendant's evidence on liability and quantum.
4. The appeal was filed without undue delay and the appeal has high chances of success.
5. The Respondent is a person of unknown means and hence the Appellant is apprehensive that if the decretal amount is paid out, the appeal be rendered an academic exercise.
6. The Application is made in good faith and the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs.
7. Unless the stay of execution is granted, the Appellants Application for stay pending hearing and determination of the intended Appeal will be rendered nugatory and the Appellant will suffer irreparable loss and damage.
8. The Appellant is ready able & willing to furnish such reasonable security in the form of bank guarantee from the Family Bank for the entire decretal amount pending hearing and determination of the application and intended Appeal.

## Determination/Analysis

9. The application is premised on Order 42 rule 6(2) of the [Civil Procedure Rules, 2010](#) provides that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings 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 sub rule (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.
10. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See [Visshram Ravji Halai vs. Thornton & Turpin](#) Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.



11. The Court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“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.”

12. The only issue necessary for determination would be whether the application seeking stay of execution is merited.

### **Substantial Loss**

13. On the first condition, the court in *Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331, defined substantial loss as follows;

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

14. In *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd vs. Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

15. In *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

16. The sum awarded to the Respondent was on the claim which from the judgment of the Court the Claimant’s evidence was not controverted. In fact no evidence was offered.

17. The Respondent’s financial means remain wholly unknown and, in those circumstances, the Applicant’s intended appeal were to succeed, that success would be rendered nugatory.

18. The Applicant’s application for stay is if the Respondent initiated the process of execution and proceed to execute unless the court issues an order of stay of execution, the Applicant will suffer substantial loss and the appeal will be rendered nugatory.



19. Odunga J. in *George Kimotho Ilewe Anastacia Wanza Mutbuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)* stated that:-

“It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant’s business.” See in Bungoma High Court Misc. Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto and James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR.

20. Gichuhi, Ag.JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at 417 held:

“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.”

21. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent. The is not a colossal amount and there has been ample time with interim stay of execution granted.

22. On the other hand, the Respondent did not file any documents and/or pleadings.

### **Unreasonable Delay**

23. On the second condition, the Applicant stated that his application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgment of the Trial Court was entered on 28<sup>th</sup> August 2023. The Memorandum of Appeal was filed on 28/9/2023 and Notice of Motion seeking grant of stay of execution was filed on 17/1/2023. The Court finds that there is no undue delay in filing the application herein.

### **Furnish Security**

24. The Applicant/Appellant proposed to furnish such reasonable security in the form of bank guarantee from the Family Bank for the entire decretal amount pending hearing and determination of the application and intended Appeal. 25. The Court in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

It follows therefore that it is the discretion of the court to determine the security.



## **Disposition**

26. In the premises: -

- a. There will be a stay of execution pending the said appeal on condition that the Applicant remits to the Respondent half of the decretal sum and balance of the decretal sum deliver a bank guarantee within 90 days from the date hereof and in default, the application for stay of execution shall stand dismissed.
- b. Upon compliance with the terms, LCF is retrieved and Record of Appeal already availed. Parties/Counsel to take directions on the Appeal.
- c. The costs of this application abide the outcome of the Appeal.
- d. Further Mention for directions on Appeal shall be before Court No 1 Machakos High Court

It so ordered.

**RULING DELIVERED DATED SIGNED IN OPEN COURT IN NAIROBI ON 23/1/2025.  
(VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

