



**Kahagu v Chomba (Suing as the Personal Representative of the Estate of and on Behalf of the Dependents of Chomba Kanyoni (Deceased)) (Civil Appeal E1439 of 2024) [2025] KEHC 4786 (KLR) (Civ) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4786 (KLR)

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

**CIVIL**

**CIVIL APPEAL E1439 OF 2024**

**TW CHERERE, J**

**MARCH 6, 2025**

**BETWEEN**

**CHARLES MAINA KAHAGU ..... APPLICANT**

**AND**

**LUCY WANGIKU CHOMBA ..... RESPONDENT**

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF AND ON BEHALF OF THE DEPENDENTS OF CHOMBA KANYONI (DECEASED)**

**RULING**

**Introduction**

1. The Applicant filed a Notice of Motion dated 17<sup>th</sup> December 2024, seeking an order for stay of execution of the judgment, decree, and orders arising from the judgment delivered on 21<sup>st</sup> November 2024 in Milimani Chief Magistrate's Court Civil Case No. E4815 of 2022, pending the hearing and determination of the appeal.
2. The application is supported by the affidavit of the Applicant, Charles Maina Kahugu sworn on 17<sup>th</sup> December 2024, in which he depones that he is aggrieved by the judgment and has lodged an appeal. He expresses apprehension that the Respondent might execute the decree, thereby occasioning substantial loss, particularly if the Respondent is unable to refund the decretal amount should the appeal succeed.
3. The Respondent, Lucy Wangiku Chumba, opposes the application through her affidavit sworn on 19<sup>th</sup> February 2025. She argues that the only ground of appeal relates to the multiplier used in assessing damages for loss of dependency. She further states that liability was agreed at 85:15% in her favor and urges that the Applicant pays the awarded sums for pain and suffering, loss of expectation of life, and special damages, while the amount awarded for loss of dependency be deposited in a joint interest-



earning account. She avers that she is a businesswoman capable of refunding the decretal sum in the event the appeal succeeds.

4. In his supplementary affidavit sworn on 04<sup>th</sup> March 2025, the Applicant reiterates that the Respondent has not demonstrated that she is a person of means.
5. I have considered the application together with the affidavits on record and annexures thereto.
6. The legal principles governing stay of execution pending appeal are set out in Order 42 Rule 6(2) of the Civil Procedure Rules, which provides that:

“No order for stay of execution shall be made unless –

- (a) The court is satisfied that substantial loss may result to the applicant unless the order is made;
- (b) The application has been made without unreasonable delay; and (c) Such security as the court orders for the due performance of the decree has been given by the applicant.”

7. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 held that:

“The power of the court to grant or refuse an application for a stay of execution is discretionary, and that discretion should be exercised in such a way as not to prevent an appeal from being heard on its merits.”

8. The principles established in *Halai & Another v Thornton & Turpin (1963) Ltd* [1990] eKLR reaffirm that an applicant must demonstrate:
  - a. That they will suffer substantial loss if the stay is not granted.
  - b. That the application has been made without undue delay.
  - c. That they are willing to offer security for the due performance of the decree.

9. In *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* [1986] eKLR, the Court emphasized that substantial loss is the cornerstone for granting a stay, stating:

“It is not enough merely to state that the decretal amount is a lot of money and the respondent is not able to refund it. The applicant should show substantial loss.

## **Analysis and Determination**

### **i. Whether the application was filed without delay**

10. The impugned judgment was delivered on 21<sup>st</sup> November 2024, and the present application was filed on 17<sup>th</sup> December 2024. The Applicant moved the court within a reasonable time, thus satisfying this requirement

### **ii. Substantial Loss**

11. The Applicant contends that he stands to suffer substantial loss if execution proceeds, as he doubts the Respondent’s ability to refund the decretal amount should his appeal succeed. On the other hand, the Respondent avers that she is a businesswoman capable of refunding the decretal sum but does not provide any evidence of her financial means.



12. The Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR held that:

“Once an applicant expresses doubt as to the respondent’s financial capability, the evidentiary burden shifts to the respondent to prove that she can refund the decretal sum if paid and the appeal succeeds.”

13. The Respondent has not provided evidence of her financial ability. This leaves open the possibility that the Applicant may suffer substantial loss if execution proceeds and the appeal is later successful.

**iii) Security for the due performance of the decree**

14. The Applicant offers to provide security as may be directed by the court. The Respondent proposes that the monies for pain and suffering, expectation of life, and special damages be paid to her, and the amount for loss of dependency be deposited in a joint interest-earning account.

15. In *Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another* [2018] eKLR, the court held that:

“The purpose of security is to guarantee the due performance of the decree that may ultimately be binding on the applicant. It is not meant to stifle the right of appeal.”

16. Weighing all the factors, I find that the Applicant has demonstrated that he may suffer substantial loss, and the application was filed without undue delay. However, a conditional stay is necessary to balance the rights of both parties.

17. In the circumstances, the Notice of Motion dated 17<sup>th</sup> December 2024 is allowed in the following terms:

1. There shall be stay of execution of the judgment delivered on 21<sup>st</sup> November 2024 in Milimani Chief Magistrate’s Court Civil Case No. E4815 of pending the hearing and determination of the appeal on condition that:
  - i. The Applicant shall pay 85% of the sums awarded for pain and suffering, loss of expectation of life, and special damages to the Respondent within 30 days of today’s date.
  - ii. The Applicant shall deposit 85% of the decretal sum awarded for loss of dependency, with the court within 45 days of today’s date.
2. If the Applicant fails to comply with (i) and (ii) above, the stay shall automatically lapse
3. Costs of this application shall abide the outcome of the appeal.

It is so ordered.

**DELIVERED AT NAIROBI THIS 06<sup>TH</sup> DAY OF MARCH 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ubah

For Applicant - Ms. Kahiti for COOTOW & Co. Associates Advocates



For Respondent - Ms. Munyua for Ngonyo Munyua & Co. Advocates

