



**Mwatha v Karanja (Civil Appeal E308 of 2024)  
[2025] KEHC 6146 (KLR) (Civ) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 6146 (KLR)

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

**CIVIL  
CIVIL APPEAL E308 OF 2024**

**JM OMIDO, J  
MARCH 20, 2025**

**BETWEEN**

**CYRUS GATHATWA MWATHA ..... APPELLANT**

**AND**

**SAMUEL NJUGUNA KARANJA ..... RESPONDENT**

**RULING**

1. This ruling is predicated on the Appellant’s Notice of Motion dated 30<sup>th</sup> August, 2024 that seeks the following orders:
  - a. [spent].
  - b. [spent].
  - c. [spent].
  - d. That the Honourable Court be pleased to order stay of execution of the trial court’s judgement and decree dated 5<sup>th</sup> February, 2024 pending the hearing of the appeal.
  - e. That costs of this application be provided for.
2. The application is premised on the grounds on its face. It is supported by the Appellant’s affidavit sworn on 30<sup>th</sup> August, 2024, which expounds on the grounds upon which the application is premised.
3. The application is opposed and to that end the Respondent filed a replying affidavit which he swore on 12<sup>th</sup> September, 2024.
4. This court directed that the application be canvassed by way of written submissions and gave the parties herein timelines for filing their submissions. Both parties filed their respective submissions.



5. I have considered the application, the affidavit in support thereof, the replying affidavit and the submissions filed by the parties. What this court is tasked to determine is whether the Appellant has satisfied the criteria and/or conditions for grant of an order of stay of execution pending appeal.
6. Order 42 Rule 6(2) of the Civil Procedure Rules sets out the three conditions to be satisfied by an Applicant for an order of stay of execution pending appeal to be granted.
7. The first condition under the rule is that the application for stay pending appeal must have been brought without unreasonable delay. I note that the judgement upon which the order for stay pending appeal is sought was entered on 5<sup>th</sup> February, 2024 and that the application that is the subject of this ruling was filed on 31<sup>st</sup> August, 2024.
8. The Memorandum of Appeal was filed on 1<sup>st</sup> March, 2024. The Appellant has not explained in his affidavit the delay of close to 6 months between the date the judgement was entered and the date he filed his application. All he states in his affidavit and submissions is that the proclamation pursuant to execution proceedings was done on 30<sup>th</sup> August, 2024 and that he filed his application for stay of execution pending appeal on the same day, and that there was therefore no delay.
9. With respect to the Applicant, bringing the application without delay, within the meaning of Order 42 Rule 6(2) does not refer to the period from the time of proclamation, as the Applicant seems to suggest, but rather from the time of the judgement.
10. In this case, the Applicant in addressing the first condition was under a duty to account for the time that lapsed between the date of judgement and that of filing of his motion. That period of about 6 months has not been accounted for and the Applicant has in the premises not satisfied the condition of filing the application without unreasonable delay.
11. The second condition under the rule touches on substantial loss that the Applicant stands to suffer if stay of execution is not ordered. On this, the Applicant submitted that the decree will be executed if stay of execution is not ordered and that the same will occasion him irreparable loss.
12. The Applicant conveyed his apprehension that should his appeal eventually succeed, he is unlikely to recover the decretal sum if execution proceeds.
13. The question as to who bears the burden of proof on the issue of refund in the event of a successful appeal was discussed in the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike & another* [2006] eKLR, in which the court observed as follows:

“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...”.
14. The Respondent merely stated in his replying affidavit that he is in gainful employment and carries on business in Nairobi. He did not describe the nature of his job or business and did not explain what resources he has. He attempted to do so in his submissions, which I must reject because evidence cannot be tendered through submissions. In my view, he did not, in the circumstances, demonstrate that he has the financial capacity to refund the decretal sum in the event that the appeal is ultimately successful. I am in the premises satisfied that the Appellant stands to suffer substantial loss if the order for stay of execution is not granted.



15. The third and final condition is the provision of security for the due performance of the decree. On this, the Appellant does not state in his affidavit in support of the motion or his further affidavit that he is ready and willing to provide security. He has therefore not satisfied the third condition.
16. Being of the foregoing persuasion, I reach the result that the application herein is without merit as the Appellant has not met two of the three required conditions that must be met under Order 42 Rule (6) of the Civil Procedure Rules for an application for stay of execution pending appeal to succeed. I proceed to dismiss it wholly.
17. Section 27 of the *Civil Procedure Act* dictates that costs ought to follow the event. To that end then, the costs of the application shall be borne by the Appellant.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 20<sup>TH</sup> DAY OF MARCH, 2025.**

**JOE M. OMIDO**

**JUDGE**

For Appellant: Mr. Gioche.

For Respondent: No appearance.

Court Assistant: Mr. Ngoge & Mr. Juma.

Court: The matter to be mentioned before the Deputy Registrar, Milimani Civil Division on 1<sup>st</sup> April, 2025 for directions. A mention notice to be served upon the Respondent.

**JOE M. OMIDO**

**JUDGE**

