



REPUBLIC OF KENYA



MWA & another v KJC (A Minor Suing through Mother and Next Friend JNO) (Civil Miscellaneous E089 of 2025) [2025] KEHC 4771 (KLR) (Civ) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4771 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS E089 OF 2025
TW CHERERE, J
MARCH 13, 2025

BETWEEN

MWA 1ST APPLICANT

JK 2ND APPLICANT

AND

KJC RESPONDENT

A MINOR SUING THROUGH MOTHER AND NEXT FRIEND JNO

RULING

1. The Notice of Motion dated 31st January 2025 is brought under Order 22 Rule 22, Order 42 Rules 4 and 6, Order 51 Rules 1 and 3 of the Civil Procedure Rules, Section 3, 3A, and Section 95 of the [Civil Procedure Act](#). The Applicant seeks:
 - a. Leave to appeal the judgment in Milimani CMCC No. E2584 of 2021 delivered on 26th September 2024;
 - b. Stay of execution of the said judgment pending the hearing and determination of the intended appeal.
2. The application is premised on grounds that the appeal is arguable and that the Respondent is unlikely to refund the decretal sum if the appeal succeeds, thereby rendering it nugatory.
3. The application is supported by an affidavit sworn on 31st January 2025 by Maureen Morong'a, advocate for the Applicant, averring that the Applicant's goods were proclaimed on 16th January 2025. She contends that the decretal sum is substantial and the Respondent may not be in a position to refund it. Further, the Applicant is willing to furnish security for the due performance of the decree.



4. The Respondent opposes the application through a replying affidavit sworn to by his advocate Patrick Waiganjo Wachira, on 13th February 2025. He asserts that:
 - a. The delay in filing the appeal and seeking stay of execution is inordinate and unexplained.
 - b. The Applicant has not offered security as required under Order 42 Rule 6(2)(b).
 - c. No substantial loss has been demonstrated.
5. I have considered the application, and the affidavits filed on behalf of the parties. The issues for determination are:
 - a) Whether the Applicant has met the conditions for grant of stay of execution;
 - b) Whether leave to appeal should be granted.

Analysis and Determination

6. On the issue of stay of execution, Order 42 Rule 6(2) of the Civil Procedure Rules provides that an applicant must satisfy the following conditions:
 - a) Substantial loss may result unless the stay is granted;
 - b) The application is made without unreasonable delay; and
 - c) Security for the due performance of the decree is provided.
7. Section 79G of the *Civil Procedure Act* allows the Court discretion to grant leave to appeal out of time.
8. An Applicant seeking to stay execution of a judgment pending appeal must act without unreasonable delay and not wait until execution begins before approaching the court.
9. The case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 which is the locus classicus, laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”
10. The judgment was delivered on 26th September 2024, but the Applicants moved the court only on 31st January 2025, more than four months later and only after their goods were proclaimed on 16th January 2025.
11. No explanation has been provided for the four-month delay in filing this application. The fact that the Applicants acted only after execution commenced suggests that the application is reactionary rather than based on a genuine intention to appeal.
12. However, the cumulative delay is not unconscionable and the Court may still exercise its discretion to grant leave, particularly where the intended appeal raises arguable issues, the risk of substantial loss has been demonstrated and the Applicant is willing to furnish security for due performance.



13. The Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & Ruth Wairimu Karuga* (1982-1988) 1 KAR 1018 emphasized that when considering an application for stay of execution, the key issue is whether substantial loss has been demonstrated. The court stated:

“As a general rule, an applicant must satisfy the requirements under Order 41 Rule 4 of the Civil Procedure Rules. In the absence of evidence showing substantial loss, it would be uncommon for an appeal to be rendered nugatory due to other factors. Substantial loss, in its various forms, is the fundamental consideration in granting a stay.”

14. This principle has been widely applied, including in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR), where the court reiterated that mere inconvenience or hardship does not constitute substantial loss unless the applicant demonstrates real prejudice.

15. The Applicants argue that the decretal sum is substantial and that the Respondent may not be able to refund it if the appeal succeeds. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] KECA 333 (KLR), the Court of Appeal held that:

“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. In this case, the Respondent has not provided any evidence to demonstrate his financial ability to refund the decretal sum. This in effect raises a legitimate concern of substantial loss on the part of the Applicants.

17. Order 42 Rule 6(2)(b) of the Civil Procedure Rules requires an applicant to provide security for due performance of the decree. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR, the court held that failure to furnish security is a sufficient ground to decline an application for stay since the requirement for security is intended to balance the rights of both parties, ensuring that the successful party in the lower court is not unduly prejudiced.

18. The Applicants have indicated a willingness to provide a bank guarantee as security. However, in the interest of ensuring prompt and effective security for the Respondent, I find that a deposit of the decretal sum in court is the more appropriate measure.

19. In light of the foregoing, I allow the application on the following terms:

- a. Leave is granted to the Applicants to file the intended appeal within 14 days from the date of this ruling.
- b. Stay of execution of the judgment in Milimani CMCC No. E2584 of 2021 is granted pending the hearing and determination of the intended appeal upon the Applicants depositing the total decretal sum with the court within 30 days from the date of this ruling.
- c. In default of compliance with (a) and (b) above, the stay order shall automatically lapse
- d. Costs of this application shall abide by the outcome of the appeal.

DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances



Court Assistant - Ubah

For Applicants - N/A for Kimondo, Gachoka & Co. Advocates

For Respondent - Mr. Kiptanui for Waganjo Wachira Advocates

