



REPUBLIC OF KENYA



KENYA LAW
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**Nyikuri & another v Mwiti (Civil Appeal E030 of 2024)
[2025] KEHC 2765 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E030 OF 2024
JK SERGON, J
MARCH 13, 2025**

BETWEEN

WYCLIFFE SIKUKU NYIKURI 1ST APPELLANT

PASCAL OTIENO AMOKE 2ND APPELLANT

AND

PURITY NGUGI MWITI RESPONDENT

*(Being an appeal from the judgment/decree of the Honourable F.M Nyakundi
(PM) delivered on 11/06/2024 in Kericho CMCC No E006 of 2020)*

RULING

1. The application coming up for hearing is a notice of motion dated 24th January, 2025 seeking the following orders;
 - (i) Spent.
 - (ii) Spent.
 - (iii) Spent.
 - (iv) That this Honourable Court be pleased to grant a stay of execution of the judgment/ decree in Kericho CMCC number E006 of 2020 delivered on the 11th day of June 2024, pending the hearing and full determination of this appeal.
 - (v) Spent
 - (vi) That the Honourable Court be pleased to stay taxation of party and party costs in Kericho CMCC number E006 of 2020 pending hearing and determination of the appeal.



- (vii) That upon grant of prayer no (iii) and (iv) above, this Honourable Court be pleased to order that the Applicants do provide sufficient security in the form of a suitable Bank Guarantee from a reputable financial institution to secure the Judgment herein for Kshs. 809,250/= pending hearing and determination of this appeal.
- (viii) That costs of this application be in the cause.
2. The Application is supported by the supporting affidavit of Pascal Otieno Amoke the 2nd Appellant/ Applicant herein and the insured of motor vehicle registration no. KCS 022Q which forms the subject matter of the Application herein, hence competent to swear the affidavit on behalf of the co-applicant and on his own behalf.
 3. He avers that directline insurance instructed the firm of Kimondo Gachoka & Company Advocates to enter appearance and defend him in Kericho CMCC number E006 of 2020, which they did and that judgment in Kericho CMCC number E006 of 2020 was delivered on the 11th day of June 2024 whereby we were condemned to pay Kshs. 809,250/- plus costs and interest.
 4. He avers that they were aggrieved by the judgment on liability and quantum and have since instructed their Advocates on record to file a memorandum of appeal and that the afore-stated appeal, to wit, Kericho High Court Civil Appeal No. E030 of 2024, has high chances of success.
 5. He avers that this application ought to be allowed because;
 - i. There is no order of stay of execution in force.
 - ii. The decree is for a substantial sum of Kshs. 809,250/= which if paid to the respondent and the appeal is successful, they will not be able to recover the same from the respondent and the appeal will therefore be rendered nugatory.
 - iii. That they will suffer substantial loss and damage if orders sought herein are not granted and further that the appeal will be rendered nugatory
 - iv That this application has been filed timeously.
 - v That the respondent will not be prejudiced in any way if the orders sought herein are granted.
 - vi That it is in the interest of justice that the execution of justice and/or decree in Kericho CMCC No. E006 of 2020 and taxation of costs is stayed pending hearing and determination of the appeal.
 - vii That the respondent is a person of straw and will not be able to refund the decretal sum if he is allowed to execute and the appeal thereafter succeeds.
 6. He avers that the respondent will not be prejudiced as the applicants are ready, willing and able to furnish security by providing a bank guarantee as security for a sum of Kshs. 809,250/=.
 7. He avers that unless the instant application is heard and stay granted, the respondent will proceed to execute against them thereby rendering this application and the appeal nugatory.
 8. . The matter came up for inter partes hearing, the learned counsel for the applicant stated that there was no response to the application dated 24th January, 2025, whereas, there was no representation on the part of the respondent.
 9. Purity Ngugi Mwiti, the respondent herein filed a replying affidavit on the Case Tracking System albeit belatedly.



10. She vehemently opposes the application dated 24th January, 2025
11. She avers that the application is frivolous, vexatious and otherwise an abuse of court process.
11. She avers that the application has been filed after over 210 days from the date of judgment and no plausible reason has been given to justify the delay in filing the application.
12. She avers that in CMCC No. 006 of 2020 the Defendant/Appellant did not call any witness to controvert the testimony/evidence of the Plaintiff/Respondent and the Appellants in their submissions offered a sum of Kshs: 350,000/=. The Appellant had no issue with liability and for that reason she proposed as follows:- (a) Half of the Judgment sum and costs be paid to the Plaintiff's Advocate, as a condition for grant of the orders sought. (b) The other half of the judgment sum be deposited in court.
13. She avers that she is entitled to enjoy the fruits of her judgment, and if the orders of stay are granted, the Appellants be given timelines to file their record of appeal and that the appeal be heard and determined expeditiously.
19. Having considered the pleadings by the parties the issue (s) for determination is whether grant a stay execution and a stay of the assessment of the party to party costs in the proceedings in the trial court.
20. On the issue as to whether to grant a stay of execution, the judgment was delivered on 11th June, 2024 while the present application was filed on 24th January, 2025, over six months after the lapse of the 30 days stay of execution granted by the trial court.

An application for stay invokes the discretionary powers of this court under Order 42 Rule 6 (1) of the *Civil Procedure Rules, 2010* that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Order 42, Rule 6 (2) which states as follows: "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." This court notes that the instant application was not filed timeously and is characterised by inordinate delay. On one part, the applicants contended that they would suffer substantial loss and damage if stay is not granted and that the appeal would be rendered nugatory and they were willing to offer a bank guarantee of the entire decretal amount as security. On the other part, the respondent contended that a stay of execution is conditional and therefore the applicants should be ordered to deposit the half the decretal sum to her advocate and the other half of the decretal sum be deposited in court and that this court should set specific timelines within which the applicants ought to prosecute their appeal. Having considered the submissions by the parties on the issue of stay and the circumstances of this case, the inordinate delay notwithstanding, it is the finding of this court that the applicants are entitled to a conditional stay of execution as they ventilate their appeal.

21. On the issue as to whether to grant a stay of the assessment of party to party costs in the proceedings before the lower court in Kericho CMCC number E006 of 2020 which are due for assessment, it is the view of this court that a stay of the assessment proceedings will be a travesty of justice because costs were awarded by the trial court to the successful party in the suit being the plaintiff/respondent and no appeal, reference or review has been filed against the award of the party to party costs by the applicants herein.
22. Therefore, the notice of motion dated 24th January, 2025 is hereby allowed in the following terms;



- (i) Execution of the judgment/decreed in Kericho CMCC number E006 of 2020 is hereby stayed pending the hearing and determination of the appeal on condition that the Applicant to deposit the entire decretal sum Kshs.809,250/= in an interest earning account in the joint names of both advocates within forty five (45) days hereof.
- (ii) In default, the order staying execution shall lapse.
- (iii) Costs shall abide in the outcome of the appeal.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 13TH DAY OF MARCH, 2025.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Mbeche for the Respondent

Ongwacho for the Applicant

