



**Kutisishi v Juma & 2 others (Civil Appeal E001 of 2024)  
[2025] KEHC 5138 (KLR) (21 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5138 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E001 OF 2024  
S MBUNGI, J  
APRIL 21, 2025**

**BETWEEN**

**ZEBEDEE KUTISISHI ..... APPELLANT**

**AND**

**IBRAHIM JUMA ..... 1<sup>ST</sup> RESPONDENT**

**EZRA OKOTH OLODI ..... 2<sup>ND</sup> RESPONDENT**

**STEPHEN WALUBI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant herein, Zebedee Kutsishi, filed the application dated 4<sup>th</sup> December 2024, seeking the following orders: -
  - a. That this application be certified urgent and heard ex parte in the first instance. (spent)
  - b. That there be a stay of execution of the judgment delivered on 25/10/2024 pending the hearing and determination of this application inter parties.
  - c. That there be a stay of execution of the judgment/decreed issued on 25/10/2024 pending the hearing and determination of the intended appeal in the court of appeal.
  - d. That any other relief this court deems just and expedient to grant
  - e. That the costs of this application be provided for.
2. The application is supported by the ground on the face of the said application and the supporting affidavit of the applicant dated 4<sup>th</sup> December 2024,



3. According to the applicant, they recalled that on 25/10/2024, the Hon. court delivered judgment in favour of the respondent, and being aggrieved by the judgment, he filed a notice of appeal asserting that he intends to appeal the decision at the court of appeal.
4. He avers that if the stay is not granted, his appeal would be rendered nugatory and that the appeal raises triable issues.
5. The applicant filed their grounds of opposition and replying affidavit dated 10<sup>th</sup> December 2024, claiming that the application is misconceived and barred in law. They hold that the applicant would not be prejudiced if they complied with the court orders and that the grounds of appeal do not raise any triable issues.
6. In their replying affidavit, the national organizing secretary claimed that the stay of execution application is not merited as the reasons did not meet the legal threshold and conditions to grant the stay.
7. They hold that the judgment set to be stayed was an appeal from the decision from Butali CMCC No. 204 of 2023 which judgment granted their prayers and the court of appeal was an academic exercise and waste of the court's time denying them an opportunity to discharge their duties as the office bearers of the Kenya National federation of sugarcane farmers.
8. They claim that the applicant will not suffer any irreparable loss since they are not a member of the Kenya National Federation of sugarcane Farmers and he has not shown the authority that he brings the action.
9. They hold that the issue of public interest lies with the hearing of the intended appeal rather than the issuing of the stay orders since the applicant had not filed a memorandum of appeal.
10. He avers that the alleged intended Appeal and instant application are frivolous since they were brought in bad faith and harass the respondent since it raises no triable issue and the pendency of the suit in court is creating unnecessary anxiety within the membership of the federation and is a direct affront to their mandate and activities.
11. They held that the application is vexatious and was brought to derail the functioning of the federation and the respondent, and pray that the application be dismissed with costs to be borne by the applicant.
12. The parties were directed to file submissions however none of the parties complied.

### **Analysis and determination**

13. The main issues for determination are whether the applicant has satisfied the conditions set out in order 42 rule 6 of the [Civil Procedure Rules](#) for a stay of execution pending appeal.
14. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish for the court to order a stay of execution are provided for under order 42 rule 6(2) [Civil Procedure Rules](#). Order 42 rule 6 of the [Civil Procedure Rules](#) stipulates:

“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 orders 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 1st 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.
15. Under order 42 rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
  1. Substantial loss may result to him/her unless the order is made;
  2. That the application has been made without unreasonable delay; and
  3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
16. Substantial loss was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR: -

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal... The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
17. In the instant case, the applicant avers that they stand to suffer substantial loss if the stay is not granted; however, they have not elaborated on what substantial loss will be suffered.....
18. As to whether the Application has been filed without undue delay, judgment was entered on 25<sup>th</sup> October, 2024, the notice of appeal was filed on 31<sup>st</sup> October 2024, and this application was filed on 4<sup>th</sup> December 2024. The court finds that the Application has not been filed without undue delay.
19. The final ground that needs to be determined is on the security of costs.
20. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR, the court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor....Civil process is quite different because in civil process, the judgment is like a debt; hence, the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.



21. The issue of security is discretionary, and it is upon the court to determine the same. The applicant has not offered any security for the performance of the decree.
22. The court, in granting the stay, has to carry out a balancing act between the rights of the two parties. The court ought to determine whether there is a just cause for depriving the respondent of his right to enjoy the judgment. The respondent argues that the applicant has not satisfied the conditions to warrant him stay of execution. The applicant, on the other hand, states that his appeal has high chances of success. The applicant has attached a notice of appeal where he raised one issue for determination, which is on jurisdiction; however, he has no grounds showing how the court erred in holding that it lacked the jurisdiction.
23. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR, the court stated: -

“The Court, in considering whether to grant or refuse an application for stay, is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory, while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to the fruits of his judgment; hence, the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
24. All considered, it is my view that the applicant has not met the threshold of granting stay of execution pending appeal.
25. Accordingly, I find that the application dated 14th December 2024 lacks merit and is hereby dismissed with costs.
26. Right of Appeal 30 days explained.

**DATED, SIGNED AT KAKAMEGA THE 21<sup>ST</sup> DAY OF APRIL, 2025 AND DELIVERED ON 24<sup>TH</sup> APRIL, 2025.**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Court Assistant – Albright Sunguti

Mr. Maoga for the respondent present.

Applicant/Appellant absent.

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