



**Kanyi v Kimani & another (Civil Appeal E321 of 2023)  
[2025] KEHC 5434 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5434 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E321 OF 2023  
DO CHEPKWONY, J  
APRIL 8, 2025**

**BETWEEN**

**JAMES NJOROGE KANYI ..... APPELLANT**

**AND**

**MARGARET WANJIKU KIMANI ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN NJOROGE KIMANI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before this Court for determination is the Notice of Motion application dated 31<sup>st</sup> August, 2023 filed pursuant to Order 42 Rule 6 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act* in which the Applicant/Appellant seeks the following orders:-
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. That the Honourable Court be pleased to issue an order staying execution of the Judgment delivered on 3<sup>rd</sup> August, 2023 in Limuru CMCC No 338 of 2019 Margaret Wanjiku Kimani & Stephen Njoroge Kimani (Legal Representatives) v James Njoroge Kanyi, pending the hearing and determination of this appeal.
  - e. That the costs of the application be provided for.
2. The Application is based on the ground set out on its face and the Supporting Affidavit of Allan Odede sworn on the instant date. According to the Appellant/Applicant, Judgment was delivered against him and being aggrieved by it, he has lodged an appeal which he holds has high chances of success which may be rendered nugatory if the application is not allowed. The Applicant contends that he is ready



and willing to comply with the conditions which shall be set by the court. The applicant also argues that he stands to suffer substantial loss as the Respondents may not be in a position to refund any funds, that the application has been filed timeously and that, it would be in the interest of justice that the same be allowed.

3. The Application has been opposed through the Replying Affidavit of Margaret Wanjiku Kimani, the 1<sup>st</sup> Respondent sworn on 13<sup>th</sup> September, 2023 . She argues that the Judgment was delivered on 3<sup>rd</sup> August, 2023 and stay of execution granted for thirty (30) days. According to the 1<sup>st</sup> Respondent, APA Insurance was not a party to the appeal or primary suit hence has no locus standi to swear the Affidavit in support of the application. She further argues that the Respondent’s evidence in the trial suit was not rebutted and thus the appeal is not an arguable one. She has urged the court that should it be inclined to allow the application, then it should direct the Applicant to deposit the entire decretal sum into the parties advocates joint bank account. The Respondent also holds that the application is an abuse of the court process only meant to deny the Respondents an opportunity to enjoy the fruits of their Judgment, and thus it ought to be struck out with costs.
4. The Respondent also filed Notice of Preliminary Objection dated 13<sup>th</sup> September, 2023 on the following grounds:-
  - a. That Allan Odede has no *locus standi* to swear the Supporting Affidavit on behalf of the Applicant.
  - b. That the Applicant’s application is therefore bad in law and an abuse of the court process.However, on 16<sup>th</sup> May, 2024, the Respondents through their Counsel Mr. Ngigi, withdrew the said Notice of Preliminary Objection.
5. The parties then were directed to canvass the application by way of written submissions which, as at the time of writing this Ruling, only the Applicant had filed his submissions dated 16<sup>th</sup> October, 2023.

### **Analysis and Determination**

6. In determining the application dated 31<sup>st</sup> August, 2023, this Court has read and considered the arguments for and against the prayers sought therein by the parties as set out in their respective affidavits and submissions alongside the statute and case law cited. What has arisen for determination is whether an order to stay the execution of the Judgment delivered on 3<sup>rd</sup> August, 2023 in Limuru CMCC No 338 of 2019, Margaret Wanjiru Kimani & another (Legal Representatives) v James Njoroge Kanyi, can issue?
7. The law on stay of execution is enshrined under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides 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”



8. The purpose of an application for stay of execution pending appeal was explained by the court in the case of *RWW v EKW* [2019] eKLR, where it held that:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Pursuant to these provisions, it is now trite law that for a court to grant stay of execution, three conditions must be met:

- a. The application has been made without unreasonable delay.
- b. The Applicant will suffer Substantial loss
- c. The Applicant has offered security for due performance of the decree.

10. On considering the first condition, this Court notes that Judgment herein was delivered on 3<sup>rd</sup> August, 2023 and the present application filed on 2<sup>nd</sup> September, 2023 which was timely and without unreasonable delay hence this condition had been fulfilled.

11. On the second condition of substantial loss, the applicant has only stated that he is likely to suffer substantial loss given that the decretal sum of Kshs 3,362,152/=. The Applicant has not substantiated the loss he is likely to suffer if the order for stay of execution is not issued. It has been held that it is not enough to simply state that the substantial loss may be suffered. This was the position in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR where the Court held that:-

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

12. While this Court agrees with the decision in the case of *Kenya Shell* (supra) that without the evidence of the substantial loss it is difficult to grant the stay orders as there is no reason why the Respondent should be kept away from its Judgment, it is worth noting that the purpose of an application for stay of execution is to preserve the subject matter of a suit so as to allow or assure the Appellant of his/her right of appeal without the fear of it being rendered nugatory. This decision is then left to the discretion of a court.

13. Lastly, for determination is the issue of security for the due performance. In this case, in his affidavit, the Applicant has stated that he is willing to comply with the conditions to be set out by the court so as to fulfil this condition. The Respondent on the other hand has proposed that the Applicant be ordered to deposit the entire decretal sum in a joint interest earning account in the name of Counsel, if the court is inclined to grant stay of execution orders in this case. The issue of security was discussed in the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where the Court held:-

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of



the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails...”

14. Having considered all the facts presented by the parties in support or opposition of the application, this Court finds that the Applicant fulfilled the three conditions required for stay of execution orders to issue as provided for under Order 42 Rule 6 of the *Civil Procedure Rules*. Therefore, the Court proceeds to allow the Notice of Motion application dated 31<sup>st</sup> August, 2023 in the following terms:-
- a. There shall be a stay of execution of the Judgment delivered on 3<sup>rd</sup> August, 2023 in Limuru CMCC No 338 of 2019, Margaret Wanjiku Kimani & another (Legal Representatives) v James Njoroge Kanyi, pending the hearing and determination of the appeal on condition that the Applicant deposits the entire decretal sum of Kshs 3,362,152/= in a joint interest-earning account in the names of both Advocates for the parties herein within forty-five (45) days from the date of this ruling.
  - b. The Appellant to file and serve a Record of Appeal within thirty (30) days of this ruling.
  - c. The Deputy Registrar to call for and avail the original Record of Proceedings of the trial court.
  - d. Mention on 27<sup>th</sup> May, 2025 for parties to confirm compliance and take further directions on disposal of the appeal.
  - e. Failure to comply with Orders (a) and (b) above, the application shall stand dismissed.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 8<sup>TH</sup> DAY OF APRIL, 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

No appearance for and by either party

Court Assistant - Martin

