



**Kenya National Examination Council v Misiani (Civil Appeal
E359 of 2025) [2025] KEHC 12181 (KLR) (Civ) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12181 (KLR)

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

CIVIL

CIVIL APPEAL E359 OF 2025

TW CHERERE, J

MAY 15, 2025

BETWEEN

THE KENYA NATIONAL EXAMINATION COUNCIL APPELLANT

AND

NEHEMIAH STONE BIC MISIANI RESPONDENT

RULING

“A stay of execution serves to protect the appeal process from being rendered nugatory while respecting the validity of the judgment on record.”

1. The Appellant, a body corporate, has filed a Notice of Motion dated 07th April 2025 under Section 3A of the *Civil Procedure Act* and Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*. The application seeks:
 1. A stay of execution of the judgment delivered on 22nd November 2024 in Nairobi Milimani MCCC No. 11409 of 2018 pending the hearing and determination of this appeal
 2. That the costs of this application be in the appeal.
2. The application is supported by the affidavit of Befly J. Bisem, the Appellant’s Deputy Director, Legal Services, sworn on 07th April 2025 and on the grounds that:
 1. The Appellant is aggrieved by the judgment and has preferred an appeal;
 2. The appeal raises arguable issues with overwhelming chances of success;
 3. The decretal sum of KES 7,000,000 plus interest and costs is substantial;
 4. The Appellant is likely to suffer substantial loss if execution proceeds;



5. There is a reasonable apprehension that the Respondent may not refund the decretal sum if the appeal succeeds;
 6. The application has been filed without unreasonable delay; and
 7. It is in the interest of justice that the orders sought be granted.
3. The Respondent opposes the application through a replying affidavit sworn on 28th April 2025, contending that:
1. The Appellant has not satisfied the requirements of Order 42 Rule 6 of the [Civil Procedure Rules](#).
 2. The Appellant has not demonstrated what substantial loss it would suffer
 3. The Respondent is financially capable of refunding the decretal sum should the appeal succeed.

Issues for determination

4. I have carefully considered the application in light of the affidavits on record and cited cases and the only issue that arises for determination is whether the Appellant has satisfied the requirements for stay of execution under Order 42 Rule 6(2) of the [Civil Procedure Rules](#).
5. The present application is anchored on Order 42 Rule 6(2) of the [Civil Procedure Rules](#), which provides:
 - a) “No order for stay of execution shall be made under sub rule (1) unless—
 - b) The application has been made without unreasonable delay
 - c) 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.

1. Substantial Loss

6. The Appellant asserts that it stands to suffer substantial loss if execution proceeds, as the Respondent may be unable to refund the decretal sum should the appeal succeed. The amount in question is KES 7,000,000 plus interest and costs.
7. Judicial precedents emphasize that a claim of substantial loss must be specific and supported by credible evidence, not mere speculative assertions (See [Machira t/a Machira & Co Advocates v East African Standard](#) [2002] eKLR and [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR). However, the law also states that once an Applicant expresses apprehension about the Respondent’s ability to refund the decretal amount, the evidential burden shifts to the Respondent to rebut that apprehension (See [ABN Amro Bank NK v Le Monde Foods Limited](#), Civil Application No. 15 Of 2002 [NRB] and [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another](#) [2006] eKLR).
8. In this case, the Appellant has expressed a reasonable apprehension regarding the Respondent’s ability to refund the decretal sum. Whereas the Respondent has averred financial capability to refund the sum, this averment is not supported by any evidence. Therefore, the Respondent has failed to discharge the evidential burden shifted to him.
9. Accordingly, I am satisfied that the Appellant has demonstrated a likelihood of substantial loss if the stay is not granted.



2. Timeliness of the Application

10 The impugned judgment was delivered on 22nd November 2024 and the present application was filed on 07th April 2025 resulting in a delay of approximately five (5) months. Although the delay has not been explicitly explained, I find that a five-month delay, in the context of this case, is not unreasonable and is excusable.

3. - Security for Due Performance

11. The requirement to furnish security under Order 42 Rule 6(2)(b) is mandatory, and an applicant seeking a stay must comply with it as a condition precedent. In the present case, the Appellant has expressed willingness to comply with any terms the Court may impose in this regard. To balance the Appellant's right to appeal and the Respondent's right to the fruits of the judgment, a conditional stay of execution, subject to the provision of appropriate security, is warranted.
12. Further to the foregoing, I have considered if the appeal raises triable issues to avoid the same being rendered nugatory should the decision of the appellate Court overturn that of the trial Court.
13. The memorandum of appeal challenges the quantum on general damages and exemplary damages. The right to be heard on appeal is a fundamental principle of justice which the Court must guard jealously, particularly where the intended appeal raises an arguable issue, even if only a single triable issue exists. (See *Nairobi Women's Hospital v Purity Kemunto* [2018] eKLR and *Medical Laboratory Technicians and Technologists Board v Prime Communications Ltd* [2014] eKLR, and *Kimani & Another v Benson* Civil Appeal E006 of 2023).

Disposition

14. From the foregoing analysis, the notice of motion dated 07th April 2025 is allowed on the following terms:
 1. There shall be a stay of execution of the judgment delivered on 22nd November 2024 in Nairobi Milimani MCCC No. 11409 of 2018 pending the hearing and determination of the appeal on condition that the Appellant deposits the sum of KES 3,000,000 with the court
 2. Costs of this application shall abide the outcome of the appeal
 3. Mention before the Deputy Registrar on 04th July 2025 to confirm the filing of the record of appeal

DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ruth

For Appellant - Mr. Ngumbi for the Attorney General

For Respondent - Present in person

