



REPUBLIC OF KENYA



Kemboi v Njagi (Civil Appeal E010 of 2025) [2025] KEHC 5767 (KLR) (7 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E010 OF 2025**

JM NANG'EA, J

MAY 7, 2025

BETWEEN

CECILA CHEPKOECH KEMBOI APPELLANT

AND

LEONARD WACHIRA NJAGI RESPONDENT

RULING

1. Vide Notice of Motion dated 17th January 2025 the Appellant craves the following reliefs;-
 1. Spent
 2. Spent
 3. That this honourable court be pleased to issue orders for stay of execution of of ruling and/ or decree made on 18th November 2024 against the appellant/Applicant pending hearing and determination of the appeal.
 4. That the costs of this application be in the Cause.
2. The application arises from the stated ruling in which the Respondent was granted a total Kshs. 1,961,713/= together with costs and interest against the Appellant in Molo CMCC No. E263 of 2024. Aggrieved by the decision, the Appellant lodged this appeal relying on a number of grounds of appeal as per Memorandum of Appeal dated 11/10/2024.
3. By Affidavit in Support of the Motion, the Appellant inter alia avers that the appeal stands a high chance of success and that she would suffer substantial loss if the application is not allowed. She contends that the trial court disregarded her declaratory, being Molo CMCC No. 510 of 2024 she brought against her insurer, thereby causing her irreparable loss. The Appellant signaled her willingness and readiness to comply with any conditions that may be imposed by the court.



4. Through affidavit evidence in reply, the respondent opposes the Motion. He attacks the application as offending the provisions of Order 42 Rule 6[2] of the *Civil Procedure Rules* 2010 governing determination of an application for stay of execution pending appeal, particularly as regards the question of substantial loss. The Respondent complains that the application is intended to delay satisfaction of his decree in Molo CMCC No. E263 of 2024.
5. The Respondent, however, deposes that if the court decides to allow the application then the Appellant be ordered to deposit the entire decretal sum of Kshs. 1,961,713 into a joint-interest earning bank account in the names of the advocates for the parties.
6. The Appellant does not seem to have filed submissions. The Respondent's submissions reiterate that the Appellant failed to satisfy the conditions for grant of the application stipulated under Order 42 Rule 6[2] of the *Civil Procedure Rules* 2010. Regarding the issue of substantial loss, the Respondent's advocates make reference to the judicial determination in *Shell Ltd v Kibiru & Another* [1986] KLR 410 in which it was famously postulated that

“substantial loss in its various forms is the cornerstone of the court's jurisdiction to grant stay pending appeal. 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.”

This decision also noted that lodging of an appeal does not operate as stay of execution of the impugned decree.

7. Order 42 rule 6[1] [2] of the *Civil Procedure Rules* 2010 governs disposal of an application such as before me for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-
 - a. unless 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. In *RWW v EKW* [2019] eKLR and *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 it is restated that the court's discretionary power whether or not to allow such an application is exercised depending on the peculiar facts and circumstances of each case.
9. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, “Substantial Loss” in the context of an application for stay of execution pending appeal was defined thus;

“It is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory or of no consequence.”

This is similar to the holding in the case of *Shell Ltd* (*supra*) relied upon in the Appellant's submissions.
10. The Appellant asserts that he has brought the Motion without unreasonable delay. The Respondent does not contest the claim and I accordingly find that this condition has been satisfied.
11. The Respondent insists that security for costs should be given to cushion him against litigation costs in the event the appeal fails..



12. Based on its affidavit evidence, the Appellant has expressed willingness and readiness to abide by any conditions the court may set in allowing the application. In *John Odungo v Joyce Irungu Mubatia* [2014] eKLR the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows

“preparedness as well as readiness to provide security should one be called upon to do so”.

13. The Appellant has therefore satisfied the requirement for offer and/ or deposit of security for costs to merit the discretionary order of stay of execution pending appeal, having expressed her willingness and readiness to comply.

14. Determination of the application turns on the question of substantial loss, if any, the Appellant might suffer if stay of execution is not ordered. The case of *Nyatera v Nyakundi* [Civil Appeal E033 of 2022] [2023]KEHC 3086 KLR [16 March 2023] [Ruling] is relevant for the proposition that the Applicant ought to show the manner in which his appeal would be rendered nugatory if stay of execution is not ordered.. The court opined in the case that it is not enough to say that because the Respondent intends to proceed with execution, he should be stopped because of the appeal. The court is therefore required to tread a delicate balance of the parties’ interests. As it is now trite, this is the cornerstone of the court’s discretion to grant or refuse stay of execution pending appeal. The onus is on the Appellant to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds. In *Tropical Commodities Ltd. International [in liquidation]* [2004] 2 EA 331 my senior brother [Ogolla J] explained that substantial loss is a qualitative concept. It refers to;-

“any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

15. In Milimani HCMCA No. 1561 of 2007, *Century Oil Trading Company Ltd v Kenya Shell Ltd*, this court again explained that;-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes when, it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

16. Regarding the burden of proof, the Court of Appeal held in *National Industry Credit Limited v Aquinas Francis Wasike & Another* [2006] eKLR that;-

“once an applicant expresses a reasonable fact that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

17. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including *Matata & Another v Rono & Another* [Civil Appeal No. E034 of 2024] [2024] KEHC 2799 [KLR] [19 March 2024] [Ruling].



18. Based on the affidavit evidence of the parties neither of them has stated their financial position. The Appellant has not made out a prima facie case of the respondent's inability to pay back any decretal sum to warrant the respondent to debunk the claim.
19. In exercising my discretion in the circumstances, I allow the application as hereunder;
 - a. Stay of execution is ordered on condition that the Appellant deposits the entire decretal sum into court within 30 days from the date hereof in default of which the order shall automatically lapse and the Respondent shall be at liberty to levy execution.
 - b. The costs of this application shall abide the appeal.

Ruling accordingly.

J. M. NANG'EA, JUDGE.

RULING DELIVERED THIS 7TH DAY OF MAY, 2025 IN THE ABESENCE OF THE PARTIES AND/OR THEIR ADVOCATES WHO HAD NOTICE.

J. M. NANG'EA, JUDGE.

