



**Muthoni & another v Mutemi (Civil Miscellaneous Application  
E212 of 2025) [2025] KEHC 12195 (KLR) (Civ) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12195 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL MISCELLANEOUS APPLICATION E212 OF 2025**

**TW CHERERE, J**

**MAY 8, 2025**

**BETWEEN**

**MARY MUTHONI ..... 1<sup>ST</sup> APPLICANT**

**JOSEPH MWANGI MAIGUA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BENARD MUTEMI ..... RESPONDENT**

**RULING**

“The right to seek stay of execution is not an end in itself; it is a procedural relief contingent on the existence of a valid or properly intended appeal. Where no such appeal exists or is contemplated within the confines of the law, the application is devoid of legal foundation and cannot stand.”

1. On 07<sup>th</sup> November 2024, judgment was entered for the Respondent against the Applicants in Milimani CMCC E861 of 2020.
2. By a notice of motion dated 21st January 2025, premised on Order 22 Rule 22, Order 42 Rules 4, 6 and 7, and Order 50 Rules 1 and 3 of the Civil Procedure Rules, and Sections 3 and 3A of the *Civil Procedure Act*, the Applicants seek the following orders:1. Spent2. Spent3. Stay of execution of the decree and judgment pending the filing of the intended appeal4. Stay of execution upon payment of KES. 1,103,5505. Order to secure the judgment and decree by depositing KES. 1,103,550 court6. Any other order as the court may deem fit7. Spent8. Costs abide the outcome of the appeal
3. The application is supported by an affidavit sworn by Joyce Chichi, the Applicants’ advocate, on 21<sup>st</sup> January 2025. The main grounds are that:
  - (1) The Applicants are aggrieved by the judgment and intend to appeal;



- (2) Instructions to appeal were received after the lapse of the time prescribed for filing an appeal;
  - (3) The Respondent may not be in a position to refund the decretal sum if the appeal succeeds.
4. The Respondent opposes the application by a replying affidavit sworn on 03<sup>rd</sup> March 2025, contending that:
- (1) The application is meant to delay settlement of the decree;
  - (2) No appeal has been filed, and the time to appeal for doing so has lapsed
5. Having considered the notice of motion in light of the affidavits on record, I have determined that the issues arising for determination are:
1. Whether the Applicants have demonstrated entitlement to an order of stay of execution pending appeal.
  2. Whether the Applicants should be permitted to deposit the decretal sum in court.

### **Analysis and Determination**

#### **Whether the Applicants have demonstrated entitlement to stay of execution pending appeal**

6. Order 42 Rule 6(2) of the Civil Procedure Rules sets the requirements for the grant of stay of execution pending appeal. An applicant must satisfy the court that:
1. Substantial loss may result unless the order is made;
  2. The application has been made without unreasonable delay;
  3. Such security as the court may order has been provided.
7. The Applicants contend that unless stay is granted, they may suffer substantial loss because the Respondent may not be able to refund the decretal sum if the appeal succeeds. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the Court of Appeal held:
- “Once an applicant expresses a reasonable fear that if he pays over the decretal sum to the respondent and succeeds on appeal he would not be able to recover the money, the evidential burden shifts to the respondent to show that he would be in a position to refund the decretal sum if the appeal succeeds.”
8. The Respondent has not rebutted the Applicants’ claim. However, substantial loss alone does not automatically entitle an applicant to stay. In *David Morton Silverstein v Atsango Chesoni* [2002] eKLR, the Court emphasized that the applicant must also demonstrate that unless stay is granted, the intended appeal would be rendered nugatory.
9. Although the Applicants have shown the likelihood of substantial loss, the procedural propriety of the application must still be addressed.
10. The Applicants concedes that the time to appeal has lapsed and no extension of time has been sought. In *Peter Nyaga Muvake v Joseph Mutunga* [2015] KECA 475 (KLR), the Court of Appeal stated:
- “In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water. We so find and hold.”



11. Since no leave to appeal out of time has been sought or obtained, the application for stay is untenable and must fail.

**Whether the Applicant should be permitted to deposit the decretal sum in court**

12. The Applicants also seek an order permitting them to deposit the decretal sum in court.
13. Whereas deposit of decretal sums is recognized as a form of security under Order 42 Rule 6(2)(b) of the Civil Procedure Rules, it presupposes the existence of a pending or properly intended appeal. In *Gianfranco Manenthi & Another v Africa Merchant Assurance Co. Ltd* [2019] eKLR, the Court stated:

“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 a 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 is meant to guarantee the due performance of such decree or order as may ultimately be binding on the applicant.”

14. In the present case, no appeal has been filed within the prescribed time, and no steps have been taken to seek extension of time. There is no pending appeal or intended appeal to be secured. Permitting deposit of the decretal sum at this stage would serve no practical purpose and would amount to granting stay through the back door. Accordingly, the prayer for leave to deposit the decretal sum in court is declined.

**Disposition**

15. The Applicants demonstrated substantial loss but have failed to establish that the application is properly anchored on a valid or regularized appeal process.
16. Similarly, there is no appeal or intended appeal to warrant deposit of the decretal sum.
17. Accordingly, the Notice of Motion dated 21<sup>st</sup> January 2025 is hereby dismissed with costs to the Respondent.
18. File closed

**DELIVERED AT NAIROBI THIS 08<sup>th</sup> DAY OF May 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Nyambala

For Applicant - Mr. Ndirangu for Kimondo Gachoka & Co. Advocates

For Respondent - Ms. Mumbi for Musili Mbiti Advocates LLP

