



REPUBLIC OF KENYA



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**Nzau & another v Oginga & another (Suing as Administrators of the Estate of Brian Barasa)
(Civil Appeal E320 of 2025) [2025] KEHC 12226 (KLR) (Civ) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12226 (KLR)

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

CIVIL

CIVIL APPEAL E320 OF 2025

TW CHERERE, J

MAY 22, 2025

BETWEEN

ALFRED MIITAU NZAU 1ST APPELLANT

ELITE ACCOUNTING SERVICES LIMITED 2ND APPELLANT

AND

LIVEENA ATIENO OGINGA 1ST RESPONDENT

LEONARD WAFULA EMMANUEL 2ND RESPONDENT

SUING AS ADMINISTRATORS OF THE ESTATE OF BRIAN BARASA

RULING

“The Court’s discretion to grant a stay of execution is not a shield for judgment-debtors to delay justice, but a safeguard to ensure that an appeal, if successful, is not rendered illusory.”

1. By Notice of Motion dated 24th March 2025 brought under the provisions of Article 159 of *the Constitution*, sections 1A, 1B, 3A and 75 of the *Civil Procedure Act*, and Order 43 Rules 1 and 2, Order 50 Rules 4 and 6 of the Civil Procedure Rules, the Appellants seek:
 1. Stay of execution of the judgment delivered on 14th February 2025 in Milimani CMCC No. E13072 of 2021, pending the hearing and determination of the appeal.
 2. Costs be provided for
2. The application is supported by the affidavit of learned counsel Eddie Omondi sworn on 24th March 2025 and is premised on the following grounds:



1. The Appellants are aggrieved by the judgment delivered on 14th February 2025 and have lodged an appeal against it;
 2. The appeal challenges, in particular, the quantum of damages awarded, which the Appellants contend is excessive;
 3. There is a real apprehension that the Respondents will proceed with execution unless stay is granted, as the 30-day stay granted by the trial court has lapsed;
 4. There is a reasonable apprehension that, in the event the appeal succeeds, the Respondents may not be in a financial position to refund the decretal sum, thereby rendering the appeal nugatory;
 5. The appeal raises arguable issues and is not frivolous, particularly on the contested issue of quantum;
 6. The application has been brought timeously and without inordinate delay, having been filed on 25th March 2025, shortly after the lapse of the initial stay;
 7. It is in the interest of justice that the status quo be preserved pending the hearing and determination of the appeal.
3. The Respondents oppose the application through a replying affidavit sworn by Liveena Atieno Oginga on 08th April 2025 and submissions dated 16th May 2025. The grounds of opposition are as follows:
1. The application is an abuse of the court process;
 2. The Appellants have approached the Court with unclean hands;
 3. The appeal is not arguable;
 4. The Respondents hold a valid judgment and are entitled to enjoy the fruits thereof without undue delay;
 5. The Appellants did not adduce evidence at trial and therefore lack an arguable appeal, as emphasized in *Rono v Lomsons Enterprises (Civil Case 5 of 2019) [2024] KESC 6249 (KLR)*;
 6. The application was filed after the lapse of the 30-day stay granted by the trial court, amounting to unreasonable and unexplained delay;
 7. The Appellants have not demonstrated substantial loss, as required under Order 42 Rule 6(2) (a), and have failed to rebut the evidential burden;
 8. The Appellants have not offered or proposed any security, contrary to the mandatory requirement under Order 42 Rule 6(2)(b);
 9. If the application is allowed, the entire decretal sum should be deposited in court or in an interest-earning joint account of both advocates as a condition.

Issue for determination

4. Flowing from the supporting affidavit and the replying affidavit, the sole issue for determination is whether the application satisfies the threshold for grant of stay of execution pending appeal as set out under Order 42 Rule 6(2) of the Civil Procedure Rules.



5. The principles that govern the grant of stay of execution pending appeal are well settled under Order 42 Rule 6(2) of the Civil Procedure Rules. An applicant must satisfy the Court that:
 - (a) Substantial loss may result unless the order is made;
 - (b) The application has been made without unreasonable delay;
 - (c) Security for the due performance of the decree has been given.
6. These conditions are conjunctive and not disjunctive. The applicant must therefore demonstrate all three limbs:
 - (i) substantial loss,
 - (ii) absence of unreasonable delay, and
 - (iii) provision of security.

Delay

7. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court emphasized:

“Equity aids the vigilant, not the indolent. A party seeking discretionary relief must place before the Court satisfactory reasons to excuse the delay. Delay defeats equity.”
8. The impugned judgment was delivered on 14th February 2025. A stay of execution for thirty (30) days was granted, expiring on 15th March 2025. This application was filed on 25th March 2025, ten (10) days after the expiry of that stay. Although the Applicant has not tendered an explanation for the delay, I am satisfied that the delay is brief and not so inordinate as to warrant a denial of relief sought on that ground alone.

Substantial loss

9. In *Antoine Ndiaye v African Virtual University* [2015] eKLR, the Court of Appeal held that:

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
10. The trial court awarded KES. 13,014,380 less 15% contributory negligence plus costs and interest. The Appellant avers that the Respondents may not be in a financial position to refund the sum if the appeal succeeds and this contention has not been rebutted.
11. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the Court of Appeal stated:

“This Court has said before and it will say it again that while the legal duty is on the Appellant to prove that the Respondent will not be able to repay the decretal sum, the burden shifts to the Respondent to show that he would be in a position to refund the decretal sum if the appeal succeeds and the sum is paid out to him before the appeal is heard.”



12. Similarly, in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR the Court held:

“The evidential burden shifts to the person against whom it is raised to rebut the same; if they do not, judgment shall be entered on the strength of the uncontroverted evidence.”

13. Since as stated hereinabove the Respondents have not provided any evidence to rebut the apprehension of their inability to refund if the appeal succeeds, I find that the requirement of substantial loss is met.

Arguability of the appeal

14. The Appellants’ memorandum of appeal dated 14th March 2025 challenges quantum. This alone suffices to show that the appeal is not frivolous. As held in *Butt v Rent Restriction Tribunal* [1979] eKLR:

“If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.”

Security for due performance

15. In *Gianfranco Manenthi & Another v Africa Merchant Assurance Co. Ltd* [2019] eKLR, the Court stated:

“The law does not envisage a situation where the Court will grant stay of execution without security for the due performance of such decree or order as may ultimately be binding on the applicant.”

16. The principle was reaffirmed in the persuasive decision in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR that:

“The purpose of the security under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. The security is meant to protect the adverse party.”

17. Further, in another persuasive decision in *Thuo v Waliula (Civil Appeal E008 of 2025)* [2025] KESC 17198 (KLR), the Court held:

“A party seeking stay must demonstrate willingness to furnish security in a form that safeguards the rights of the decree-holder.”

18. The Appellants have not offered any security thereby failing to meet one of the mandatory requirement for stay of execution pending appeal but have demonstrated substantial loss and they did file this application without delay.

19. The Court notes that liability was apportioned on a consent basis at 85:15 in favour of the Plaintiff. The judgment sum is not nominal. In the circumstances, the Court must balance the right of the decree-holder to enjoy the fruits of judgment and the right of the Appellant to pursue an appeal that may be rendered nugatory.

20. In the result, the Notice of Motion dated 24th March 2025 is allowed on the following orders:



1. There shall be a stay of execution of the judgment delivered on 14th February 2025 in Milimani CMCC No. E13072 of 2021 pending the hearing and determination of the appeal on condition that:
 - i. The Appellant shall pay KES. 1,000,000 to the Respondents through their advocates
 - ii. The Appellant shall deposit KES. 4,000,000 into court
2. Costs of the application shall abide the outcome of the appeal
3. Mention before the Deputy Registrar on 01st July 2025 to confirm the filing and the service of the record of appeal

DELIVERED AT NAIROBI THIS 22nd DAY OF May 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ruth

For Appellants - Mr. Mwaniki for Humphrey & Co. LLP Advocates

For Respondent - Mr. Muchoki for Onyango & Aywa Advocates

