



REPUBLIC OF KENYA



Ngugi v Wanjiru (Civil Appeal E027 of 2025) [2025] KEHC 6340 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6340 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E027 OF 2025
FN MUCHEMI, J
MAY 15, 2025**

BETWEEN

MARY NJERI NGUGI APPELLANT

AND

JAMES KURIA WANJIRU RESPONDENT

RULING

Brief Facts

1. The application dated 24th February 2025 seeks for orders of stay of execution against the judgment in Thika CMCC No. 97 of 2018 delivered on 29th January 2025 pending the hearing and determination of the appeal.
2. The respondent opposed the application through a Replying Affidavit dated 17th March 2025.

Applicant's Case

3. The applicant states that the ruling in Thika CMCC No. 97 of 2018 was delivered on 29th January 2025 in respect of two applications dated 15th December 2024 and 30th June 2024. The court below allowed the application dated 30th July 2024 and directed that the applicant pay Kshs. 200,000/- per month on the 30th day of every month beginning the month of February 2025. The trial court found that the application dated 15th December 2024 lacked merit and dismissed the same. Being aggrieved with the said ruling, the applicant lodged an appeal which she says has high chances of success.
4. The applicant states that unless stay of execution is granted the respondent will be at liberty to execute the said orders rendering the current application and appeal nugatory.



The Respondent's Case

5. The respondent states that the application lacks merit and has been brought in bad faith in order to curtail him from realizing the fruits of his judgment. The respondent avers that the applicant has not demonstrated any substantial loss incurred by herself if the orders sought are not granted. The respondent argues that the greater prejudice shall be visited upon himself by the escalating interest on the outstanding principal award and costs noting that the judgment in the trial court was delivered on 20th July 2022.
6. The respondent further argues that the applicant has failed to show that the appeal has any prospects of success as the substantive appeal namely Civil Appeal No. 127 of 2023 was dismissed with costs by the current court amidst the applicant's failure and refusal to comply with conditions set by the court. The respondent states that the applicant's insurer Invesco Assurance Co. Ltd is not party to the primary suit as there is no contract between the decree holder and the applicant's insurer and thus no order can be issued and enforced against the said insurer in that suit. Thus the grounds of appeal had no legal foundation and this appeal is a waste of the court's time.
7. The respondent states that the applicant has not demonstrated that he shall not suffer prejudice by being deprived the fruits of his hard earned judgment in the primary suit before the lower court and in the appeal. It was further argued that the applicant has not offered any security and she earlier declined to comply with the court's orders in Civil Appeal No. 127 of 2023 on payment of half the decretal award to him and the other half into a joint interest earning account in the names of the advocates for the parties.
8. The respondent avers that the applicant has not demonstrated that there is any imminent risk of execution and indeed any attempt by himself thus there is nothing to warrant the issuance of the orders of stay of execution that the applicant seeks.
9. The respondent states that the applicant has not shown any document to demonstrate that she has applied for certified copies of the proceedings and the impugned ruling yet those documents are critical for the compilation of the Record of Appeal. The respondent argues that the applicant intends to obtain stay pending appeal so as to punish him by going to sleep on the said orders with no real intention of prosecuting the said appeal as she previously did in Civil Appeal No. 127 of 2023.
10. The respondent avers that he is a man of sufficient means duly engaged as a business man hence adequate financial capacity to settle any amount held to be due to him in the unlikely event the applicant's ill advised proposed appeal should succeed.
11. The respondent states that he shall be prejudiced in the event the orders sought are granted and that his pursuit of redress has been long and arduous since the filing of the principle suit on 16th February 2018. The expenses incurred in filing and prosecuting the matter as well as the attendances of the hearings were long and perilous endeavors to prosecute the matter inflicted a heavy toll on him that cannot be compensated.
12. Parties disposed of the application by filing written submissions.

The Applicant's Submissions.

13. The applicant relies on Order 42 Rule 6(2) of the *Civil Procedure Rules* and the case of *Bhutt vs Rent Restriction Tribunal* [1982] KLR 417 and submits that the purpose of an application for stay of execution 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.



14. The applicant submits that the instant application was filed timeously as the ruling was delivered on 29th January 2025 whereas the memorandum of appeal and the instant application were filed on 14th February 2025 and 25th February 2025.
15. The applicant relies on the cases of *Tropical Commodities Suppliers Ltd & Others vs International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 and *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR and submits that she is an elderly lady of 78 years old with no source of income or means to pay the judgment sum thus exposing her to possibility of civil arrest in execution thereof. The applicant further submits that she has a history of difficulty in breathing associated with lower limb numbness which was evidenced at the trial court. In the circumstances, she will suffer substantial loss if the court allows the respondent to execute against her in any form or manner. The applicant argues that any form of execution against her will be an imminent threat to her life and health, which loss will irreparably affect or negate the very essential core of her as a party in the appeal.
16. The applicant relies on the case of *Century Oil Trading Company Ltd vs Kenya Shell Limited* Nairobi (*supra*) and submits that although the respondent opposed the application, he never filed any affidavit of means to prove that if he is paid the decretal sum and the appeal is successful, he will be in a position to refund the decretal amount.
17. Relying on the case of *Mataa & Another vs Rono & another* (Civil Appeal E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024), the applicant submits that the current application does not fall within the purview of Order 42 Rule 6 of the *Civil Procedure Rules* as to warrant payment of adequate security for costs as she is not appealing the judgment of the trial court from which the judgment debt arose but rather seeks to appeal the ruling of the trial court.

The Respondent's Submissions

18. The respondent refers to the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR and submits that execution is a lawful process. The respondent reiterates the contents of his affidavit and further submits that the applicant is trying to hoodwink the court by feigning non-existent illness and untruthfully purporting to be a person of straw. The respondent argues that the applicant in her application dated 30th July 2024 affirmed to pay him an instalment of Kshs. 200,000/- per month until payment in full. Furthermore, the applicant is a successful farmer and she is also running a thriving matatu business. Her financial capability is evident in her capacity to hire and instruct counsel to wage and sustain legal battles in the instant court and in the lower court. The respondent relies on the case of *Kenya Shell Limited vs Benjamin Karuga Kibiru & Another* [1986] KECA 94 (KLR) and urges the court to dismiss the current application.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

19. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to grant orders for stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-
 1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed



from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

2. 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 1st 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.
20. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
21. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
22. The applicant in her affidavit argues that she stands to suffer substantial loss as the respondent shall proceed to execute the decree.
23. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show that the intended execution shall irreparably affect her or will alter the status quo to her detriment therefore rendering the appeal nugatory. In the instant case, the applicant has not shown how she stands to suffer substantial loss. The applicant has just mentioned that should the respondent proceed with the execution, the instant proceedings and as such, the appeal shall be rendered nugatory and an exercise in futility. It is only in her submissions that the applicant states that the respondent will not be in a financial position to pay back the decretal sum if the appeal succeeds. Thus, it is my considered view that the applicant has not demonstrated the substantial loss she stands to suffer.
24. The court notes that the applicant had approached the court below on payment of the decretal amount in installments and was allowed to pay KSh.200,000/= every calendar month. She has defaulted on the orders of the court and has now filed an appeal. The orders of the court in offsetting the decree in installments were fair in that the decretal amount is over KSh2,000,000/=. Judgment having been entered in favour of the respondent, the applicant is obligated to satisfy the decretal amount and in



default, execution must follow. I refer to the orders for payment in installments because this application for stay has barely demonstrated that the applicant is likely to suffer substantial loss.

25. I reach a conclusion that substantial loss has not been shown in this application.

Has the application has been made without unreasonable delay.

26. The ruling was delivered on 29th January 2025 and the applicant filed the instant application on 24th February 2025. Thus the application has been filed timeously.

Security of costs.

27. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

28. Evidently, the issue of security is discretionary and it is upon the court to determine it as well as the terms applicable. The applicant stated that since she is not appealing on the main decree, but from a ruling of the lower court on the payment of the decretal sum, she ought to be exempted from furnishing security.

29. Additionally, grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicant’s unfettered right to file an appeal to fully ventilate her grievances. This was well stated in the case of *M/s Porteit Maternity vs James Karanga Kabia* Civil Appeal No. 63 of 1997 where the court held:-

That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.

30. Bearing in mind the said balance of interests of both parties, and considering the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.

31. Accordingly, the application dated 24th February 2025 lacks merit and is hereby dismissed with costs to the respondent.

32. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 15TH DAY OF MAY 2025.

F. MUCHEMI

JUDGE

