



**Thiongo & another v Mukhwana & another (Suing as Administrators of the Estate of Samuel Ashumu Omulama - Deceased) (Civil Appeal E123 of 2024) [2025] KEHC 6411 (KLR) (16 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6411 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E123 OF 2024  
S MBUNGI, J  
MAY 16, 2025**

**BETWEEN**

**MONICAH MUTHONI THIONGO ..... 1<sup>ST</sup> APPELLANT**

**ANTHONY MWANGI NJERI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RABECA MUKHWANA ..... 1<sup>ST</sup> RESPONDENT**

**JACOB LITUNYA OMULAMA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF SAMUEL ASHUMU  
OMULAMA - DECEASED**

*(Rabeca Mukhwana & Jacob Litunya Omulama (Suing as administrators of the Estate of Samuel Ashumu Omulama (deceased)-----repondent)*

**RULING**

1. The Appellant/Applicant herein, filed the application dated 8<sup>th</sup> July, 2024, seeking the following orders: -
  - a. That this Honourable Court be pleased to stay the execution of decree in Kakamega CMCC NO. E282 OF 2021 Between Rabeca Mukhwana & Jacob Litunya Omulama (Suing as administrators of the Estate of Samuel Ashumu Omulama Cedeaced -vs- Monicah Muthoni Thiong'o & Another be and is hereby stayed pending the hearing and determination of this appeal herein.
  - b. The costs of this application are provided for.



2. The application is supported by the ground on the face of the said application and the supporting affidavit of the Applicant dated the same date as the application.
3. In his supporting affidavit, he avers that he was aware of the judgment delivered against him on 12<sup>th</sup> June, 2024 .
4. The Applicant avers that if the awarded sum on 2,091,160.00/= is paid to the respondent it may be possible to recover it is the Appeal succeeds thus rendering the appeal nugatory.
5. That the Applicant is ready as the insurers of the motor vehicle in question to provide a bank guarantee to guarantee the due performance of the decree.
6. The Respondents opposed the application and filed a replying affidavit.
7. The Respondents are amenable to the stay of execution being granted if the applicant deposits the balance of the decretal amount into a joint interest earning bank account in the names of the advocates of the parties.
8. I have looked at the application, supporting affidavit and submissions filed by the applicant. I have also looked at the replying affidavit filed by the respondent. The main issue for determination is whether the application is merited.

**Analysis and Determination.**

9. The law governing the grant of orders for a stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules, which stipulates as follows: -
  1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 the application being made, to consider such application and to make such order thereon as may to it seems just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is referred may apply to the appellate court to have such order set aside.
  2. No order for a stay of execution shall be made under sub-rule (1) unless—
  3.
    - (a) 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.
10. The above provision requires the Applicant seeking orders for a stay of execution to establish that he has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted, and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for a stay of execution pending appeal must be made without unreasonable delay.
11. The three conditions to be fulfilled can therefore be summarized as follows;
  - a. That substantial loss may result to the applicant unless the order is made.



- b. Application has been made without unreasonable delay.
  - c. Security as the court orders for the due performance.
12. The Court of Appeal in *Butt Vs Rent Restriction Tribunal* [1979] stated what ought to be considered in determining whether to grant or refuse a stay of execution pending appeal. The court said that: -
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse
13. The first condition that the Applicant should meet is if he will suffer substantial loss if the stay orders are not granted.
14. On what constituted substantial loss, it was explained in the case of *James Wangalwa & Another v 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.
15. The second consideration is whether the application was filed without unreasonable delay.
16. The court in *Jaber Mohsen Ali & Another vs. Priscillah Boit& Another* E&L No. 200 of 2012[2014] eKLR was of the view that unreasonable delay depends on the circumstances of the case. The court stated:
- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir, Eldoret* E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate



the land. I note that the judgment was delivered on 23<sup>rd</sup> July 2024. The memorandum of appeal was filed on 29<sup>th</sup> July 2024 which was less than a week after the judgment was entered.

17. The appeal was filed on 4<sup>th</sup> July, 2024 and the application was filed on 19<sup>th</sup> July, 2024 while the judgment was delivered on 12<sup>th</sup> June, 2024 almost a difference of one month. This court finds that the appeal and this application for a stay of execution have been filed without undue delay.
18. The last consideration is on the security. In *Focin Motorcycle Co. Limited vs Ann Wambui Wangui & Another* (2018) eKLR the court stated that:

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground.”
19. Security is discretionary and it is upon the court to determine the same. In this case, the applicant is willing to provide a bank guarantee to guarantee the due performance of the decree.
20. The respondent wishes the applicant to deposit the balance as a security for the due performance of the decree.
21. It would only be fair that the applicant deposit a reasonable amount of the decretal sum.
22. Considering all relevant factors and in order not to render the intended appeal illusory, and since, based on the grounds of appeal, the same is also against the quantum awarded, I do grant a stay of execution of the decree herein on condition that;
  - a. The Appellant/Applicant does deposit a sum of Kenya shillings three hundred thousand (Kshs. 700,000/=), as security for the performance of the decree in a joint interest earning account in the names of the Advocates of the parties.
  - b. This condition is to be met within 90 days from the date of this ruling in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
  - c. The costs of this Application will be in the cause.
  - d. Mention on 11.9.2025 for directions on the hearing of the appeal.
  - e. It is so ordered.
  - f. Right of Appeal 30 days.

**DATED, SIGNED and DELIVERED in open court at KAKAMEGA this 16<sup>th</sup> Day of May, 2025**

**S.N MBUNGI**

**JUDGE**

