



REPUBLIC OF KENYA



KENYA LAW
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**Uap Insurance Co Ltd/Old Mutual Group v Nkatha (Civil Appeal
E344 of 2024) [2025] KEHC 5967 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5967 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E344 OF 2024**

HM NYAGA, J

MAY 8, 2025

BETWEEN

UAP INSURANCE CO LTD/OLD MUTUAL GROUP APPELLANT

AND

JANE NKATHA RESPONDENT

RULING

1. The application for determination is the application dated 11th December, 2024, in which the Appellant/applicant seeks, the following orders :-
 - a. Spent
 - b. Spent
 - c. That this court deserve a stay of execution of condition of the ruling dated 26th November, 2024 in Meru CMC NO. E090 of 2023, pending the hearing and determination of the appeal herein.
 - d. That this honourable court be pleased to issue any other order it deems mete and just in the circumstances.
2. The application is founded upon the grounds set out on tis face and is supported by the affidavit of Frankline Nyaga, sworn on the 11th December, 2024.
3. In a nutshell, the applicant avers that the Lower Court in the matter that is the subject of this appeal delivered a ruling on 26th November, 2024, setting aside the proceedings therein. That in doing so, the trial court required the applicant to pay a security of Ksh. 2,571,735/= into court within 30 days, as a pre-condition for enjoying the relief of setting aside the proceedings therein inclusive of the Judgment that was delivered on 30th August, 2024.



4. That by virtue of the said Clause of the ruling, in default of such security, the Judgment was to be reinstated and is capable of execution, yet the proceedings were set aside and the matter had a date to fix a hearing date. That aggrieved by the said ruling the applicant has preferred the current appeal, which is arguable with high chances of success. That unless stay is granted, the applicant will suffer substantial loss as execution will proceed, rendering the appeal nugatory.
5. In response, the respondent filed a replying affidavit sworn on 15th January, 2025.
6. In a nutshell, the respondent avers that indeed, the lower court delivered the ruling in question and that the deposit of the decretal sum was a condition precedent to the setting aside of the proceedings and judgment therein. That it is ill advised to term the orders of the trial court as erroneous and or repugnant. That the applicant failed to deposit the decretal sum and is thus in contempt of the court orders.
7. The respondent points out that the suit in question was a declaratory suit to enforce the compliance of the judgment in the primary suit, which is Meru CMCC No. 141 of 2019. That what the appellant is doing is forum shopping and evading compliance of the Judgment in the primary suit. That litigation has to come to an end and the court ought not to aid a litigant who had come to court with unclean hands. That the dependants of the deceased continue to suffer untold prejudice due to the act of the applicant I not complying with the orders of the lower court.
8. The application was canvassed through written submissions.
9. For the applicant it is to be considered under the provisions of order 42 Rule 6 (2) of the Civil Procedure Rules and it has to show that:-
 - a. The applicant will suffer substantial loss unless the order sought are granted
 - b. The application is made without delay.
 - c. The applicant has given security for the due performance of the decree.
10. On substantial loss, it is submitted that should the execution proceed, the applicant's tools of trade will be attached and sold to 3rd parties, hence it will be difficult to recover them. Cited to buttress this point was the case of Victory Construction Limited – Vs- BM (2019) eKLR.
11. It is also argued that the amount in question is highly disputed and the appeal may end up being an academic exercise cited was *Kenya Union of Clinical Officers- vs- Kirinyaga County Service and Other* (2023) KELRC 416 (KLR).
12. It is further submitted that the application has been brought without undue delay, within the 30 days stay period granted by the trial court.
13. On the question of society, it is submitted that this is not relevant since the order appealed against is an interlocutory Order and not the Judgment.
14. Therefore it is argued, the respondent would only be entitled to throw away costs, which ought not to exceed Ksh. 30,000/= which the applicant is ready and willing to pay.
15. The applicant further submits that it was an error for the trial court to have ordered it to deposit the amount in question since the judgment had been set aside. To buttress this point, the applicant cited *Yoosbir Engineering Corporation -vs- AIA Architect Ltd* (2023) KECA 872 KLR and *Mwale – vs Ali Co. Limited* (2022) KEHC 1120 (KLR).



16. For the respondent, it is submitted that the applicant has failed to comply with the conditions set out under order 42 Rule 6(2) of the *Civil Procedure Rules*; in that find the substantial loss has been demonstrated. Citing the case of *Shem David Mukumbi – vs- Alice Ngila Kilanyo* (2021) eKLR, it is submitted that the overriding objective is to ensure the execution of party's right shall not derogate the right of the other.
17. That while the court is to ensure the appeal is not rendered nugatory. It has also to ensure that the successful party is not impeded from the enjoyment of the fruits of his judgment.
18. It is submitted that it is in that regard that the trial/court gave a condition precedent to the grant of the orders setting aside of the proceedings and judgment and allowed fresh hearing.
19. It is submitted that if the applicant had complied with the trial courts' orders, no substantial loss would have been occasioned. That this would have demonstrated good faith on its part. That this application is a clear demonstration of good faith.
20. Citing the case of *Chege – vs- Gachara* (2024) KEHC 1994(KLR) it is submitted that execution is a lawful process and is not a ground for granting stay of execution.
21. On the question of security, it is submitted, that this has not been provided nor offered by the applicant. That it is not strange for a court to grant a condition precedent to be met by an application such as the present one, cited was the case of *Mwangi – vs- Gitoto and Another* (2024) KEHC 2734 (KLR).
22. On the offer of payment of KSh. 30,000/= as throw away costs, it is admitted that the issue here is not the throw away costs but the decretal sum for which the trial court gave conditions which have not been complied with.
23. The respondent urged the court to dismiss the application. This being an application for stay of execution pending appeal, the court has to consider it under the provisions of Order 42, Rule 5 (2) of the *Civil Procedure Rules*. The said rule provides as follows:-

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- (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 order set aside.
- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (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.



- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with
24. The applicant's argument is that it has appealed against the ruling of the lower court, where it was ordered to deposit the decretal sum in court, as a condition precedent to the setting aside of the Judgment in the suit. The court ordered that in default of such payment, the judgment would be reinstated and the respondent would be at liberty to execute.
 25. The amount was not to be paid, to the respondent, but court, where it would be reachable to the applicant, should the appeal be successful. It is thus not correct to state that the applicant would suffer substantial loss or render the appeal nugatory.
 26. Having said so, perhaps, then at the right time to question whether the trial court erred in principle in ordering the deposit of decretal sum as a condition for setting aside the judgment.
 27. The respondent had obtained a decree in the primary suit, Meru CMC NO. 141 of 2019. Upon conclusion of that suit, the respondent commenced on declaratory suit against the applicant. It sought a declaration that the applicant was bound to satisfy the Judgment and decree in the said primary suit, together with costs. The applicant filed a defence, but on the date of the hearing, it failed to attend and the matter proceeded in its absence.
 28. Subsequently, judgment was entered as sought in the plaint. It is then that the applicant moved the court with the application to set aside and he court made the orders that are the subject of the appeal herein.
 29. The applicant argument is that upon setting aside the judgment the trial court erred when it ordered it to deposit the decretal sum in court.
 30. It is to be noted that the appeal herein arises from the exercise of a discretionary power of the Learned Magistrate Under Order 12 Rule 7 Civil Procedure Rules. IN order to succeed an appeal, it has to be shown that the said court acted in error of law and principle took account of irrelevant conditions, or failed to take account of a relevant consideration on that the decision was plainly wrong (See the decision of The Supreme Court of Kenya in *Apongo Arthur Kibira – Vs- Independent Electoral and Boundaries Commission and 3 Others* (2019) eKLR)
 31. In *Yoosbin Engineering Corporation -vs- AIA Architect Limited* (Supra), the Court of Appeal dealt with a situation where the Judge had in addition to an order for payment of throw away costs, she also ordered the applicant to deposit the decretal sum. The appellate court found that this was a misdirection and set aside the order to deposit the decretal sum.



32. In the instant case, the learned magistrate only ordered the deposit of the decretal sum in court. In that an error in principle or an order to be interfered with by this court?
33. In my opinion, the trial court was dealing with a regular Judgment and gave a conditional order setting aside the Judgment. It thus follows that the trial court cannot be said to have erred or applied the wrong principles. That order was within its discretion.
34. In *Patel – Vs- East Africa Cargo Handling Services Limited* (1974) EA 75, the court held as follows:-
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There are no limits.
35. Relying on the said authority. I am unable to state that the trial court erred in any way.
36. The submissions that the court should make an award of throw away costs in place of the deposit of the decretal sum would be tantamount to going against what I have stated above. This court ought not to interfere with the discretionary orders of the trial court merely because, it could have made a different order.
37. On the basis of the above, I am unable to state whether the applicant's appeal has a high chance of success or not.
38. As regards, the time of filing of the application, there is no doubt that the application was filed without undue delay. On the question of security, I have dealt with the issues above,
39. For the foregoing reasons, I find that the application is lacking in merits and is dismissed with costs.
40. In the interest of justice, however, I will grant the applicant 60 days to comply with the deposit of the decretal sum in the lower court.

DATED, SIGNED & DELIVERED AT MERU THIS 8TH DAY OF MAY, 2025.

H.M. NYAGA

JUDGE

