



REPUBLIC OF KENYA



Wanjohi v Isaac (Civil Appeal E140 of 2025) [2025] KEHC 6794 (KLR) (26 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E140 OF 2025**

G MUTAI, J

MAY 26, 2025

BETWEEN

MARTHA WAKIURU WANJOHI APPELLANT

AND

BERNARD NYAKUNDI ISAAC RESPONDENT

RULING

1. I have considered the notice of motion application dated 8th May 2025, vide which the appellant/applicant seeks to stay the execution of the judgment of the court below, which was entered in default of defence.
2. The conditions under which the court may grant a stay of execution pending appeal are provided in Order 42 Rule 6 of the Civil Procedure Rules. These are:-
 - a. The application must show that he will suffer a substantial loss unless a stay is granted;
 - b. The application was filed without undue delay; and
 - c. Security for the due performance of the decree that may ultimately be binding has been provided.
3. The application herein was filed within 29 days of the delivery of the impugned ruling. That delay to me is therefore not unreasonable or inordinate.
4. The applicant has offered to deposit the entire decretal sum in court or a joint interest-earning account. To my mind, therefore, the third condition of the conditions stated above has similarly been met.
5. Has the 1st condition been met? The applicant avers that the respondent's means or ability to repay whatever is paid to him is unknown. In my view, once the applicant alleges that the respondent has no means to repay the decretal amount, if the appeal is successful, the burden shifts to the respondent to show that he is in fact in a position to do so. This hasn't been done in this case. For that reason,



the applicant has satisfied the first condition. I am guided by the decision of the Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] KECA 333 (KLR) where it was held that:-

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

6. Since it wasn't shown that the respondent can pay back the decretal amount, I agree with the applicant's counsel that her client may indeed suffer substantial loss. The court defined what constitutes a substantial loss in the case of *James Wangalwa & another v Agnes Cheseto* [2012] KEHC 1094 (KLR). The court stated as follows: -

“ 11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory.”

7. The upshot of the foregoing is that the application filed herein has merit. The same is allowed on condition that the entire decretal sum be deposited in a joint interest-earning account in the names of both parties' counsel within 30 days of the date hereof.
8. I order that in default thereof execution do issue forthwith.
9. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE



In the presence of: -

Ms Rina, for the Respondents;

Ms Muyuka, for the Appellant/Applicant; and

Arthur - Court Assistant.

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