



**Gichuhi v Mauti (Civil Miscellaneous E033 of 2025)  
[2025] KEHC 12208 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12208 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL MISCELLANEOUS E033 OF 2025  
TW CHERERE, J  
JUNE 5, 2025**

**BETWEEN**

**STEPHEN MWANGI GICHUHI ..... APPELLANT**

**AND**

**DOMINIC ABUKI MAUTI ..... RESPONDENT**

**RULING**

1. Before the Court is a Notice of Motion dated 08th May 2025 brought under Order 22 Rule 22, Order 42 Rules 4, 6 and 7, and Order 51 Rules 1 and 3 of the Civil Procedure Rules. The Appellant seeks the following orders:
  1. Leave to appeal out of time against the judgment delivered on 30<sup>th</sup> January 2024 in Milimani CMCC No. E6298 of 2022
  2. Stay of execution of the said judgment pending the hearing and determination of the intended appeal.
2. The application is supported by the affidavit of Dennis Wanyama, learned counsel for the Appellant, sworn on even date. The grounds relied upon are that:
  1. The judgment awarded the Respondent KES 450,000 with costs and interest;
  2. The Appellant is aggrieved and has filed an appeal with arguable grounds;
  3. Instructions to appeal were issued late;
  4. The Appellant will suffer irreparable loss and the appeal rendered nugatory unless stay is granted;
  5. The Appellant is willing to comply with any conditions the Court may impose.



3. The application was duly served. The Respondent, however, did not file any response.
4. Having considered the application in light of the supporting affidavit, the sole issue for determination is whether an order of stay of execution ought to be granted.
5. The guiding provision is Order 42 Rule 6(2) of the Civil Procedure Rules, which states:
  - “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.”
6. From the foregoing, this Court must therefore interrogate the application against the three cumulative requirements namely:i. Absence of unreasonable delayii. Substantial lossiii. Provision of security.
7. The judgment sought to be stayed was delivered on 30<sup>th</sup> January 2024. The present application was filed on 08<sup>th</sup> May 2025, which is over 15 months later. The explanation offered is that the Appellant issued instructions to appeal late, but no affidavit from the Appellant is annexed, nor is there correspondence or other supporting evidence of any follow-up or explanation for the prolonged delay.
8. A party seeking the discretionary orders of the court must act with speed and diligence. Where there is delay, the same must be explained to the satisfaction of the court. In the absence of an acceptable explanation, the discretion of the court cannot be exercised in that party's favour.
9. In the persuasive decision in *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] KEHC 7255 (KLR), the Court held:
  - “When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away.”
10. In the present case, the fifteen-month delay is inordinate and unexplained.
11. Concerning substantial loss, the Court of Appeal in *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* [1986] KLR 410, held:
  - “It is not normal in money decrees for the appeal to be rendered nugatory. The applicant must show other factors which would render the success of the appeal nugatory apart from loss of money... The position of the applicant before and after payment of the decretal amount must be clearly disclosed and demonstrated.”
12. Similarly, while enunciating this, the Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR, the Court of Appeal stated:
  - “The discretionary relief of stay of execution pending appeal is designed to prevent substantial loss to the applicant. It is not enough to merely state that loss will result. The applicant must demonstrate the loss that will result and how that loss will be substantial. Such demonstration must be by way of evidence or credible material.”



13. In the present application, the Appellant merely states, in broad terms, that it will suffer irreparable harm and that the appeal will be rendered nugatory if stay is not granted. However, these assertions are not supported by any factual particulars or evidence. The nature of the loss apprehended is not described, quantified, or linked to any specific hardship that would arise from execution of the decree. As such, the alleged loss remains speculative, vague, and wholly unsubstantiated. Without credible evidence showing that execution would occasion real and irreparable prejudice, beyond the ordinary inconvenience of satisfying a judgment, the Court is not persuaded that substantial loss will result. It is well established that the burden lies with the applicant to prove, not merely allege, that substantial loss is likely to occur.
14. The Appellant states it is “ready to comply with any condition the Court may deem fit,” but has not proposed or offered any form of security.
15. In *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR, the Court of Appeal stated:

“The rules of procedure must be followed. In an application for stay pending appeal, the applicant must show he has met all the three conditions. One of them is to give security. The court cannot grant the order of stay without security for the due performance of the decree.”
16. The requirement for security under Order 42 Rule 6(2)(b) is not merely procedural, it is jurisdictional. The Court cannot grant an order for stay where the applicant has failed to offer or propose any form of security for the due performance of the decree. It is incumbent upon the applicant to make a concrete proposal, not to leave the matter open-ended for the Court to determine on its own motion. In the absence of such an offer, the application is fatally deficient and must fail.

### **Disposition**

17. From the foregoing analysis, it is evident that the notice of motion dated 08<sup>th</sup> May 2025 falls short on all three mandatory limbs of Order 42 Rule 6(2). Consequently, the Court finds no legal or equitable basis upon which to exercise its discretion in favour of the Appellant.
18. Accordingly:
  1. The Notice of Motion dated 08<sup>th</sup> May 2025 lacks merit and it is hereby dismissed with no order for costs
  2. This being a miscellaneous file, it is hereby closed

**DELIVERED AT NAIROBI THIS 05<sup>TH</sup> DAY OF JUNE 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ubah

For Appellants - Mr. Wanyama for Kairu & Mc Court Co. Advocates

For Respondent - Mr. Kiptanui for Waiganjo Wachira & Co. Advocates

