



Karanja v Chesang (Appeal E002 of 2025) [2025] KEHC 8167 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8167 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
APPEAL E002 OF 2025
RN NYAKUNDI, J
JUNE 12, 2025**

BETWEEN

DANIEL KARANJA APPLICANT

AND

MARGARET CHESANG RESPONDENT

RULING

1. What is pending before me is a Notice of Motion Application dated 26th May 2025 where the Applicant is seeking the following orders:
 - a. Spent
 - b. Spent
 - c. This Honourable Court be pleased to stay execution of the judgement and decree issued in Eldoret SCCOMC No. E769 of 2024 on 16/8/2024 pending the hearing and determination of this appeal.
 - d. Spent
 - e. The Honourable Court be pleased to stay proceedings on Eldoret SCCOMC No. E769 of 2024 pending the hearing and determination of this appeal.
 - f. Costs be provided for
2. The Application is premised under sections 1A, 1B and 3A of the Civil Procedures Act, Order 42 of the Civil Procedure Rules, section 38 of the *Small Claims Court Act*, and Rule 30 of the Small Claims Court Rules.
3. The Application is based on the following grounds on the face of it: -



- a. The Respondent herein obtained an ex parte judgement and decree against the appellant in Eldoret SCCOMC No. E769 OF 2024.
 - b. The Respondent had commenced execution of the decree.
 - c. The Respondent was dissatisfied with the said default judgement and filed an application to have the same set aside as well as for leave to defend the claim.
 - d. Vide its ruling delivered on 9/5/2025 the trial court declined to set aside the ex parte default judgement and or grant the appellant leave to defend the claim.
 - e. The appellant has filed an appeal against the trial court's ruling of 9/5/2025, which appeal has high chances of success.
 - f. Unless the orders sought herein are granted, the appeal will be rendered nugatory.
 - g. The Respondent has commenced execution of the decree herein and unless an order for stay of execution is issued, the Appellant stands to suffer irreparable loss and damage.
 - h. It is just, fair and expedient that this application be allowed.
4. The Application is supported by the Annexed Affidavit dated 26th May 2025 sworn by Daniel Karanja, the Applicant herein whose averments are similar and echo the grounds of the application.

Replying Affidavit

Analysis and Determination

5. I have carefully read and considered the Application and the Supporting Affidavit. There is only one issue manifest for determination; Whether this court should grant stay of execution of the Judgment/ Decree dated 16/8/2024 issued in Eldoret SCCOMC No. E769 OF 2024
6. A look at the application calls for the review of the legal framework governing the stay of execution. Stay of Execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 sub rule (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.”
7. A read of the Order 42 Rule 6 of the Civil Procedure Rules provides 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
8. These principles were enunciated in *Butt Vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse 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 own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Undue Delay

9. I take cognizant note that the Respondent herein obtained an ex parte judgement and decree against the appellant in Eldoret SCCOMC No. E769 OF 2024. The Respondent had commenced execution of the decree. The Applicant was dissatisfied with the said default judgement and filed an application to have the same set aside as well as for leave to defend the claim. Vide its ruling delivered on 9/5/2025 the trial court declined to set aside the ex parte default judgement and or grant the appellant leave to defend the claim. The appellant has filed an appeal against the trial court’s ruling of 9/5/2025.
10. As to whether the Application has been filed without undue delay, judgment was entered on 16/8/2024. The Applicant filed an application to have the same set aside as well as leave to defend the claim and the trial court denied to set aside the default judgement vide the ruling dated 9/5/2025. The Applicant filed this Application on 26th May 2025 for stay of execution of the judgement and decree. This is 17 days after the ruling was delivered by the trial court. This court thus finds that the appeal and this application for stay of execution has been filed without undue delay.



Substantial Loss

11. On the issue of substantial loss, Ogolla, J in *Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation)* [2004] 2 EA 331 stated that:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

12. In the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the court expressed itself as hereunder:

“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.”

13. The same position was adopted by Kimaru, J in *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani)* HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

14. In the case of *National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another* (2006) eKLR the Court of Appeal held thus;

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

15. I take note that the Applicant stated that the Respondent has commenced execution of the decree therein and unless an order for stay of execution is issued, he stands to suffer irreparable loss and damage. Guided by the above authorities and in the absence of the requisite proof from the Respondent that she is a person of means, I find that the Appellant has satisfied this court that he will



suffer substantial loss before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.

Security

16. As regards deposit of security, the court observed in the case of *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* [2019] eKLR it was held that: -

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

17. Courts shall always presume validity of the Trial Court Judgment and as such pending hearing and determination of the Appeal, the Respondent judgment cannot be impeached under the guise of seeking stay against execution orders. The Court must similarly consider the overriding objective and balance the interest of the parties to the suit while considering the issue of security to be offered. The law is that where the applicant intends to exercise his undoubted right of appeal, and in the event, that he was eventually to succeed, he should not be faced with a situation in which he would find himself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.
18. I have considered this Appeal and thus in exercise of my discretion having in mind all principles for grant of stay of execution of judgment and decree pending hearing of the Appeal, I find the Application to be of Merit and allow the same on the following terms;
- a. An Order of Stay of execution of the judgment/Decree issued in Eldoret SCCOMC No. E769 of 2024 on 16/8/2024 pending the hearing and determination of this Appeal.
 - b. The Appellant shall file the Record of Appeal within 21 days and have the same served upon the Respondents.



- c. That the Deputy Registrar of the High Court shall ensure that the typed proceedings have been duly processed for purposes of fast tracking the Appeal.
- d. Status Conference on 30th June 2025
- e. Costs shall be in the cause.
- f. It is so ordered

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 12TH JUNE 2025

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R. NYAKUNDI
JUDGE

