



REPUBLIC OF KENYA



KENYA LAW
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**Kiema & another v Ndonye (Civil Appeal E001 of 2025)
[2025] KEHC 8190 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E001 OF 2025
LN MUTENDE, J
JUNE 12, 2025**

BETWEEN

VICTORIA NDUKU KIEMA 1ST APPLICANT

SIMON MAINA 2ND APPLICANT

AND

MOSES MUNYAO NDONYE RESPONDENT

RULING

1. The Applicants approached this court through a Notice of Motion dated 25th February, 2025, seeking orders thus;
 1. Spent.
 2. This honourable court be pleased to grant an order of stay of execution of the judgment delivered on 17th December, 2024, and all consequential orders arising therefrom pending the hearing and determination of this application inter-parties.
 3. This honourable court be pleased to grant an order of stay of execution of the judgment delivered on 17th December, 2024, and all consequential orders arising therefrom pending the hearing and determination of the appeal.
 4. This honourable court be pleased to issue an order allowing the Applicants to deposit the entire decretal sum awarded by the trial court of Kshs.2,893,000/- in a joint interest earning account only as security pending hearing and determination of the appeal Nyahururu HCCA E001 of 2025.
 5. This honourable court be pleased to issue any other order as it may deem just, appropriate and expedient in the interest of justice.



6. Costs of this application be provided for.
2. The application is premised on grounds that the defence case upon being closed, judgment was reserved for delivery on 17th December 2024, and was delivered where the Applicants were held 100% liable, general damages of Kshs.2,500,000/-, special damages of Kshs.93,000/-, future medical expenses Kshs.300,000/- entered plus costs and interest. And being dissatisfied, the Applicants lodged an appeal on 15th January, 2025.
3. The Applicants are apprehensive that in the event the amount is paid to the Respondent, and the High court overturns the judgment of the trial court they may never recover the amount which is very high. And that the appeal raises numerous triable issues and has high chances of success.
4. The Applicants are apprehensive that the Respondent will commence execution proceedings against them to their detriment. That the Applicants are ready, willing and able to deposit the entire decretal sum in a joint interest earning account as security for due performance of the judgment/ decree pending the hearing and determination of the appeal, within the scope of the *Insurance (Motor Vehicles Third Party Risks) Act* as this honourable court may order.
5. The Applicants stand to suffer substantial loss and damage if the orders sought herein are not granted and further that the appeal will be rendered nugatory and that no loss shall be occasioned to the Respondent if the orders sought herein are granted.
6. That the Judgment amount which is the subject matter herein is substantial and should the execution process commence, the Applicants stand to suffer irreparable loss and prejudice as the ability of the Respondent herein to refund the decretal amount is unknown. And that this honourable court has powers to grant the orders sought herein in the interest of justice and fairness.
7. In response thereto, the Respondent dismissed the application as a mere attempt to deny him the fruits of the Judgment. That the Applicants have failed to meet the threshold set under Order 42 Rule 6 for grant of stay of execution pending appeal and that the appeal does not have any chances of success.
8. I have considered the application, affidavits in support and opposition; and rival arguments by the parties.
9. The first issue to be considered is whether there was undue delay in bringing the appeal. The Judgment was delivered on 18th December, 2024, and the application was filed on 2nd February, 2025, 2 months later. The delay cannot be dismissed as disproportionately excessive.
10. On the subject of substantial loss, the loss that may be suffered by the party aggrieved must be one that cannot be repaired, one which is so significant to an extent that it cannot be compensated by damages.
11. In *Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR

“...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. 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.”

12. It is urged that the appeal has high chances of success and if the stay of execution is not granted the Applicant will suffer substantial loss and if money is paid out the Respondent may not refund the same.
13. It's argued by the Applicants that the Respondent has not submitted that he is a man of means such that if execution is levied and the judgment is overturned the same can be recovered. The duty is upon the Respondent to demonstrate that he is not a man of straw such that he will be able to refund the decretal sum, in event the appeal succeeds.
14. In *Stanley Karanja Wainaina & Another v Ridan Ayangi Mutubwa Nairobi HCCA No. 427 of 2015* it was stated that;

“It is not enough for him to merely swear that fact in an affidavit without going further to provide evidence of his liquidity. In my view the Respondent has evidential burden to show that he has the resources since this is a matter that is purely within his knowledge.”

15. On the question of security in *Gianfranco Manenthi & Another v Africa Merchant Co. Ltd (2019) eKLR* the court held that;

“...the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.”

16. This is a case where the Applicants have offered to deposit the entire decretal amount in a joint interest earning account as security for due performance.
17. Counsel for the Respondent however prefers part of the sum being deposited in court.
18. It is apparent that the Applicants are only aggrieved by the findings on quantum. That being the case, the upshot of the above is that the application is allowed. There be stay of execution on condition that the Applicants pay the Respondent Kshs700,000/- within 10 days of today and the balance of the decretal sum be deposited in court. Costs of this application shall be paid by the Applicants.
19. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF JUNE, 2025.

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L.N. MUTENDE

JUDGE

