



**Kitua v Nthiwa & another (Suing as Administrators of the Estate of Alex Munyao Kitua)
(Civil Appeal E499 of 2025) [2025] KEHC 12221 (KLR) (Civ) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E499 OF 2025

TW CHERERE, J

JUNE 5, 2025

BETWEEN

KAVOI KITUA APPELLANT

AND

MERCY NG'UNDU NTHIWA 1ST RESPONDENT

MUENI KITUA 2ND RESPONDENT

SUING AS ADMINISTRATORS OF THE ESTATE OF ALEX MUNYAO KITUA

RULING

1. The Appellant, by a Notice of Motion dated 05th May 2025, seeks the following orders:
 1. Stay of execution of the judgment delivered on 3rd April 2025 in MCCC E5405 of 2022 pending the hearing and determination of this appeal
 2. Costs be provided for.
2. The application is brought under Sections 1A, 1B, 3A, and 79G of the *Civil Procedure Act* and Order 42 Rule 6(2) of the Civil Procedure Rules. It is supported by the affidavit of Moses Barasa, Advocate. The Appellant states that the appeal is arguable, that the Respondents may not be able to refund the decretal sum if the appeal succeeds, and that the Appellant is willing to offer security.
3. The Respondents oppose the application through Grounds of Opposition dated 26th May 2025 wherein it is contended that if the application is allowed, the total decretal sum should be deposited in an interest earning account.



Issues for Determination

4. The present application is anchored on Order 42 Rule 6(2) of the Civil Procedure Rules, which provides:
 - a) “No order for stay of execution shall be made under subrule (1) unless—
 - b) The application has been made without unreasonable delay
 - c) 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.
5. I have considered the application in light of the supporting affidavit and identified the following issues for determination:
 1. Whether the application was filed without unreasonable delay;
 2. Whether the appeal is arguable;
 3. Whether substantial loss may result if stay is not granted;
 4. Whether the Court should exercise its discretion in favour of the Applicant;
 5. What order should be made as to security.

1. Whether the Application Was Filed Without Delay

6. Judgment in MCCC E5405 of 2022 was delivered on 03rd April 2025 and the application was filed on 05th May 2025. The delay is slightly over one month.
7. The delay though unexplained is not inordinate and has not been shown to have occasioned any prejudice to the Respondent. The Court is therefore satisfied that the application was brought timeously within the meaning of Order 42 Rule 6(2)(b) of the Civil Procedure Rules.

2. Whether the Appeal is Arguable

8. In *Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR, the Court of Appeal stated:

“An arguable ground of appeal is not one which must succeed but it should be one which is not frivolous; a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable.”
9. The appeal challenges both liability and quantum. I am satisfied that the appeal raises triable issues and is therefore arguable.

3. Whether Substantial Loss May Result

10. Judgment was entered in favour of the Respondents in the sum of KES 5,360,700. The Appellant expresses apprehension that the Respondents may be unable to refund the decretal sum should the appeal succeed.



11. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the Court of Appeal held:

“Once the applicant expresses a reasonable fear that the respondent would be unable to repay the decretal sum, the evidential burden shifts to the respondent to demonstrate his financial ability.”

12. In the present case, the Appellant has expressed such apprehension, and the Respondents have not rebutted it by any affidavit or financial disclosure. In the circumstances, I am satisfied that the Appellant has demonstrated the risk of substantial loss if the stay is not granted.

4. Security for Due Performance of the Decree

13. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, where it was stated that: _

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

14. Order 42 Rule 6(2)(b) requires that an applicant provide security for the due performance of the decree. The Appellant has expressed willingness to furnish security. The Respondents propose full deposit of the decretal amount. To balance these competing interests, I consider it just to grant a conditional stay.

15. The power to grant stay under Order 42 Rule 6(2) is discretionary. In exercising this discretion, the court must ensure that the appeal is not rendered nugatory while also balancing the Respondent’s right to enjoy the fruits of judgment.

16. In the often-cited case of *Butt v Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal stated:

“The court has to exercise its discretion in a way that will not render the appeal nugatory should it eventually succeed. A stay should be granted where there is no overwhelming hindrance to the appeal”.

17. The grant of stay is a judicial pause, not to defeat judgment, but to preserve the integrity of the appellate process and ensure that justice, when rendered, is not in vain.

18. From the foregoing analysis, I find that the Appellant has met the threshold for stay of execution pending appeal.

19. The application for stay of execution pending appeal is allowed on the following terms:

1. The Appellant shall deposit the sum of KES 2,500,000 in a joint interest-earning account to be opened in the names of counsel for the parties
2. Costs of the application shall abide the outcome of the appeal
3. Mention before the Deputy Registrar on 31st July 2025 to confirm the filing and the service of the record of appeal



DELIVERED AT NAIROBI THIS 05TH DAY OF JUNE 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Appellants - Ms. Ireri for Joe Ngigi & Co. LLP Advocates

For Respondent - Ms. Akasi for Shem Kebong'o & Co. Advocates

