



REPUBLIC OF KENYA



KENYA LAW
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**Nzau & another v Kubai (Civil Appeal E422 of 2025)
[2025] KEHC 12223 (KLR) (Appeals) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12223 (KLR)

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

APPEALS

CIVIL APPEAL E422 OF 2025

TW CHERERE, J

JUNE 5, 2025

BETWEEN

ALFRED MITAU NZAU 1ST APPELLANT

ELITE ACCOUNTING SERVICES LIMITED 2ND APPELLANT

AND

JONAH KILEVU KUBAI RESPONDENT

RULING

1. The Appellants moved this Court by a Notice of Motion dated 28th May 2025 expressed to be brought under Article 159 of *the Constitution*, Section 1A, 1B and 3A and Section 75 of the *Civil Procedure Act*, and Order 43 Rule 1, Order 43 Rule 2, and Order 50 Rules 4 and 6 of the Civil Procedure Rules. They seek the following orders:
 1. That pending the hearing and determination of the intended appeal, this Honourable Court be pleased to grant a stay of execution of the judgment delivered on 21st March 2025 in Milimani CMCC No. E11147 of 2021
 2. That costs of this application be provided for.
2. The application is supported by the affidavit of Eddie Omondi, counsel for the Appellants, sworn on 28th May 2025. It is deposed that judgment was entered in favour of the Respondent in the sum of KES 1,662,965 less 15% contributory negligence, resulting in a net award of KES 1,413,520.25 plus costs and interest. The Appellants state that they have filed an arguable appeal with high prospects of success. They further raise apprehension that the Respondent's whereabouts are unknown and the Respondent lacks the means to refund the decretal sum if the appeal succeeds.



3. The Respondent opposed the application by a replying affidavit sworn on 07th May 2025, contending that the appeal is unmeritorious, and intended to obstruct the fruits of judgment. The Respondent, however, proposes that in the event stay is granted, the decretal sum be deposited in a joint interest-earning account in the name of advocates for both parties.

Analysis and Determination

4. The relevant legal framework on stay of execution is found in Order 42 Rule 6(2) of the Civil Procedure Rules, which provides:

“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.”

4. Having considered the application in light of the affidavits on record, the issues arising for determination are:
 - a) Whether the application was filed without unreasonable delay
 - b) Whether the Appellants have demonstrated substantial loss
 - c) Whether security has been offered.

a) Delay

4. The impugned judgment was delivered on 21st March 2025 and the application was filed on 28th May 2025. The delay of a little over two months though notable, is not inordinate in the circumstances and has not been shown to have occasioned any prejudice to the Respondent. The application was filed within the permissible statutory window for lodging an appeal and prior to the commencement of execution proceedings. In the absence of demonstrable prejudice or undue delay, the Court is satisfied that the application was brought within a reasonable time.

b) Substantial Loss

4. The most prominent ground raised by the Appellants is the apprehension that if the decretal sum is paid to the Respondent, it may not be recovered should the appeal succeed. They state that the Respondent’s whereabouts are unknown and their financial standing is unclear. This apprehension has not been dispelled by the Respondent, who has not provided any affidavit of means or other evidence of capacity to refund the decretal amount.
4. The Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR stated:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a reasonable fear that the 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.”

8. Accordingly, I find that the Appellants have sufficiently demonstrated that they are likely to suffer substantial loss if the decretal sum is paid out and the appeal later succeeds.

c) Security for Due Performance

9. Although the Appellants have not tendered a specific proposal for security, the Respondent has suggested that the entire decretal sum be deposited in an interest-earning joint account in the names of the parties' advocates. It is trite law that the provision of security is not a matter of discretion but a mandatory requirement under Order 42 Rule 6(2)(b) of the Civil Procedure Rules. The Court, however, retains discretion as to the form and quantum of security to be ordered, guided by the circumstances of the case and the need to balance the rights of both parties. In the present matter, liability has already been determined at a ratio of 85:15 against the Appellants. This finding is not under challenge and must therefore inform the measure of security required.
11. In the broader interests of justice, the Respondent is entitled to the protection of a judgment lawfully obtained and the Court must therefore strike a balance between preserving the efficacy of the appeal and safeguarding the Respondent's right to the fruits of the judgment.
11. In view of the admitted apportionment of liability at 85:15 against the Appellants, I find it just and equitable to grant a conditional stay of execution upon deposit of eighty-five percent (85%) of the decretal sum.

Disposition

12. From the foregoing analysis, I make the following orders:
 1. A stay of execution of the judgment delivered on 21st March 2025 in Milimani MCCC No. E11147 of 2021 is hereby granted pending the hearing and determination of the intended appeal
 2. The stay is conditional upon the Appellants depositing 85% of the decretal sum, into a joint interest-earning account in the names of the advocates for both parties
 3. Costs of the application shall abide the outcome of the appeal
 4. Mention before the Deputy Registrar on 31st July 2025 to confirm the filing 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. Mutesi for Humphrey & Co. LLP Advocates

For Respondent - Ms. Nyanchera for Onyango & Oywa Advocates

