



**Paul v Mwangi (Suing as the Legal Administrator of the Estate of Kelvin Mwangi Wanjiku) ((Suing as the Legal Administrator of the Estate of Kelvin Mwangi Wanjiku)) (Civil Appeal E125 of 2024) [2025] KEHC 8385 (KLR) (11 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8385 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E125 OF 2024  
CW GITHUA, J  
JUNE 11, 2025**

**BETWEEN**

**JOSPHAT MWONGELA PAUL ..... APPLICANT**

**AND**

**HANNAH WANJIKU MWANGI ..... RESPONDENT**

**(SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF KELVIN MWANGI WANJIKU)**

**RULING**

1. The appellant, Josephat Mwangela Paul (hereinafter the applicant) moved this court through a Notice of Motion dated 27<sup>th</sup> November 2024 principally seeking orders of stay of execution of the judgement and decree of the lower court in Muranga CMCC No. E223 of 2022 and any consequential orders pending hearing and determination of his appeal.
2. The application is anchored on the grounds stated on its face which are by and large replicated in the depositions made by the applicant in his supporting affidavit sworn on 27<sup>th</sup> November 2024. The applicant contended that he was aggrieved by the trial court's decision on both liability and quantum hence this appeal; that upon expiry of the thirty days stay of execution granted by the trial court, the respondent commenced execution and has obtained warrants of attachment and sale against his motor vehicles registration no. KBV 309A, KDR 476H, KBV 650M as well as other moveable properties which are now on the verge of attachment, alienation and sale.
3. In addition, the applicant asserted that if execution was not stayed, he was likely to suffer substantial loss since it would be difficult to recover the decretal sum from the respondent if his appeal was successful; that therefore, his appeal will be rendered nugatory. Further, the applicant expressed willingness to



- provide security for the performance of the decree in the form of a bank guarantee issued by Family Bank.
4. The applicant also averred that the application was filed timeously and urged the court to allow it claiming that doing so will not occasion any prejudice to the respondent that cannot be compensated by an award of costs.
  5. The application was contested vide a comprehensive and lengthy replying affidavit sworn on 17<sup>th</sup> December 2024 by the respondent, Hannah Wanjiku Mwangi. In summary, the respondent deposed that the application was incompetent; was bad in law and amounted to an abuse of the court process; that the application was only filed after the applicant was served with a proclamation notice, warrants of attachment and sale and was therefore solely aimed at delaying execution and realization of fruits of her judgement; that allowing the application would cause her great prejudice.
  6. The respondent further deposed that the applicant had not demonstrated that he had an arguable appeal which would be rendered nugatory if execution was actualized in the unlikely event that the appeal succeeded. To expound on this averment, the respondent claimed that she was not impecunious as she was self-employed in Nairobi and was undertaking farming activities in Muranga County and was capable of refunding the decretal amount if and when required.
  7. The respondent also challenged the reliability and suitability of the bank guarantee offered as security by the applicant contending that besides the difficulties that would be associated with enforcing bank guarantee, the one offered by the applicant had expired since it was valid for 12 months and it was dated 6<sup>th</sup> July 2023.
  8. It was the respondent's case that the application lacked merit and ought to be dismissed with costs but in the event that the court was inclined to grant the stay orders as sought, they should be granted on condition that the applicant deposited the entire decretal amount in an interest earning account held jointly in the names of counsel on record for both parties.
  9. The application was canvassed orally before me on 25<sup>th</sup> March 2025. Learned counsel Ms. Mwangi argued the application on behalf of the applicant while learned counsel Mr. Mbue Ndegwa represented the respondent. In their submissions, both counsel re-iterated and expounded on the positions taken by their respective clients in support and in opposition to the application as summarised above.
  10. Having considered the application, the affidavits on record as well as the rival submissions made on behalf of the parties, I find that the only issue which arises for my determination is whether the applicant has met the threshold for grant of orders of stay of execution pending disposal of his appeal.
  11. The parameters for grant of stay of execution pending appeal are set out in Order 42 Rule 6 (2) of the Civil Procedure Rules (the Rules) which provides as follows:

“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”.
  12. As held by the Court of Appeal in *Butt V Rent Restriction Tribunal* (1979) eKLR, the decision whether or not to grant stay pending appeal is discretionary but needless to state, this discretion, just



like all other judicial discretions, must be exercised judiciously in accordance with established legal principles and the law. It should not be exercised capriciously or arbitrarily.

13. An applicant will be deserving of grant of orders of stay pending appeal if he demonstrated that sufficient cause existed to justify exercise of the court's discretion in his favour. And sufficient cause is established if all the conditions spelt out in Order 42 Rule 6 (2) of the Rules had been met.
14. Starting with the requirement that the application should be filed without unreasonable delay, the court record reveals that the judgement challenged on appeal was delivered on 2<sup>nd</sup> July 2024. The instant application was filed on 28<sup>th</sup> November 2024, about four months later. Although the applicant did not give any explanation for this delay, a perusal of the court record shows that the application was filed a day after the memorandum of appeal was filed. The record also shows that the appeal was filed out of time but with leave of the court. Considering that the application was filed a day after the appeal was filed, i am satisfied that the application was filed timeously.
15. On the issue of substantial loss, the applicant claimed that the process of execution was underway and if stay was not granted, the decretal amount will be realized by the respondent who allegedly lacked financial ability to refund the same if his appeal was successful and this will render his appeal nugatory.
16. Substantial loss is a relative term which denotes irreparable damage a party was likely to suffer as a consequence of denial of stay and the applicant was forced to pay the decretal amount. In *Kenya Shell Limited V Benjamin Karuga Kibiru & another (1986) eKLR*, the Court of Appeal defined substantial loss as follows;

“.....Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”
17. It is important to note that the fact that the execution process had commenced or was ongoing, as is the case here, does not by itself amount to substantial loss because execution is a lawful process which is authorized and protected by the law. See: *James Wangalwa & another V Agnes Naliaka Cheseto (2012) eKLR*; However, as held in *Kenya Shell Limited V Benjamin Karuga Kibiru & another [Supra]* substantial loss will be established if an applicant demonstrated that if stay was not granted and execution was levied, the appeal will be rendered nugatory owing to the respondents inability to refund the decretal amount.
18. In this case, the applicant has contended that the respondent lacked financial means to refund the decretal amount and this exposed him to substantial loss if the appeal was successful as this will render the appeal nugatory.
19. The law is that once an applicant expressed apprehension that the respondent was incapable of refunding the decretal amount when called upon to do so, the burden of proof shifted to the respondent to demonstrate ability to refund the money if necessary.

See : *National Industrial Credit Bank Ltd V Aquinas Jarius Wasike & Another [2006] eKLR*; *Kenya Posts & Telecommunications Corporation V Paul Gachanga Ndarua (2001) eKLR*
20. The respondent has denied the applicants aforesaid claim and has asserted that she was financially stable and was capable of refunding the decretal sum if she was called upon to do so. She did not however avail any evidence to prove her financial standing or to substantiate her claim that she was engaged in business which included farming.



21. Since the respondent has failed to dislodge the applicant's assertion that if execution was not stayed, he was unlikely to recover the decretal amount if his appeal was successful, I find that the applicant has demonstrated that he was likely to suffer substantial loss if stay was not granted as prayed.
22. . As regards the applicants offer of security, I agree with the respondent that the bank guarantee proposed by the applicant as security for the due performance of the decree in this case was not credible or suitable because as admitted by the applicant's counsel in his submissions, the same had expired and there was no evidence of its renewal.
23. In any event, a reading of Order 42 Rule 6 (2) ( b) of the Rules shows that it is the court which should order the security an applicant should give which would ultimately be binding on the applicant which in the court's view was sufficient to guarantee performance of the decree.
24. The above notwithstanding, i have considered the respondent's assertion that if the application was allowed, she will suffer prejudice as her right to enjoy the fruits of her judgement will be further delayed. That may well be so but justice is a two way street. In as much as the respondent is entitled to immediate enjoyment of the fruits of her judgment, the applicant who was dissatisfied with the trial court's judgment has a statutory and constitutional right to challenge it on appeal and to have that right safeguarded so that the appeal is not rendered nugatory.
25. In determining applications of this nature, the court is called upon to undertake a delicate balance between the competing rights and interests of the parties and arrive at a decision which was fair and just to each of them.
26. Having weighted the interests of the parties in this appeal, I find merit in the instant application and it is hereby allowed on condition that the applicant will deposit the entire decretal amount in an interest earning account held jointly by counsel on record for both parties within the next 45 days failing which the stay orders will automatically lapse.
27. Lastly, costs as a general rule follow the event and are at the discretion of the court. I award costs of the application to the respondent to compensate her for the inconvenience she was likely to suffer given the outcome of this application considering that she had already commenced execution when the application was filed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANGA THIS 11<sup>TH</sup> DAY OF JUNE 2025.**

**HON. C. W. GITHUA**

**JUDGE**

In the Presence of:

Mbue Ngegwa for the Respondent

Ms Nanjira for the Applicant

Ms. Susan Waiganjo, Court Assistant

