



**ASV v FAH (Civil Appeal E120 of 2024)
[2025] KEHC 9971 (KLR) (Family) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E120 OF 2024
PM NYAUNDI, J
JULY 10, 2025**

BETWEEN

ASV APPLICANT

AND

FAH RESPONDENT

RULING

1. This is a ruling on an application dated 19th March 2025 for stay of execution of the judgment of Senior Resident Kadhi at Nairobi (Hon. M.G. Randu) in Nairobi Matrimonial case No. E001 OF 2024 delivered on 27th August 2024.
2. The application dated 19th March 2025 seeks the following orders;
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this appeal, there be a stay of execution of the judgment, orders and decree by the Honourable Kadhi Garama Randu delivered on 27th August 2024 and Ruling delivered on 13th February 2024 in the Kadhi's Court Divorce Cause No. E001 of 2024 before the parties herein.
 - d. That the Appellant do have costs of this application or costs be in the cause.
3. The applicant avers that the Kadhis court delivered a judgment on 27th August 2024. He is dissatisfied with the whole judgment and has filed an appeal dated 25th September 2024. That a decree of Kshs. 2,200,000 was passed against him and was further ordered to return a jewelry box containing a golden ring, golden bracelets, necklace, wrist watches, earrings and pendant and that Fazali Investments



Limited, Mercedes Benz KDC 786 S and motor vehicle KDH 786 B having been considered as matrimonial properties should be put in a pool to be shared in the ratio 50:50 respectively including liabilities after audit of the company's financial status. That he released Kshs. 250,000 and the jewelry box as part of the settlement of the decree. Thereafter, he lodged an application dated 23rd September 2024 seeking to be indulged to settle the decretal amount through a monthly instalment of Kshs. 50,000 due to his financial situation. On 13th February 2025, the court issued a ruling against him. He argued that he is not in a position to pay a lump sum of Kshs. 2,000,000.

4. He argued that his appeal has high chances to succeed because the trial court went against the court of appeal decision in determining cruelty, went against Sharia Law in determining that Khula was not sought and further went against *the Constitution* of Kenya which highlights on equality of men and women. That he stands to suffer substantial loss as he will be unable to recover the amount paid to the applicant and also that the appeal will be rendered nugatory. Further, that the application was made without delay. He argues that he is willing to provide security and is ready to abide by the terms and conditions that this court may issue.

Response

5. The Respondent opposed the Application by relying on the Replying Affidavit sworn on 3rd April 2025. She averred that the applicant's application is meant to deny her the fruits of the judgment of the trial court. She argued that the judgment of the trial court is sounded and well considered and thought of. She averred that the applicant is in control and possession of the matrimonial properties which are held jointly and he enjoys benefits from Fazali Investments Ltd. She argued that the applicant is in breach of the orders of the trial court that the properties should be shared in the ratio of 50:50 and has not filed a comprehensive audit of companies as ordered by the court. She averred that the applicant should be ordered to deposit security of Kshs. 5,000,000. That the applicant's application does not raise serious issues of law and will not suffer any irreparable harm if the application is not allowed.

Applicant's Submissions.

6. The applicant relies on Order 42 Rule 6 (2) of the Civil Procedure Rules and the case of Kabugua v Mwatata *& another (Civil Appeal 1 of 2021)* [2023] KEELC 15715 (KLR) [2021] and submits that he has met the threshold of granting of stay of execution orders.
7. On the issue of substantial loss, the applicant contends that he stands to suffer substantial loss of Kshs. 1,950,000 if stay of execution is not granted. To support his argument, the applicant relies on the case of Antoine Ndiaye v African Virtual University [2015] eKLR, Kenya Shell Limited v Benjamin Karuga & Another [1986]eKLR, James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR and Felix Kipchoge Limo Langat v Robinson Kiplangat Tuwei [2018] eKLR and submits that he has demonstrated that he stands to suffer irreparable and substantial loss.
8. The applicant relies on the case of Nicholas Stephen Okaka & another v Alfred Waga Wesonga [2021] eKLR and contends that the respondent has not demonstrated that she will be able to reimburse the amount deposited should the appeal succeed.
9. The applicant has proposed to provide security by depositing Kshs. 2,000,000 of the decretal sum in court as a condition for the grant of the orders. To support his contentions, the applicant relies on the cases of Felix Kipchoge Limo Langat v Robinson Kiplangat Tuwei [2018] eKLR, Nicholas Stephen Okaka & another v Alfred Waga Wesonga [2021] eKLR and Kangethe & another & Lwegando (Civil Appeal E253 of 2024) [2025] KEHC 1639 (KLR) and urges the court to use its discretion and allow him to deposit Kshs. 2,000,000 as security.



10. He argued that the appeal was filed without delay; judgment was delivered on 13th February 2025 while the appeal was filed on 19th March 2025.
11. Relying on the decision of *Regnoil Kenya Limited v Winfred Njeri Karanja*, Civil Appeal No. 329 of 2018, the applicant contends that his appeal raises triable issues that warrant an appeal.

Respondent's Submissions.

12. The Respondent submitted that the applicant has not demonstrated that he will suffer substantial loss. She sought to rely on the decision of *Kenya Shell Limited v Benjamin Karuga & Another* [1986]eKLR, *Mutua Kilonzo v Kioko David Machakos* Civil Appeal No. 62 of 2018.
13. On security of costs, she submitted that the court has discretion to order one to deposit security. She relied on the decisions of *Jayesh Hasmukh Shah v Narin Haira & Another* [2015] Eklr and *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* [2014] eKLR. Relying on the decision of *Njenga v Njeri & 2 others* (Civil Appeal E125 of 2023) [2323] KEHC 23991 (KLR), she further submitted that furnishing security is not enough; that security should be valid and enforceable. She argued that the applicant is a man of means and therefore the allegation that he is not financially stable is a lie.

Analysis And Determination.

14. I have considered the application before me, the Reply filed by the Respondent as well as the written submissions filed by each party.
15. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
 1. No appeal or second appeal shall operate as a stay of execution or proceedings 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 orders 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 1st 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.
16. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; andSUBPARA 3.



The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

17. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

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.

18. In the same breadth, in the case of Kenya Hotel Properties Limited v Willesden Investments Limited [2007] eKLR, the Court of Appeal stated that:

...It does appear to us that in considering the question as to whether the success of the intended appeal would be rendered nugatory were we to refuse the application for stay, the main requirement is to weigh the position of the parties before the court with the background of ensuring justice in mind...

19. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties. In RWW v EKW (2019) eKLR, the court of Appeal had this to say in this regard:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

20. The Applicant has further argued that it has an arguable Appeal with high chances of success. I have perused the memorandum of Appeal. The issues in my view are arguable. This is not to necessarily say that the Appeal will succeed, all that is required of this court is to ascertain that there is an arguable Appeal on record. (Ref: Bake N Brite Nairobi Ltd v Daniel Mutisya Mwalonzi (2015) eKLR.

21. I consider that the delay in presenting the application is not inordinate.

22. On the issue of security, the applicant ought to satisfy the condition of security. In the persuasive decision of Gianfranco Manenthi & another v Africa merchant Assurance Co. Ltd [2019] eKLR the court observed:-

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.... .

23. From the above decision, the issue of security is discretionary and it is upon the court to determine the same. It is worth noting that the right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment. Consequently, the Appellant must provide security so that the Respondent can easily have access to the money in the event that the Appeal fails. The applicant has indicated that he has approached Diamond Trust Bank to give him security. He is willing to provide security of Kshs. 2,000,000.
24. In the end, the Application is allowed, I hereby proceed to make the following orders:
- a. Pending the hearing and determination of the Appeal herein there shall be a stay of execution of the Judgment and decree of Nairobi Kadhi Divorce Cause No. E001 of 2024.
 - b. The stay is conditional upon the Appellant depositing the sum of Kshs 2 million in court within 30 days.
 - c. The Appellant to prepare and serve record of Appeal within 60 days
 - d. In accordance with Section 65 (1)(c) of the Civil Procedure Act the Chief Kadhi will nominate an assessor to sit with the Court at the hearing of the Appeal
 - e. Mention before the Deputy Registrar on 7th October 2025 to confirm compliance
 - f. Each party to meet their own costs.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 10th DAY OF JULY, 2025.

. M NYAUNDI

HIGH COURT JUDGE

In the presence of:

Ms. Akinyi holding brief Mr. Yuony for Respondent

Salim Valli for Appellant/Applicant

Fardosa Court Assistant

