



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiruthi v Kiruthi (Civil Appeal E282 of 2024)  
[2025] KEHC 10274 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10274 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E282 OF 2024**

**TW OUYA, J  
JULY 17, 2025**

**BETWEEN**

**JOSEPH GITHINJI KIRUTHI ..... APPELLANT**

**AND**

**FREDRICK KINYANJUI KIRUTHI ..... RESPONDENT**

**RULING**

1. The Notice of Motion Application before the Court dated 18<sup>th</sup> October 2024 is premised under the provisions of Order 51, Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules as read together with Sections 1A and 3A of the Civil Procedure Act and Article 159(2)(d) of the Constitution of Kenya. The Applicant craves the following Orders as against the Respondent:
  - i. Spent.
  - ii. That there be a stay of the Ruling of the Honourable Y.M. Barasa (PM) delivered on 11<sup>th</sup> October 2024 in Thika Miscellaneous Civil Case No. E008 of 2024 pending the hearing and determination of the application inter partes.
  - iii. That there be a stay of the Ruling of the Honourable Y.M. Barasa (PM) delivered on 11<sup>th</sup> October 2024 in Thika Miscellaneous Civil Case No. E008 of 2024 pending the hearing and determination of the appeal.
2. The suit is supported by the grounds set out at the foot thereof as well in the Affidavit sworn by Joseph Githinji Kiruthi (the Applicant herein) on 18<sup>th</sup> October 2024.
3. The Applicant, being aggrieved with the decision of the trial Court which awarded costs to the Respondent in respect of the Applicant's withdrawn suit, filed for review/setting aside/vacation of the same which Application was dismissed by the Court vide a ruling dated 11<sup>th</sup> October 2024.



4. It is the Applicant's case that his appeal against the decision of the trial Court rendered on 11<sup>th</sup> October 2024 will be rendered nugatory unless this Court grants a stay of execution as sought. While expressing his willingness to deposit such security as may be directed by the Court, the Applicant urged the Court to take to account that he is impecunious, therefore, any security ought to be lenient.
5. The Respondent resisted the subject suit through his Relying Affidavit sworn on 21<sup>st</sup> November 2024. He affirmed that the Applicant is his sibling/biological brother who filed a scandalous suit while being fully involved in a succession matter with the Respondent. That the Applicant subsequently withdrew his suit; however, the Respondent had incurred costs defending the same; hence, is entitled to costs as held by the Court.
6. The Respondent subscribed to the position that the award of costs falls within the discretion of the Court. Therefore, it does not follow that a party seeking to withdraw a suit with no Orders as to costs is entitled automatically to the grant of such Orders.
7. It was the Respondent's further contention that the instant suit is meant to prevent him from enjoying the fruits of a successful judgment. Furthermore, execution is a legal process and the Applicant failed to demonstrate that he stands to suffer substantial loss unless a stay of execution is granted.
8. The application was canvassed by way of written submissions. The Applicant filed written submissions dated 18<sup>th</sup> November 2024 through his counsel and identified a single issue for resolution by the Court, namely: Whether there should be a stay of the Ruling of the Honourable Y.M. Barasa (PM) in Thika Miscellaneous Civil Case No. E008 of 2024 pending the hearing and determination of the application and appeal.
9. It was the Applicant's submission that unless this Court grants a stay of execution of the trial Court's decision dated 11<sup>th</sup> October 2024, the family relationship between the parties herein, who are siblings, will break down irretrievably.
10. The Respondent filed written submissions dated 21<sup>st</sup> November 2024 through his Counsel and isolated the following two (2) issues for determination by the Court; Whether the prayers sought for stay of execution should be granted and Costs of the application.
11. Relying on the reasoning of the Court in the cases of *Kamaliza Security Guards v Construction (K)Limited* [2001] eKLR; *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR; and, *RWW v EKW* (2019) eKLR, the Respondent submitted that the Applicant has failed to satisfy the requirements for the grant of an Order of stay of execution.
12. Furthermore, the Order which granted the Respondent costs was issued on 26<sup>th</sup> March 2024. However, the Applicant made no effort to satisfy the same for a period of eight (8) months whereupon he challenged the trial Court's decision dated 11<sup>th</sup> October 2024.
13. On the issue of costs, it was submitted that costs follow the event as held by the Court in the cases of *DGM v EWG* [2021] eKLR; and *Party of Independent Candidates & Another v Mutula Kilonzo & 2 Others* (2013) eKLR.
14. The Court has carefully inspected the pleadings and rival submissions filed by the parties herein and identified the gist of the appeal to be whether the Trial Court exercised its discretion wrongfully in awarding costs to the Respondent in respect of the Applicant's withdrawn suit.
16. The Applicant relied on the familial relationship with the Respondent to buttress the position that the trial Court misdirected itself by awarding costs to the Respondent. For his part, the Respondent



upheld the decision granting him costs on the Applicant's withdrawn suit as demonstrating a sound exercise of the trial Court's discretion.

17. Order 42 Rule 6 of the *Civil Procedure Rules*, enjoins the Court to consider the following factors with respect to applications for stay of execution:

- “(a) The application is brought without undue delay;
- (b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- (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.”

18. It is trite that while the Courts are invested with the discretion to grant the relief of stay of execution, such discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. See the holding in *Antoine Ndiaye v African Virtual University* [2015] KEHC 6783 (KLR).

19. The Court is satisfied that the subject application was brought following undue delay, having been filed some eight (8) months following the issuance of the decision sought to be stayed. No reason was proffered by the Applicant for the delay in filing the subject cause. The Court will move to evaluate whether the Applicant has demonstrated that he stands to suffer substantial loss unless stay of execution pending appeal is granted.

20. In the case of *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR), the Court addressed itself on the issue of stay of execution in the following terms:

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459.”

20. It is trite that a party seeking stay of execution pending appeal, such as the Applicant herein, is required to demonstrate that he stands to suffer “substantial loss” unless such stay is allowed. In the case of *RWW v EKW* [2019] KEHC 6523 (KLR), the Court held as follows:

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

21. It bears emphasis that execution itself is a lawful process. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR), the Court declared as follows:

“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.”

22. In the subject suit, the Applicant subscribed to the position that the filial relationship between the parties herein is likely to break down irretrievably unless a stay of execution pending appeal is granted. The Respondent, for his part, insisted that he is entitled to costs on account of the Applicant’s withdrawn suit as he expended resources in defending the same. The possibility of the breakdown of the relationship between the parties herein who are siblings, while unwelcome, does not amount to “substantial loss” as contemplated under Order 42 Rule 6 of the Civil Procedure Rules.
23. Having carefully evaluated the entirety of the evidence supplied by the parties to the suit, the Court holds and finds that the Applicant has not proven that he stands to suffer substantial loss in the event a stay of execution pending appeal is not granted as sought.
24. The Applicant submitted that he is impecunious and prayed for an order requiring that he provide lenient security, commensurate with his current financial position.
25. However, having held that the Applicant has failed to demonstrate that he stands to suffer substantial loss if a stay of execution pending appeal is not granted, the Court is not persuaded to direct the Applicant to furnish security for the due performance of the orders of the trial Court.
26. The Court shall proceed to make the final Order that:

The Application is found unmerited and is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH JULY 2025.**

**HON. T. W. OUYA**

**JUDGE**

For Appellant.....Ms Mwaura

For Respondent.....Mr Wachira hb for Mr Kanyi

Court Assistant.....Brian

