



REPUBLIC OF KENYA



Kahuro v Njoroge (Civil Appeal E183 of 2024) [2025] KEHC 9463 (KLR) (2 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E183 OF 2024**

PN GICHOHI, J

JULY 2, 2025

BETWEEN

ALFRED KAGIRI KAHURO APPELLANT

AND

PETER NJOROGE RESPONDENT

RULING

1. The Appellant has moved this Court by way of a Notice of Motion dated 21st August, 2024, brought under Certificate of Urgency and premised on Sections 1, 1A & 1B of the Civil Procedure Act, Order 42 Rules 6 & Order 51 Rules 1 of the Civil Procedure Rules, seeking for Orders; -
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of this Appeal, this Court be pleased to Order for stay of Execution of the Judgement and Decree issued on 9th August, 2024, together with all consequential Orders arising therein.
 4. The costs of this Application be provided for.
2. The application is based on the grounds on the face of the application and the Supporting Affidavit of the Appellant sworn on 22nd August, 2024.
3. The Appellant/Applicant stated that the Respondent commenced these proceedings in the Small Claims Court in Nakuru vide a statement of claim dated 18th April, 2024. The claim was heard and a decision rendered on 9th August, 2024 in favour of the Respondent herein for payment of the sum of Kshs. 850,000, together with costs and interest.
4. Aggrieved by that decision, the Appellant lodged this Appeal by a Memorandum of Appeal dated 20th August, 2024 alongside this Application.



5. He contended that the Appeal raises weighty triable issues with high probabilities of success. Further that unless the Orders sought are stayed, the Appeal will be rendered nugatory and he will suffer immense loss.
6. He stated that he is willing to abide by any security terms and directions issued by this Court.
7. The Respondent opposed the application by his Replying Affidavit sworn on 17th September, 2024 terming the Application bad in law, incurably defective and an attempt to delay the fruits of his lawful judgment, and thus should be dismissed with costs.
8. He stated that the Applicant has not demonstrated how he will suffer substantial loss or damage, and a mere averment is insufficient to prove irreparable loss. Further that the decretal amount is not substantial, and that he has the capacity to refund the money if the appeal succeeds.
9. He denied the allegation that the Appeal will be rendered nugatory and stated that the Appeal is casual and uninspiring, only meant to abuse the court process and keep the successful litigant from the judgment's fruits.
10. He reiterated that the power to grant a stay is discretionary and not a matter of right, and the Applicant has failed to meet the conditions for it, making Section 3A of the Civil Procedure Act inapplicable. Moreover, that the Applicant failed to provide security.
11. Accordingly, that the application does not meet the requirements for granting a stay pending appeal and the same should be dismissed.
12. Alternatively, that if the Court allows the application, he prays that half of the decretal amount be released to him through his advocates and the balance be deposited in a joint interest-earning account in the names of both advocates within 14 days of the order, pending the hearing and determination of the Appeal.
13. In rejoinder, the Appellant filed a Supplementary Affidavit sworn on 6th February, 2025, reiterating the content of his application and adding that the decretal sum awarded is a colossal sum that will cause him substantial loss and damage if execution is not stayed.
14. Moreover, that the Respondent has not demonstrated his capacity to refund the sum if the appeal succeeds, and therefore, if the decretal amount is paid, the appeal would be rendered nugatory.
15. He reiterated his readiness to abide by any security terms or directions from the court. In the same breath, he termed the Respondents proposal of security irrational and untenable and maintained that the Respondent has not shown he is a man of means, who is capable of refunding the decretal sum in the event the Appeal succeeds.
16. He maintained that the Respondent will not suffer any prejudice if the Court grants the Orders sought.

Applicant's Submissions

17. The Applicant submitted that he has satisfied the three conditions for granting a stay of execution as outlines under Order 42 Rule 6 of the Civil Procedure Act. In support of this, reliance was placed on



the case of *Mwangi V Gitutu & Another* (Miscellaneous Civil Appeal E008 OF 2024) [2024] KEHC 2734 (KLR), which held that-

“an order of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay shall also consider the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*”.

18. With regard to substantial loss, he cited the case of *Tropical Commodities Suppliers Ltd & Others Vs. International Credit Bank Ltd (In Liquidation)* [2004] 2 EA 331, where the Court stated that:-

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal”.

19. Accordingly, he submitted the decretal sum of Kshs. 850,000 is in itself a substantial amount of real worth which would occasion great loss to him. In any events, that the Respondent has not demonstrated that he is a man of means capable of refunding the Decretal sum should the Appeal be in his favour. Ultimately, that unless stay is granted the Appeal would be rendered nugatory.

20. On time taken to file the application, the Applicant cited the case of *Kamau V Nyoike (Civil Appeal 10 Of 2023)* [2024] KEHC 1952 (KLR), where a delay of two months and ten days was deemed not inordinate, and argued that their application was filed 13 days after delivery of judgement, without any inordinate delay.

21. On security, the Applicant acknowledged that the issue of security is discretionary. He cited the *Nduhiu Gitahi V Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, where the Court emphasised that, so long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security as was further stated that: -

“It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the Plaintiffs are secured in one way rather than another”.

22. As regards costs, the Appellant prayed that the Respondent be condemned to bear the costs of this application, citing Section 27(1) of the *Civil Procedure Act*, which provides that costs are discretionary and ordinarily follow the event.

Analysis and Determination

23. The principles governing stay of execution pending appeal are set out under Order 42 Rule 6 (2) of the *Civil Procedure Act* as follows: -

- “(2) No order to 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.”



24. Accordingly, the Applicant is obliged to satisfy three elements namely: -
- a. Substantial loss may result to the Applicant unless the order is made.
 - b. The application has been made without unreasonable delay, and;
 - c. The Applicant has given security for the due performance of such decree or order as may ultimately be binding on him (Applicant).
25. These elements were reiterated in the classicus case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 where Madan JA (as he was then) held:-
- “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. In the same case, Cotton LJ said at p459: “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”
26. As regard time taken to file the current application, the judgement of the trial court was rendered on 9th August, 2024, while the current application was filed on 23rd July, 2024, 14 days after judgement. The application was therefore filed without undue delay.
27. On substantial loss, it is settled law that 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 under Order 42 Rule 6 of the Civil Procedure Rules. The Applicant demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal.
28. In this case, the Applicant stated that if stay is not granted and execution proceedings ensue, he will suffer immense loss and the Appeal will be rendered nugatory. Further that the financial worth of the Respondents is unknown and if the decretal sum is paid to him, he might not be in a position to refund the same.
29. Though, the Respondent refuted the allegations that he is a person of straw, there was no mention in the Replying Affidavit of his capability to refund the decretal sum if the Appeal succeeds.
30. It is also noted that the Applicant did not make any proposals on the issue of security for costs. Instead, he left this Court to exercise its discretion on the appropriate security stating that they are willing to abide by any conditions this Court will make.
31. On the other hand, the Respondent prayed that half of the decretal sum be paid to him and the other half be deposited in an interest earning account in the joint names of their advocates.
32. From the material before Court and in order to balance the competing interest of the parties herein, the Notice of Motion dated 21st August, 2024 is allowed in the following terms: -
1. There shall be stay of execution of the Judgement and Decree issued on 9th August, 2024, together with all consequential Orders arising therein pending the hearing and determination of the Appeal.
 2. Within 30 days of this ruling, the Applicant to deposit the entire decretal sum in an interest earning Account in the joint names of the Advocates for the parties.



3. In default of (2) above, the stay of execution shall automatically lapse.
4. Costs of this application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 2ND DAY OF JULY, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Oyondi h/b for Mrs. Mukira for Appellant

Mr. Njoroge for Respondent

Ruto, Court Assistant

