



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Wildlife Service v Mwawasi (Civil Appeal E022 of 2025)
[2025] KEHC 9522 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9522 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E022 OF 2025
AN ONGERI, J
JULY 2, 2025**

BETWEEN

KENYA WILDLIFE SERVICE APPELLANT

AND

THOMAS CHONGA MWAWASI RESPONDENT

RULING

1. The application coming for consideration in this Ruling is the one dated 2nd April 2025 seeking the following orders:-
 - i. Spent.
 - ii. Spent.
 - iii. That pending the hearing and determination of the Applicant's appeal, a stay of execution of the Judgment delivered on 21st January 2025 at the Principal Magistrate's court at Voi where the Respondent was awarded the sum of Kenya Shillings Three Hundred and Twenty Five Thousand (Kshs. 325,000/=) plus costs of the suit and interests from the date of judgment and all other further and/or any consequential orders arising therefrom be and is hereby issues.
 - iv. That this Honourable Court do issue any such other and/or further orders as it may deem fit and in the interest of justice.
 - v. That the costs of this application be provided for.
2. The application is based on the following grounds:-
 - i. That a judgment was delivered on 21st January 2025 by Hon. C. K. Kithinji (PM) at the Principal Magistrate's Court at Voi awarding the sum of Kenya Shillings Three Hundred and



Twenty Five Thousand (Kshs. 325,000/=) plus costs of the suit and interests from the date of judgment.

- ii. That subsequently the learned Magistrate granted the Applicant thirty (30) days stay of execution of the said Judgment from the date thereof and the said stay lapsed on 21st February 2025.
 - iii. That the Applicant is aggrieved by the entire Judgment in Voi MCCC No. E 143 of 2023; Thomas Chonga Mwawasi v Kenya Wildlife Service and has lodged an appeal against the same before this Honourable Court in Voi HCCA E022/2025; Kenya Wildlife Service v Thomas Chonga Mwawasi.
 - iv. That unless this application is certified urgent and heard immediately and the orders sought herein granted, the Respondent will proceed to execute the said Judgment thereby rendering this application and the said appeal nugatory.
 - v. That upon the lapse of the stay orders the Applicant who has an arguable appeal with good prospects of success stands to suffer substantial loss and damage should the Respondent proceed to execute the said Judgment which is irregular in all respects.
 - vi. That the Applicant already filed a Memorandum of Appeal dated 21st February 2025 and further requested for the typed proceedings at the lower court.
 - vii. That the Applicant has acted without undue delay and it is in the interest of justice that stay of execution be granted.
 - viii. That no prejudice will be occasioned to the Respondent if the orders sought herein are granted based on the grounds set out hereinabove.
3. The application is supported by the affidavit of DERRIC KARINGA sworn on 2nd April 2025 as follows:-
- i. That I am a Legal Officer of the Applicant herein fully conversant with the facts surrounding and/or pertaining to this matter hence competent to swear this affidavit.
 - ii. That the Respondent filed a plaint dated 7th July 2023 in the subordinate court in Voi MCCC E143 of 2023; Thomas Chonga Mwawasi v Kenya Wildlife Service seeking judgment against the Applicant for:-
 - a. Special damages in the sum of Kshs. 225,000
 - b. General damages under the Kenya Wildlife (Management and Conservation Act).
 - c. Costs of the suit.
 - d. Interest on (a), (b) and (c) above.
 - iii. That the applicant filed its defence dated 21st July 2023 and the matter proceeded for hearing and by a judgment delivered on 21st January 2025 by the Honourable C. K. Kithinji (PM) in Voi MCCC E143 of 2023; Thomas Chonga Mwawasi v Kenya Wildlife Service, the Respondent was awarded the sum of Kenya Shillings Three Hundred and Twenty Five Thousand (Kshs. 325,000/=) plus costs of the suit and interests from the date of Judgment.
 - iv. That I have been advised by the Applicant's Advocate which advise I believe to be true and correct that subsequently, the learned Magistrate granted the Applicant thirty (30) days stay of



execution of the said Judgment from the date thereof and the said stay lapsed on 21st January 2025.

- v. That the Applicant being aggrieved by the whole of the said judgment has filed a Memorandum of Appeal and further requested for the typed proceedings in regards to the proceedings in the lower court within the time provided for in law.
- vi. That the Applicant is justifiably apprehensive that unless this application is certified urgent and heard immediately and the orders sought herein granted, the Respondent will proceed with execution of the said Judgment thereby rendering this application and the appeal nugatory.
- vii. That I am advised by the Applicant's Advocates on record, which advise I verily believe to be true that the said appeal raises serious and arguable appeal with good prospects of success. I have set out herein below some of the arguable grounds of appeal as advised by our advocates on record as being arguable:
 - a. That the Learned Magistrate erred in law and in fact by finding that the Respondent had proved their case and finding the Appellant 100% liable in negligence where there was no evidence in support and in total disregard of the evidence to the contrary adduced at the hearing.
 - b. That the Learned Magistrate erred in law and in fact by purporting to shift the burden of proof from the Respondent to the Appellant.
 - c. That the Learned Magistrate erred in law and in fact by awarding Kshs. 225,000 as special damages for damaged crops whereas the said damage was not proven by way of evidence.
 - d. That the Learned Magistrate erred in law and in fact by awarding Kshs. 225,000 sought within the purview of the *Wildlife Conservation and Management Act* No. 47 of 2013.
 - e. That the Learned Magistrate erred in law and in fact in awarding general damages of Kshs. 100,000 while at the same time admitting that the claim under Section 25 of the Act are not within the jurisdiction of the Honourable Court.
 - f. That the Learned Magistrate erred in fact and in law in failing to consider all the relevant factors and circumstances of the case in arriving at the decision, judgment and award.
 - g. That the Learned Magistrate erred in fact and in law in failing to consider the written submissions tendered by the Appellant's Counsel and in failing to consider the legal authorities tendered therewith.
 - h. That the Learned Magistrate erred in fact and in law by arriving at a decision and judgment that was obviously wrong and against the law.
- viii. That the Applicant will stand to suffer substantial loss and damage should the Respondent proceed to execute the said Judgment upon the lapse of the stay orders.
- ix. That the Applicant has acted without undue delay and it is therefore in the interest of justice that stay of execution pending the hearing and determination of the application and appeal be granted.



- x. That no prejudice will be occasioned to the Respondent if the orders sought herein are granted based on the grounds set out hereinabove.
4. The Respondent filed an affidavit dated 22nd April 2025 as follows:-
 - i. That am an Advocate of the High Court of Kenya with full and sufficient instructions from my client therefore competent to swear this affidavit.
 - ii. That I have read and understood the contents of the Appellants application dated 2nd day of April 2025 and I respond as follows:
 - iii. That the application by the appellants is speculate in nature as they have not served this court with any execution documents to show that the Respondent has commenced execution against them.
 - iv. That additionally the application before court does not meet the threshold for grant of the orders sought as the appellant has not deposited security before this court for them to have full evidence.
 - v. That there is no threat of execution that has been shown to this court since the process of executing against the respondent is long and tedious.
 - vi. That it will be proper that this court proceeds and dismisses this application with costs.
 - vii. That in any event the court is inclined to grant the respondent the orders they are seeking therefore they should be made to meet the conditions of order 42 Rule 6 of the Civil Procedure Rules and pay costs of this application.
 - viii. That I swear this affidavit vehemently opposing the appellants application dated 2nd day of April 2025.
 5. The parties filed written submissions as follows;
 6. The Appellant submitted that he is seeking stay of execution of the judgment delivered on 21st January 2025 at the Principal Magistrate's Court in Voi, arguing that the appeal has merit and should be allowed.
 7. Further, that the Appellant, a government institution reliant on budgetary allocations under the *Wildlife Conservation and Management Act* 2013, contends that its financial constraints are tied to the National Government.
 8. It asserts that if execution proceeds and the appeal later succeeds, the Respondent may be unable to refund the decretal amount.
 9. Conversely, should the appeal fail, the Appellant is financially capable of settling the sum without difficulty.
 10. The Appellant relies on Order 42 rule 8 of the Civil Procedure Rules, which exempts the Government from providing security for costs, and Order 42 rule 14(1), which grants courts discretion in requiring security for appeal costs.
 11. It emphasized that the purpose of security is to ensure payment in case of an unsuccessful appeal, a risk absent here given the Appellant's financial standing.
 12. Citing *RWW v EKW* [2019], the Appellant argued that courts may waive security in unique circumstances, urging the court to exercise similar discretion here.



13. It concluded that there is no justification to compel the deposit of security, given the Appellant's capacity to pay and the absence of unreasonable delay in filing the application.
14. The respondent opposed the appellant's application for a stay of execution pending appeal, arguing that the appellant must meet the strict conditions set out under Order 42 Rule 6 of the Civil Procedure Rules.
15. The respondent stated that the law is clear that an appeal does not automatically stay execution, and the appellant must demonstrate substantial loss, prompt filing of the application, and provision of adequate security.
16. The respondent emphasized that the decretal sum in this case is a monetary award, and any stay should only be granted if the appellant deposits the full amount in court as security.
17. The respondent further contended that while the appellant has a right to appeal, this must be balanced against the respondent's entitlement to enjoy the fruits of their judgment.
18. That Courts have consistently held that stay orders should not unduly prejudice a successful litigant.
19. The respondent cited several authorities, including *Arun C. Sharma v Ashana Raikundalia and Co-operative Bank of Kenya v Banking Insurance & Finance Union*, which stress that security must serve as a guarantee for the due performance of the decree, not as a punitive measure.
20. On costs, the respondent argued that the general rule is that costs follow the event.
21. Since the appellant initiated this application, they should bear the costs regardless of the outcome.
22. Further, that judicial discretion on costs should consider factors such as the conduct of the parties, the litigation's subject matter, and the need for fairness.
23. The respondent urged the court to dismiss the application if the appellant fails to comply with the legal requirements for a stay or, in the alternative, to order full security and award costs to the respondent.
24. In conclusion, the respondent maintained that the application lacks merit and should be dismissed with costs to ensure justice and uphold the respondent's right to the judgment's benefits.
25. The issues for determination in this application for stay of execution are;
 - i. Whether the appellant has satisfied the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules.
 - (ii) Whether the respondent's entitlement to the fruits of the judgment outweighs the appellant's right to appeal
26. On the issue as to whether the appellant, Kenya Wildlife Service (KWS), has satisfied the conditions for a stay of execution under Order 42 Rule 6 of the Civil Procedure Rules and whether, as a government agency, it should not be exempt from depositing security.
27. The appellant has demonstrated that if execution proceeds, it risks substantial loss, particularly given its public mandate in wildlife conservation and resource management.
28. Unlike private litigants, KWS operates under statutory obligations, and an immediate payout of the decretal sum could disrupt critical operations.
29. The court must balance this against the respondent's right to enjoy the fruits of their judgment.



30. However, as held in *Kenya Wildlife Service v James Mutembei* [2019] eKLR, the unique position of state agencies justifies a modified approach to security.
31. The application was filed without undue delay, and the subject matter involves public interest considerations.
32. Courts have previously recognized that government entities should not be treated identically to private parties when imposing security terms (see *Republic v Ministry of Agriculture Ex-Parte Muchiri W’Njuguna* [2006] eKLR).
33. While Order 42 Rule 6 mandates security, the appellant need not deposit cash if an alternative guarantee exists.
34. In *Attorney General v Zum Zum Investment Limited* [2014] eKLR, the court accepted a government undertaking as sufficient.
35. Given KWS’s public accountability, a bank guarantee from a reputable financial institution shall suffice to secure the respondent’s interests.
36. Costs shall follow the event, and since the application succeeds on terms, the respondent is entitled to costs.
37. Stay of execution is granted pending appeal on condition that the Kenya Wildlife Service provides a bank guarantee from a reputable bank, covering the full decretal sum, within 30 days of this ruling.
38. Failure to furnish the guarantee within the stipulated time shall automatically lift the stay, allowing execution to proceed.
39. The respondent is awarded costs of this application to be borne by the appellant.

DATED, SIGNED AND DELIVERED THIS 2ND JULY 2025 VIRTUALLY VIA MT AT VOI HIGH COURT.

ASENATH ONGERI.

JUDGE.

In the presence of:-

Court Assistant: Millicent

..... for the Appellant

..... for the Respondent

