



REPUBLIC OF KENYA



KENYA LAW
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**Nyabando v Onsongo (Civil Appeal E022 of 2023)
[2025] KEHC 11138 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E022 OF 2023
WA OKWANY, J
JULY 24, 2025**

BETWEEN

AGNES KWAMBOKA NYABANDO APPELLANT

AND

DAVID KINANGA ONSONGO RESPONDENT

(Being an Appeal from the Judgment in the High Court at Nyamira in HCCA No. E022 of 2023, delivered by Hon. Lady Justice W.A. Okwany Judge of the High Court on 4th July 2024)

RULING

1. The Respondent filed a Notice of Motion dated 6th August 2024 seeking a stay of execution of this Court’s judgment delivered on 4th July 2024, pending the hearing and determination of an application for leave to appeal out of time and the intended appeal before the Court of Appeal. The Application, brought under Order 22 Rule 22, Order 42 Rule 6, and Order 51 Rule 1 of the *Civil Procedure Rules*, primarily seeks stay of execution and that the costs be in the cause. The Respondent supported the Application with an affidavit stating dissatisfaction with the Court’s judgment, explaining that he had changed legal counsel after the former counsel failed to file a Notice of Appeal within the required 14 days. He argued that he is exposed to imminent execution, the judgment debt is substantial, and its enforcement would irreparably harm him.
2. The Appellant/Respondent opposed the Application through a Replying Affidavit dated 9th May 2025, asserting that the Application lacks merit. She dismissed the Respondent’s claim of losing contact with his previous counsel as an afterthought and claimed the Application is made in bad faith to deny her justice. She also noted the absence of documentation showing that the appeal has been regularized and emphasized the potential prejudice to her if the stay was granted. She further argued that the orders sought would undermine constitutional principles that justice should not be delayed and maintained that the Applicant has failed to satisfy the legal requirements for granting a stay of execution.



3. The background to this Application stems from a suit filed by the Appellant in the trial court on 28th January 2017 against Elvis Muthoka Itaa and the Respondent, seeking compensation and costs. The trial court dismissed the suit against the Respondent on 24th May 2023. Dissatisfied, the Appellant filed an appeal before this Court, which on 4th July 2024 delivered judgment in her favour, awarding her general damages of Kshs. 500,000, special damages of Kshs. 64,600, plus costs of the appeal and the trial, with interest until full payment.

Analysis and Determination

4. I have carefully considered the instant application, the response thereto and the parties' respective submissions. I find that the main issue for determination is whether the Applicant has made out a case for the granting of orders for stay of execution pending appeal.
5. The principles guiding the grant of stay of execution pending appeal are well settled under Order 42 Rule 6(2) of the Civil Procedure Rules which stipulates as follows: -
 2. No order for stay of execution shall be made under subrule (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.
6. This application seeks a stay of this Court's own judgment so that the Applicant can appeal before the Court of Appeal. The conditions for granting stay are well established. In Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others Application No. 5 of 2014 [2014] eKLR the Supreme Court held that an applicant seeking stay of execution pending appeal must satisfy court on the following parameters: -
 - a. the appeal or intended appeal is arguable and not frivolous; and that
 - b. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. (see also the Court of Appeal Case of *Butt v Rent Restriction Tribunal* [1982] KLR 417)
7. Similarly, in Multimedia University & Another vs. Professor Gitile N. Naituli [2014] eKLR, the Court of Appeal restated the principles as follows: -

“When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied.
8. An applicant for stay pending appeal must demonstrate: (i) that substantial loss may result to them unless the order is made; (ii) that the application has been brought without unreasonable delay; and (iii) that they have furnished security for the due performance of the decree. The burden lies with the applicant to satisfy the Court that the conditions have been met.
9. In the present case, the Applicant contends that he stands to suffer substantial loss if execution proceeds, citing the magnitude of the judgment sum and his inability to recover the same should the intended appeal succeed. However, the Applicant has not annexed any documentary proof of financial



incapacity or other compelling evidence to demonstrate the likelihood of suffering substantial loss. Mere allegations without evidence are insufficient.

10. On the issue of delay, I note that the judgment sought to be stayed was delivered on 4th July 2024, and the present Application was filed on 6th August 2024, approximately one month later. While this may not be an inordinate delay, it is noteworthy that the Applicant has not provided evidence that he has taken any active steps to secure leave to appeal out of time or to file a draft memorandum of appeal. This lack of demonstrable effort casts doubt on the bona fides of the Application.
11. Furthermore, the Applicant has not offered any security for the due performance of the decree, a mandatory requirement under Order 42 Rule 6(2)(b). This omission further weakens the Application and raises concerns about the Applicant's commitment to comply with the terms of the stay should it be granted.
12. The Court also notes the constitutional imperative under Article 159(2)(b) and (d) that justice shall not be delayed and shall be administered without undue regard to procedural technicalities. However, this principle must be balanced with the right of a successful litigant to enjoy the fruits of their judgment. In this case, the Respondent/Applicant has failed to present compelling grounds that outweigh the Appellant's right to execute the judgment.
13. Taking all the circumstances of the case into account, including the interests of justice, this Court finds that the Respondent/Applicant has failed to meet the threshold set for the granting of an order for stay of execution pending appeal.

Disposition

14. In light of the foregoing, the Notice of Motion dated 6th August 2024 fails and is hereby dismissed with costs to the Appellant/Respondent.
15. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF JULY 2025.

W. A. OKWANY

JUDGE

