



REPUBLIC OF KENYA



KENYA LAW
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Njoroge & another v Thiong’o (Suing as Legal Representative of the Estate of John Wanjohi Wangeci (Deceased)) (Civil Appeal E139 of 2024) [2025] KEHC 10041 (KLR) (7 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E139 OF 2024**

JM NANG’EA, J

JULY 7, 2025

BETWEEN

ROSE WANDIA NJOROGE 1ST APPELLANT

PETER WAINAINA KAMAU 2ND APPELLANT

AND

ESTHER NJERI THIONG’O RESPONDENT

SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN WANJOHI WANGECI (DECEASED)

RULING

1. Vide Notice of Motion dated 3rd July 2024 the Appellants craves the following reliefs;-
 - 1) Spent
 - 2) Spent
 - 3) That there be stay of execution of the judgement/Decree in Nakuru CMCC No. E484 of 2020 pending the hearing and determination of the Applicant’s appeal .
 - 4) That the costs of this Application be provided for.
2. The application arises from judgement of the lower court (Hon. Bildad Ochieng, Chief Magistrate) in which the Respondent was granted judgement as hereunder;
Liability- 100% in favour of the Respondent.
Damages for loss of expectation of life- Kshs. 150,000/.
Damages for pain and suffering- Ksh. 50,000



Damages for loss of Dependency- Ksh. 3,200,000.

Special Damages- Ksh. 738,675.

The Costs of the suit , and interest at court rates.

3. Aggrieved by the decision, the Appellants lodged this appeal relying on a number of grounds of appeal as per Memorandum of Appeal also dated 18th June 2024.
4. By Affidavit sworn by Peter Ngola Makau who is the Legal Officer of the Appellants' insurer (Britam General Insurance Company Limited), it is inter alia averred that the insurer is under obligation to settle the decretal sum under an insurance policy executed between it and the Appellant.
5. It is further deposed that the application has been brought timeously . The Appellants fear that execution of the lower court's judgement could be levied yet the appeal raises substantial issues requiring ventilation at its hearing. The Appellants contend that the appeal would be rendered nugatory if the stay of execution is not granted. They added that the Respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds. The Appellants, through their insurer, also express readiness to furnish the necessary security for costs that could ultimately be binding on them.
6. Through affidavit evidence in reply, the Respondent opposes the Motion contending that is misconceived , incompetent, lacks in merit and only intended to delay her enjoyment of the fruits of litigation. The Respondent further avers inter alia that on advice by her lawyers, the Appellants have not satisfied the threshold stipulated in Order 42 Rule 6 of the Civil Procedure Rules 2010 for grant of the relief of stay of execution pending appeal. She fully backs the trial court's decision.
7. The Respondent urges in the alternative that if the court is inclined to grant the application, the Appellants should be ordered to pay out half of the decretal sum to her and deposit the other half into court considering that the appeal is is said to be only against the quantum of damages awarded.

Learned Counsel for the parties filed written Submissions which the court has perused against the application and the record.

8. Order 42 rule 6(1) (2) of the Civil Procedure Rules 2010 governs disposal of an application such as before me for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-
 - a. unless 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.”
9. The Appellants contend that they have brought the Motion without unreasonable delay given that the impugned judgement was delivered about one month earlier. It is should, however, be noted that even delay of one day, if unexplained, is bad enough. The Appellant have not explained the long delay of one month to bring this application.
10. In the circumstances, the delay is found to be unreasonable/inexcusable and therefore this legal condition has not been satisfied.



11. Offer of security for costs is another mandatory legal requirement that has to be complied with. The court has power to determine the appropriate security for costs but an Applicant must first express willingness and readiness to offer security.
 - a. In *John Odungo vs Joyce Irungu Muhatia* [2014] eKLR the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows;

“preparedness as well as readiness to provide security should one be called upon to do so”.
12. The Appellants have satisfied the requirement having expressed readiness and willingness to furnish necessary security for costs.
13. Determination of the application turns on the question of substantial loss, if any, the Appellant might suffer if stay of execution is not ordered. The case of *Nyatera vs Nyakundi* (Civil Appeal E033 of 2022) [2023]KEHC 3086 KLR) (16 March 2023) (Ruling) is relevant for the proposition that the Applicant ought to show the manner in which his appeal would be rendered nugatory if stay of execution is not ordered.. The court opined in the case that it is not enough to say that because the Respondent intends to proceed with execution, he should be stopped because of the appeal. The court is therefore required to tread a delicate balance of the parties’ interests. As it is now trite, this is the cornerstone of the court’s discretion to grant or refuse stay of execution pending appeal. The onus is on the Appellant to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds. In *Tropical Commodities Ltd. International* (in liquidation) (2004) 2 EA 331 my senior brother (Ogolla J) explained that substantial loss 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.”
14. In *RWW vs EKW* [2019] eKLR and *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 in *Milimani HCMCA* No. 1561 of 2007, *Century Oil Trading Company Ltd vs Kenya Shell Ltd*, this court again explained that;-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes when, it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”
15. In *Shell Ltd vs Kibiru & Another* (1986) KLR 410 it was famously postulated that “substantial loss in its various forms is the cornerstone of the court’s jurisdiction to grant stay pending appeal. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”



16. Regarding the burden of proof, the Court of Appeal held in *National Industry Credit Limited vs Aquinas Francis Wasike & Another* [2006] eKLR that;

“once an applicant expresses a reasonable fact that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”
17. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including *Matata & Another vs Rono & Another* (Civil Appeal No. E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling).
18. Based on the affidavit evidence of the parties neither of them has stated their financial position. The Appellants who shoulder the burden of proof have in particular not made out a prima facie case of the Respondent’s inability to pay back the decretal sum to warrant the latter to debunk the claim.
19. In the particular circumstances of this case, however, the Appellants have substantially complied with the legal conditions for stay of execution pending hearing and determination of the appeal. It is also noted that half of the decretal sum has been paid to the Respondent pursuant to the court’s order issued on 8th July 2024.
20. The application is accordingly allowed on condition that the Appellants shall deposit into court the balance of the decretal sum within 30 days of the date hereof failure to which this application shall automatically stand dismissed. The costs of the Application shall abide the appeal.

J. M. NANG’EA

JUDGE.

RULING DELIVERED VIRTUALLY THIS 7TH DAY OF JULY , 2025 IN THE PRESENCE OF:

The Advocate for the Appellants, Ms Nyasetia.

The Advocate for the Respondent’s, Absent.

Court Assistant, Jeniffer

