



REPUBLIC OF KENYA



**Barasa v Liduvwi (Civil Appeal E093 of 2024)
[2025] KEHC 12841 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E093 OF 2024
S MBUNGI, J
SEPTEMBER 18, 2025**

BETWEEN

VICTOR CHRISWA BARASA APPELLANT

AND

ERICK LIDUVWI RESPONDENT

*(Being an Appeal arising from the Decision of Hon. Carolyn Cheruoyot IN
Kakamega Small Claims Case No. E443 of 2023 delivered on 9th April, 2024)*

RULING

1. The applicant filed a notice of motion application dated 24th September 2024 seeking the following orders;
 - a. That this application be certified urgent and heard exparte in the first instance(spent)
 - b. That pending the hearing of this application interparties, there be a stay of execution of the judgment entered Kakamega SCCCOMM/443/2023
 - c. That pending the hearing and determination of this application, there be a stay of execution of the judgment entered Kakamega SCCOMM 443/2023
 - d. That pending the hearing and determination of the appeal, there be a stay of execution of the judgment entered Kakamega SCCCOM/443/2023
 - e. That the appeal be fast-tracked to avoid injustices being occasioned.
2. The Application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same day by the applicant, where he stated that he appealed against the judgment entered on 9th April 2024, and that the Respondent had applied for notice to show cause.



3. He avers that the respondent intends to execute the judgment if the orders for stay are not granted and he will suffer irreparable harm, and claimed that the appeal has a high chance of success.
4. The application was canvassed by way of submissions.
5. The applicant was the only party that filed their submission at the time of writing this judgment.

submissions

6. In their submissions dated 25th February 2025, they aver that they will suffer substantial loss should the respondent execute the judgment since they applied without any undue delay by claiming that they had met all the requirements to be granted the stay of execution as per Order 42 Rule 22 of the Civil Procedure Rules, 2010
7. They seek a stay order pending the hearing and determination of the appeal and quoted the judgment by Gikonyo Judge in the case of Antoine Ndiaye v African Virtual University [2015] eKLR and the case of RWW v EKW[2019] eKLR,
8. They submitted that in the case of the Board of Governors, Moi High School Kabarak & another v Malcom Bell, Petition Nos. 6&7 of 2013; [2013] eKLR, famously called the “Malcom Bell Case”, the Supreme Court’s finding on its jurisdiction to grant orders of stay of execution of decrees.

Analysis And Determination

9. The law governing the grant of orders for a stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules, which stipulates as follows: -
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on the application being made, to consider such application and to make such order thereon as may to it seems just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is referred may apply to the appellate court to have such order set aside.
 2. No order for a stay of execution shall be made under sub-rule (1) unless—
 3.
 - (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.
10. The above provision requires the Applicant seeking orders for a stay of execution to establish that he has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted, and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for a stay of execution pending appeal must be made without unreasonable delay.
11. The three conditions to be fulfilled can therefore be summarized as follows;
 - a. That substantial loss may result to the applicant unless the order is made.



- b. Application has been made without unreasonable delay.
 - c. Security as the court orders for the due performance.
12. The Court of Appeal in *Butt Vs Rent Restriction Tribunal* [1979] stated what ought to be considered in determining whether to grant or refuse a stay of execution pending appeal. The court said that: -
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse
13. The first condition that the Applicant should meet is if he will suffer substantial loss if the stay orders are not granted.
14. On what constituted substantial loss, it was explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR: -
- “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. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal... The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
15. The Applicant avers that he will be arrested at any time if a stay is not granted for the respondent has commenced execution proceedings and if arrested this will be pre-judicial for his appeal is still pending, thus rendering the Appeal nugatory.
16. It is alive to this court that execution is a lawful process but can be stayed if the Applicant demonstrates that he will suffer substantial loss or his right to appeal will be prejudiced.
17. The Applicant has demonstrated that his likelihood that he will be arrested when the appeal is still pending and to this court it will be pre-judicial to his right to appeal.
18. The second consideration is whether the application was filed without unreasonable delay.



19. The court in *Jaber Mohsen Ali & Another vs. Priscillah Boit & Another* E&L No. 200 of 2012[2014] eKLR was of the view that unreasonable delay depends on the circumstances of the case. The court stated:

‘The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012* the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land. I note that the judgment was delivered on 23rd July 2024. The memorandum of appeal was filed on 29th July 2024 which was less than a week after the judgment was entered.

20. The appeal was filed on 9th May, 2024 and the application was filed on 2nd September, 2024 while the judgment was delivered on 9th April, 2024 almost a difference of 4 months. This court finds that the appeal and this application for a stay of execution have been filed without undue delay.

21. The last consideration is on the security. In *Focin Motorcycle Co. Limited vs Ann Wambui Wangui & Another* (2018) eKLR the court stated that:

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground.”

22. Security is discretionary and it is upon the court to determine the same. In this case, the applicant has not indicated his willingness to provide security for the court on its own motion can order provision of a security.

23. From the above analysis I find that the Applicant has demonstrated that he has a case to warrant this court to order a stay of execution for the Judgment delivered on 9th April, 2024 pending the hearing and determination of the Appeal.

24. I note that it is over a year since the judgment was delivered, therefore for the order of stay to abide I will impose the following conditions

- i. The Applicant shall deposit the decretal amount in an interest earning account in the names of both counsels within the next 30 days.
- ii. In default of the above (i) the order of the stay shall automatically stand lifted /vacated.
- iii. To hasten the disposal of Appeal I order that the Applicant/Appellant to file the record of appeal within the next 30 days from today and serve. I note that the appeal emanates from small claims court judgment, the proceedings should have been typed by now for normally there are not voluminous. The Applicant shall simultaneously file written submissions to dispose off the appeal upon being served with the record of appeal and submissions the respondent shall have 14 days to file his submissions.
- iv. In default of (iii) the Appeal shall stand dismissed.



v. Judgment on 7th November, 2025.

vi. Right Of Appeal 30 days.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF SEPTEMBER, 2025.

S.N. MBUNGI

JUDGE

In The Presence of;

C/A : Elizabeth Angong'a

Parties absent but aware of the date for ruling.

Advocates Absent also but aware of the date for Ruling.

The Court Assistant to upload the ruling to the CTS forthwith (Today).

