



Koluwa & 5 others v County Assembly of Vihiga (Through the Hon Speaker) & another (Constitutional Petition E006, E005 & E007 of 2021 (Consolidated)) [2025] KEHC 12795 (KLR) (17 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CONSTITUTIONAL PETITION E006, E005 & E007 OF 2021 (CONSOLIDATED)
JN KAMAU, J
SEPTEMBER 17, 2025**

BETWEEN

**DR AMOS KUTWA KOLUWA 1ST PETITIONER
PAMELA MBAGAYA KIMWELE 2ND PETITIONER
ENG KENNETH ELAVUNA KESEKO 3RD PETITIONER
PAUL JISEVE MBUNI 4TH PETITIONER
STEPHEN CHAHASI 5TH PETITIONER
JULIUS OBUGA MASIVA 6TH PETITIONER**

AND

**COUNTY ASSEMBLY OF VIHIGA (THROUGH THE HON
SPEAKER) 1ST RESPONDENT
GOVERNOR, COUNTY GOVERNMENT OF VIHIGA 2ND RESPONDENT**

RULING

1. In his Notice of Motion dated 18th March 2024 and filed on 27th March 2024, the 2nd Respondent sought for orders of stay of execution of the Ruling of Hon Justice P. J. Otieno given at Kakamega on 6th March 2024 together with the consequential orders arising therefrom.
2. June Aresa, Legal Counsel in the Office of the County Attorney, swore an affidavit in support of the said application and on behalf of the 2nd Respondent herein.
3. Through the said counsel, the 2nd Respondent averred that by an application dated 18th December 2023 and filed on 18th December 2023, the Respondents herein sought for review of the Judgment of the court delivered on 29th November 2023 and the court delivered its Ruling on 6th March 2023 (sic).



He stated that he was dissatisfied with the said Ruling and had lodged an appeal against the same. He added that he had also requested for typed and certified copies of the proceedings in the whole matter since inception, Ruling dated 6th March 2024 and the order consequent thereto.

4. He contended that unless a stay of execution of the said Ruling was granted, he stood to suffer substantial loss, great injustice and extreme prejudice and that he was apprehensive that the Petitioners would be at liberty to commence execution of the Ruling and consequential orders, thus render the appeal nugatory.
5. He asserted that the present application had been brought promptly, diligently and expeditiously and he was willing to abide by any conditions that shall be set by the court. He pointed out that his appeal at the Court of Appeal raised serious questions of law and that the Petitioners would not be prejudiced if the orders sought herein are granted.
6. He pointed out that instead, he was likely to suffer prejudice as he would be burdened financially considering that his office had no budget to satisfy the decree and the order increases the wage bill above the ceiling of thirty- five (35%) per cent prescribed by the Public Finance Management County Government) Regulations.
7. It was his contention that it was in the interest of justice that his application be allowed and orders sought therein be granted.
8. The Petitioners and the 1st Respondent did not appear to have filed any response to the 2nd Respondent's application herein. In fact, the 1st Respondent informed this court that that it had already obtained an order of stay of execution at the Court of Appeal and had deposited the decretal sum.
9. The 2nd Respondent's Written Submissions were dated and filed on 21st June 2024. The Ruling herein is therefore based on the said Written Submissions only.

Legal Analysis

10. The 2nd Respondent invoked Order 42, Rule 6(2)(a) of the Civil Procedure Rules and submitted that the claim herein was for payment of salary arrears, gratuity and interest on both which was approximately over Kshs 30,000,000/=. He argued that if the Petitioners proceeded and executed the decree, following the Ruling dated 6th March 2024, the appeal would not only be rendered nugatory but it would be useless and an exercise in futility. He added that if the stay order was not granted, then the County Government would suffer substantial loss.
11. He placed reliance on the case of *Selestica Ltd vs Gold Rock Development Ltd (2015)* where it was held that the purpose of an application for stay was to preserve the subject matter in dispute so that the rights of the appellant who was exercising his undoubted right of appeal were safeguarded so that if the appeal was successful, it was not rendered nugatory.
12. He urged the court to balance the interests of the parties when exercising its discretion in granting an order for stay of execution pending appeal. It called upon this court to ensure that no party suffered prejudice that could not be compensated by an award of costs. He added that if the decree was executed, there was likelihood of public funds being spent yet the appeal may succeed leading to a loss of public funds.
13. He pointed out that if the appeal was not successful, the Petitioners would go ahead and execute the Judgment and would also be compensated by an award of costs and interests and consequently, no party would suffer any prejudice as all interests shall be catered for.



14. In this regard, he relied on the case of County Government of Laikipia & Another vs Wahome & 114 Others: Transitional Authority & Another (Interested Parties) [2023] KECA 215 (KLR) where the Court of Appeal allowed the application for stay of execution for the reasons that in the event the judgment was executed, public funds would have been lost if the one hundred and fifteen (115) respondents were paid the disputed emoluments as salaries and they were unable to refund the same if the appeal was successful as their sources and means of income remained unknown.
15. He pointed out that the Ruling was delivered on 6th March 2024 and the application herein was filed on 18th March 2024 which was less than eleven (11) days thus the application was brought without unreasonable delay.
16. He further cited Order 42 Rule 8 of the Civil Procedure Rules and relied on the case of Laikipia County Government vs Tirus Kinyua Thumbi[2020]eKLR where the court stated in respect to whether government should deposit security and noted that Order 42 Rule 8 of the Civil Procedure Rules was applicable and self-explanatory and allowed the order for stay without the county depositing security for costs.
17. He also cited the case of Nzomo (Suing as the Legal Representative of the Estate of Daniel Nzomo Wambua-Deceased) vs Makueni County Government [2023] KEELC 17418 (KLR) where it was held that no orders for deposit of security of costs would issue against the Government, which included the County Government.
18. It was his contention that the County Governments were, therefore, protected under Order 42 Rule 6 and 7 of the Civil Procedure Rule and, therefore, he was exempted from depositing any security to the court.
19. The present application was brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010 which empowered a court to stay execution of its own orders or grant an order for stay of the decision that was being appealed from.
20. Under the said Order 42 Rule 6 of the Civil Procedure Rules, an applicant had to demonstrate the following:-
 - a. That substantial loss may result unless the order is made.
 - a. That the application has been made without unreasonable delay.
 - b. Such security as the court orders for the due performance of the decree has been given by the applicant.
21. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
22. This court had due regard to the case of Butt vs Rent Restriction Tribunal (1982) KLR 417 where the Court of Appeal held that the power of the court to grant or refuse an application for stay of execution was a discretionary power which should be exercised in such a way as not to prevent an appeal.
23. The general principle in granting or refusing a stay was that if there was no overwhelming hindrance, stay had to be granted so that an appeal would not be rendered nugatory if the appellate court reverse its decision.
24. In exercise of its discretion whether to grant or refuse an application for stay, a court was required to consider the special circumstances of the case and its unique requirements.



25. On the issue of substantial loss, the applicant was required not only state that it was likely to suffer substantial loss, it had to prove that it would suffer substantial loss if stay orders were not granted. What amounted to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR where the court held that substantial loss was what had to be prevented by preserving the status quo because such loss would render the appeal nugatory.
26. The 2nd Respondent averred that it would suffer substantial loss if the Petitioners executed the judgment as there was likelihood of public funds being spent yet the appeal may be a success hence losing public funds. The 2nd Respondent's apprehension that the Petitioners may execute the Judgment before the Appeal was heard and determined was therefore not baseless. This is notwithstanding the fact that the Court of Appeal had already granted the 1st Respondent stay of execution of the decree herein.
27. Taking into account that the execution of the decree involved public funds, this court was satisfied that the 2nd Respondent had demonstrated that it would suffer irreparable loss if the execution of the Judgment were to proceed.
28. On whether the application had been brought without unreasonable delay, it was not in dispute that the Ruling was delivered on 6th March, 2024. The present application was filed in court on 27th March 2024. A delay of about twenty-one (21) days was not inordinate and was excusable.
29. On the last condition as to the provision of security for costs, Order 42 Rule 8 of the Civil Procedure Rules, 2010 provides as follows:-

“No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.”
30. It was clear from the above provision that no orders for deposit of security shall issue against the Government and this includes the County Government. The county government is therefore protected from the requirements of Order 42 Rule 6 and 7 of the Civil Procedure Rules.

Disposition

31. For the foregoing reasons, the upshot of this court's decision was that the 2nd Respondent's Notice of Motion application dated 18th March 2024 and filed on 27th March 2024 was merited and the same be and is hereby allowed in terms of prayer No (3) therein. As the 2nd Respondent was the Governor of the County Government of Vihiga and it would be punitive to award costs to a government against its citizens, this court deviated from the general principle that costs follow the event and direct that each party will bear its own costs.
32. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 17TH DAY OF SEPTEMBER 2025

J. KAMAU

JUDGE

