



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kibet v Kesses & another (Civil Appeal E061 of 2025)  
[2025] KEHC 12672 (KLR) (16 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12672 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E061 OF 2025  
SM MOHOCHI, J  
SEPTEMBER 16, 2025**

**BETWEEN**

**JOASH KIBET ..... APPLICANT**

**AND**

**MARIA JERUTO KESSES ..... 1<sup>ST</sup> RESPONDENT**

**JOSHUA KIMUTAI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a Notice of Motion Application filed pursuant to Under Section 1A,1B,3, 3A of the *Civil Procedure Act*, Order 22, Rule 22, Order 51, Rule 1 of the Civil Procedure Rules and all other enabling provisions of the Law.
2. The Appellant/Applicant craves for the following relief(s) from the Court that;-
  - a. The Honorable Court be pleased to certify this application urgent and heard on a priority basis.
  - b. This Honorable Court be pleased to issue an order staying the execution of the Judgment in Eldama Ravine Senior Principal Magistrate's Court in Civil Case No. E069 of 2022 delivered on 18<sup>th</sup> February 2025 ordering the Appellant/Applicant to pay Kshs. 2.5Million as special dependency damages among other payments pending the hearing and determination of the appeal herein.
  - c. The costs of this application be provided for.
3. The Application is supported by the sworn Affidavit evenly dated of Joash Kibet Kiptui and is premised on the following grounds, that;



- i. The Appellant/Applicant was sued in the Eldama Ravine Senior Principal Magistrate's Court in a traffic accident claim. Vide Eldama Ravine Senior Principal Magistrate's Court in Civil Case No. E069 of 2022, the Respondents were awarded an amount of Ksh. 2.5 Million as special dependency damages without the trial learned Magistrate assigning any basis for the award
- ii. The said Judgment did not consider the Submissions filed showing that the award on the said item could have been much lower in the circumstances.
- iii. There is real danger that if the orders of stay of execution are not granted, there is real threat to the Appellant/Applicant being executed against and with great loss and damage as a result.

### **Applicants Case**

4. It is the Applicants submission that, the Application is premised on grounds that the Appellant/Applicant was sued in Eldama Ravine Senior Principal Magistrate Court in Civil Case No. E069 of 2022 based on a traffic accident claim. The Plaintiffs/Respondents were awarded Ksh 2.5 million as special dependency damages without the trial magistrate assigning any basis for such an exorbitant award. The Judgment did not consider the submissions filed showing that the award on the said item could have been much lower in the circumstances.
5. That being dissatisfied with the said Judgment he has preferred an appeal against the same and there is real danger that if the orders of stay of execution are not granted, there is real threat to the Appellant/Applicant being executed against with great loss and damage as a result. The Appellant/Applicant has high chances of success on appeal and will suffer substantial loss and his appeal rendered nugatory if orders of stay of execution are not granted.
6. That his Application has been filed timeously and that the Respondents will not be prejudiced in any way if the orders sought herein are granted. It is in the interest of justice that the execution of Judgment and/or decree herein be stayed pending the hearing and determination of the appeal.
7. The Applicant contends that the Respondents are persons of straw and will not be able to refund the decretal sum if they are allowed to execute and the appeal thereafter succeeds. And his filed appeal raises triable issues and thus the orders of stay of execution should be granted. The Respondents being persons of straw will not be able to refund the decretal/disputed sum should the appeal be successful owing to their financial unknown and for shaky financial standing.
8. The Applicant submits on the issue of substantial loss, relying on Ogolla, J in Tropical Commodities Suppliers Ltd & others vs International Credit Bank Ltd (in Liquidation) [2004] 2EA 331 stated that:
 

“Substantial loss does not represent any particular Mathematical formula. Rather it 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 loss that is merely nominal.”
9. The Applicant contends he has met the threshold for grant of the orders sought as was enunciated in Butt vs Rent Restriction Tribunal 1979] where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal, the Court said that:-
 

“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.



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.

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.”

10. That the appeal raises triable issues and thus sufficient cause for seeking orders to stay of execution pending appeal.
11. Reliance is placed on Nairobi (Milimani) HCCC 795 Warsame J (as he then was) held that:

“Every party aggrieved with a decision of the High Court has natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the Defendant”
12. That the Appellant/Applicant's purpose of applying for stay of execution pending the hearing and determination of the appeal herein is to preserve his rights as an Appellant as was held in the case of RWW V EKW [2019] eKLR, the Court stated as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”
13. It is the Applicant's submission that in the interest of justice, the orders of stay sought be granted to enable him prosecute his appeal which has high chances of succeeding. The Applicant submits that his application is supported by the decision made in Butt vs. Rent Restriction Tribunal [1979] KE CA 22 (KLR).
14. Further reliance is made to the case of Wilson V Church (No.2) 12 Ch. D (1879)454 at P.459, the Court stated as follows:

“It is in discretion of the Court to grant or refuse a stay but what has to be Judged Sin every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court has a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if succession from being nugatory.”
15. In the same matter above quoted, Cotton LJ said at P, 458

“I will state my opinion that when a party is appealing, exercising his undoubted right to appeal, this caught ought to see that the appeal, if successful, is not nugatory.”
16. It is the Appellant/Applicant's submission that he has met the threshold for grant of orders of stay of execution and for the interest of justice pray that the orders be granted as prayed.

### **Respondents Case**

17. It's the Respondents submissions that, the Applicant has not demonstrated substantial loss.



18. That the burden of proving “substantial loss” lies squarely on the shoulders of the applicant. As was held in *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] KLR 410, Platt Ag. J.A. stated:

“It is not sufficient to merely state that the sum of money is substantial and that the Respondent would suffer loss if the money is paid. Evidence must be provided to show that the Respondent cannot refund the amount if the appeal succeeds.”

19. That in the present case, the Appellant has not provided any affidavit evidence of the Respondents’ inability to refund the decretal sum. It is trite law that mere assertion of inability to recover funds is not enough. This Court is entitled to presume that a decree-holder is capable of repaying the amount unless proved otherwise.

20. That, the Appellant’s affidavit merely asserts, in blanket terms, that he will suffer irreparable harm if execution proceeds. No bank statements, no asset profile, no proof of impecuniosity is tendered. The Court of Appeal in *Kenya Shell* rejected such bare allegations.

21. Conversely, the Respondents—bereaved parents—continue to endure demonstrable economic and emotional hardship stemming from funeral expenses, counselling costs, and the abatement of dependency support. Delay compounds that loss.

22. Moreover, the Appellant is attempting to stay a judgment entered partly through a consent on liability, a fact which militates against any presumption of merit or urgency. The Respondents contend that the Appellant is simply seeking to delay justice and frustrate enforcement.

23. That the Application has not been made in good faith and with due dispatch and that while the judgment was delivered on 18<sup>th</sup> February 2025, the application for stay was filed on 10<sup>th</sup> March 2025, after the lapse of over 20 days without any satisfactory explanation.

24. That the delay is telling of the Applicant’s lack of seriousness and further supports the inference that the application is not aimed at preserving the status quo for the ends of justice, but to prevent the decree-holder from enjoying the fruits of her judgment.

25. That the Appellant went as far as to engage the plaintiff on possible payment plans to settle the decretal award yet it was just a delay tact as he waited in bated breath of stay orders that were rightly not granted by this Honourable Court to those who do not come to equity with clean hands.

26. That the Applicant has not made any offer for security for costs, a mandatory requirement under Order 42 Rule 6(2)(b) and reliance is placed upon the Court of Appeal decision in *Halai & Another v Thornton & Turpin (1963) Ltd* [1990] KLR 365 held:

“The High Court’s discretion to order stay of execution is fettered by three conditions, namely: establishment of a sufficient cause, satisfaction of substantial loss, and the furnishing of security. The applicant must satisfy all these conditions.”

27. The Applicant has neither offered any security nor proposed to deposit any portion of the judgment sum. The Respondents submit that the application is fatally defective on this ground alone.

28. The Respondents are amenable to reasonable arrangements, including the deposit of part of the judgment sum into a joint interest-earning account and release part of the sum to the plaintiff.

29. However, the Appellant has ignored this avenue and instead sought to block the entire execution process without any assurance of compliance with the decree should the appeal fail.



30. That the issue of Security for costs is not optional as was held in the case of Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd [2019] eKLR that: -
- “The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower Court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls., the Court stressed that an applicant must be “ready and willing to abide by such order.”
31. That the default practice is well-settled: 50 % of the decretal amount plus taxed costs to the decree-holder; the remainder in an interest-earning joint account as advanced in Samvir Trustees Ltd v Guardian Bank Ltd the Appellant has ignored this, signalling bad faith.
32. That the Memorandum of Appeal discloses no serious or arguable issues, reflecting a clear lack of merit. The valuation of the deceased’s life at Kshs. 500,000 in the Memorandum is not only insulting but also inconsistent with precedents in fatal claims. Reference being made to the case of Hellen Waruguru Waweru (Suing as the legal representative of the Estate of Peter Waweru Mwangi) v Kiarie Shoes Stores Limited [2015] eKLR, where the Court of Appeal emphasized that awards in fatal accident cases must be fair, reasonable, and just, bearing in mind the value of life and dependency.
33. That, by suggesting an absurd figure as a reasonable award, the Appellant reveals his lack of seriousness and deliberate attempt to devalue the life of the deceased child. This supports the conclusion that the appeal is designed merely to frustrate the decree-holder.
34. That the intended appeal is filed in futility and bad faith that, the Memorandum of Appeal pegs general damages at Ksh. 500,000 for loss of life of a minor. Prevailing authorities: SMM & Another v SMS [2017] eKLR awarded Ksh 2.5 million (dependency & general); KPLC v Paul Waithaka [2018] eKLR affirmed Ksh 1.5 million for an adult. The Appellant’s figure is thus hopelessly out of step with jurisprudence.
35. An appeal mounted on such a premise lacks prospects. Courts frown upon appeals lodged solely to buy time as advanced in Kenya Commercial Bank v. Benjoh Amalgamated Ltd.
36. That, Article 159(2)(a) of *the Constitution* mandates Courts to deliver justice to all. Further, Article 48 guarantees the right of access to justice and Article 50(1) the right to a fair and expeditious hearing.
37. That the Respondents have already endured the pain of losing a child. Their journey through the justice system should not be dragged further by procedural tactics and meritless appeals. The Court is urged to uphold the dignity of the process and safeguard the decree-holder’s right to timely enforcement.
38. The Appellant has failed to satisfy the legal and equitable conditions for grant of stay of execution and thus the application dated 10<sup>th</sup> March 2025 should be dismissed with costs and that the Respondents be at liberty to proceed with execution of the judgment in CMCC No. E069 of 2022; alternatively, should the Court be inclined to grant a conditional stay, direct the Appellant to pay half of the decretal amount plus taxed costs to the Respondents’ advocates and deposit the balance in a joint interest-earning account within 14 days of the ruling.



## Analysis & Determination

39. I have carefully considered pleadings in support of and opposition to and note that the only issue which arise for determination is whether stay against execution should be granted during pendency of the Appeal.
40. The conditions that have to be met prior to the Court issuing stay orders pending appeal are set out under Order 42 Rule 6(2) of the Civil Procedure Rules which stipulates: -
- “No order for stay of execution shall be made under sub rule 1 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
- 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.”
41. In essence the Applicant should satisfy the Court that: -
- i. Substantial loss may result to it should the order not issue;
  - ii. The application has been made without unreasonable delay; and
  - iii. Such security for the due performance of such decree or order has been given as may ultimately be binding on it.
42. This Court is equally privy to the Memorandum of Appeal and that the Appeal is largely on the quantum award under a specified head and that the liability of the Appellant is settled therefore being a partial appeal against judgment.
43. This Court is unpersuaded that the Applicant/Appellant has satisfied the conditions for grant of stay against execution of judgment orders, however to further entrench access to justice, the right to Appeal while recognising the validity of the judgment on Appeal it is in the wider interest of justice to grant a conditional order of stay.
44. In balancing the interest of the parties this Court invokes its inherent jurisdiction to determine the Application on the following terms;
- a. An order of stay of execution is hereby issued against judgement dated 18<sup>th</sup> February 2025 and its subsequent orders all in Eldama Ravine SPM’s Court Civil Case No. E069 of 2022 pending the hearing and determination of the Appeal.
  - b. The Applicant shall pay to the Respondents the sum of Kshs 500, 000/- of the decretal amount within thirty (45) days of this Ruling;
  - c. The Respondent’s shall have costs of the Application assessed at Kshs. 20,000/- to be paid within thirty (30) days of this Ruling;
  - d. In default of condition (b) and (c) above, the stay order shall be automatically vacated and this Application shall be deemed to have been dismissed with costs and the Respondents shall be at liberty to execute.
  - e. The Appellant shall file and serve a record of appeal within sixty (60) days of this Ruling;
- It is so ordered.



DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 16<sup>TH</sup> DAY OF SEPTEMBER, 2025.

.....

MOHOCHI S.M.

JUDGE

