



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mutua & another v Ngunzi (Civil Appeal E122 of 2024)
[2025] KEHC 12586 (KLR) (12 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E122 OF 2024
TM MATHEKA, J
SEPTEMBER 12, 2025**

BETWEEN

MULONZI PETER MUTUA 1ST APPELLANT

CHARLES MBUVI KYULE 2ND APPELLANT

AND

COSMAS MUTISYA NGUNZI RESPONDENT

RULING

1. The application before me is the notice of motion dated 18th October 2024. The applicant seeks inter alia stay of execution of the judgment and decree in Makindu PMCC E61 of 2022 pending the hearing and determination of the defendant's appeal.
2. The application is brought under sections. 1A, 1B and 3 A, 63(e) of the *Civil Procedure Act* and order 22 Rule 22(1) order 42 Rule 6 Order 51 rule 1 of the Civil Procedure Rules 2010.
3. The grounds are that the applicants were dissatisfied with the judgment of the subordinate court and lodged an appeal and if the stay is not granted, they will suffer substantial loss. They are ready and able to abide by reasonable orders that may be granted by the court regarding security and more, particularly to deposit half the degree to a mounted court or deposit half the decretal sum in a joint interest earning account of both the applicants and the respondents advocate the balance to be held in abeyance. Nevertheless, the applicants are ready to be subjected to the fair discretion of this court.
4. The application is supported by the affidavit of the first applicant appellant sworn on 18th October 2024. He reiterates the grounds on the face of the application and states that the judgment of the subordinate court ordered the appellants to pay the plaintiff the sum of Kenya shillings 1,023,330 in damages plus cost and interest.



5. The application is opposed by the replying of a Faith Mutio Mutuku Advocate for the respondent. She depones that judgment was delivered on the 17th September 2024 finding the defendants 100% liable, awarding the sum of Kenya shillings 950,000 as general damages, special damages of Kenya shillings 73,330 together with costs and interest. In the further affidavit she annexes the decree.

6. She contends that the applicants in the memorandum of appeal do not deny that they are to blame for the accident. That they are only claiming that the respondent contributed to the accident and as such, if the court is inclined to grant stay of execution, then they should be ordered to release three quarters of the decretal sum to the respondent and the balance be deposited in a joint interest earning account with a reputable bank in the names of counsel for both parties.

Parties through their counsel filed written submissions the.

7. For the appellant, it is submitted that they have complied with the requirements of order 42 rule 6(2).

8. The appellant relies on *Amal Hauliers Limited versus Abdunnassir Abubakar Hassan*, [2017] eKLR, where the court held that

the respondent has not disclosed any source of income that he would use to refund the applicant, the decretal amount, should the appeal succeed. Indeed, respondent's averment that he is in dire need of money to continue with treatment for the serious injuries received in the accident can only confirm that he will not be able to refund the decretal sum were the applicant's appeal to succeed. The applicant has thus established that it will suffer substantial loss if they intended execution is not stayed. It also follows that if the respondent executes the judgment and the applicants appeal succeeds, then not only will the applicant suffer substantial loss, but the appeal will also be rendered nugatory .

9. It is also submitted that the application has been brought without a reasonable delay. Judgment was delivered on 17th September 2024. The memorandum of appeal was filed on 16th of October. 2024 and the application for stay of execution was filed on the 18th of October. 2024. Hence all were done within a month.

10. It is for the submitted that the applicant is willing to furnish security for due performance of the decree . It is submitted that the applicants are willing to deposit the entire decretal sum in court, which move will secure the interest of both parties without bias. and once the appeal is determined, the party that wins will have ready access to the decretal sum.

11. The appellant relies on *Focin Motorcycle Co Limited versus Anne Wambu Wangui and another* [2018] eKLR where the learned judge 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 for stay.

12. It is further submitted that the applicants have an arguable appeal with chances of success on the grounds that the trial court arrived at his decision without considering that there was no sufficient evidence to prove the claim or the submissions of the appellants on quantum and liability.



13. It is further submitted that the fact that the appellants are seeking that the judgment of the lower court be dismissed/ be set outside its entirety, it would be unfair and prejudicial to have any of the decretal sum paid to the appellant.
14. For the respondent, it is submitted that the issues for determination, are whether the applicant has met the conditions for stay of the execution pending appeal.
15. That the applicant is supposed to demonstrate that he can provide security for the due performance of the decree and that he will suffer substantial loss unless the application is granted.
16. It is submitted that the applicants in their affidavit have indicated that they are willing to deposit half the decretal sum as security. It is submitted that that is an indication that they are not willing to give security for the entire decretal of sum and that would not be sufficient security for the due performance of the decretal sum.

On the issue of sufficient security, the respondent relies on

17. *Yegon v Rono* (Environment & Land Case 5 of 2016) [2023] KEELC 20880 (KLR) (19 October 2023) (Ruling) where the court said;

...On the last condition as to provision of security, I find that Order 42 Rule 6 (2)(b) of the Civil Procedure Rules stipulates in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has not offered to furnish security for due performance of such decree or order as may ultimately be binding on him.

18. He also relies on *Kassan Kanji Nhirani & Another; v Jane Njeri Kimani & Another* [2020] eKLR where security for the entire decretal sum was not offered and the court held stated:

“... Suffice it to state that having paid a sum of Kshs 1,270,000/= as was indicated in the Judgment, it was evident from the sum that was indicated in the decree that there was a balance of Kshs 450,000/= that had remained unpaid. In view of this outstanding balance, this court found it necessary to consider if it could grant the Applicants an order for stay of execution pending appeal ...The Applicants had paid the Respondents part of the decretal sum and further deposited part of the decretal sum into court. They had therefore demonstrated that they had complied with the third condition of being granted an order for stay of execution pending appeal. However, there was need for them to pay the balance of Kshs 450,000/= which would be sufficient security as was binding upon them for the due performance of the decree herein.”

On the issue of substantial loss, the respondent relies on *Njenga v Njeri & 2 Others* (Civil Appeal E125 Of 2023) [2023] KEHC ;23991 (KLR) (24 October 2023) (Ruling) where the court said

It is the duty of the Applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* (2002) KLR 63 the Court of Appeal considered as to what amounts to substantial loss and held that – “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.

19. He also relies on *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR where the court held the view that;

“... for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”

On the court’s duty to balance the rights of both parties in such a matter the respondent referred the court to *Cannon Assurance Limited v Peter Mulei Sammy* [2019] eKLR

It would therefore be unfair to deny the Respondent access to at least part of the fruits of the judgment. The Respondent has clearly indicated that he has the means with which to refund the decretal sums should the appeal succeed in the end. The Applicant is a giant insurance company and therefore part of the decretal sums herein if released to the Respondent will not cause a financial dent upon its operations. I am satisfied that the Applicant herein has not demonstrated that it stands to suffer substantial loss if an order of stay is not granted. The trial court had already directed that the applicant do deposit part of the decretal sums as security which it has already done and release part thereof to the Respondent. The Applicant should thus proceed and comply with the second order.

It is submitted that the application should be dismissed.

20. From the foregoing the only issue for determination is whether the application has any merit to warrant the orders sought by the applicant.
21. I have considered the application, the affidavits, the submissions the amended memorandum of appeal and the Judgment of the subordinate court. I have noted that there was no dispute that an accident happened. The dispute is how the accident happened; hence the appeal has a triable issue whether or not the respondent was wholly to blame for the accident.
22. The respondent has not demonstrated that he would be in a position to refund the entire decretal sum if paid to him. Information related to this ability is within his ability and counsel did not provide any. Hence the fear of the applicant that the appeal could be rendered nugatory.
23. The applicant has indicated the ability and willingness to abide by the directions of this court including the deposit of the entire decretal sum in court. In my view that is in compliance with the requirement for the provision of security for the performance of the decree is available.

What orders to issue?

24. An accident happened involving the respondent and the applicant’s m/v. He sustained injuries. He has a regular judgment.
25. The stay of execution is allowed on condition that the applicants pay the respondent the sum of Ksh 150,000, and the rest of the decretal sum is deposited in a joint interest earning account in the names of both counsel within 30 days hereof. In default the stay will lapse and execution to issue.



The respondent to have costs of the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA CTS THIS 12TH SEPTEMBER 2025.

MUMBUA T MATHEKA

JUDGE

CA Mwanatumu

