



**Waturu & another (Suing as the Legal Representatives and Administrators of the Estate of Paul Giticha Ngare (Deceased)) v Ndege & another (Civil Appeal E103 of 2023) [2025] KEHC 13186 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13186 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E103 OF 2023  
EM MURIITHI, J  
SEPTEMBER 25, 2025**

**BETWEEN**

**GEORGINA WAMBUI WATURU ..... 1<sup>ST</sup> APPELLANT**

**SAMUEL MURIITHI NGARE ..... 2<sup>ND</sup> APPELLANT**

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF  
THE ESTATE OF PAUL GITICHA NGARE (DECEASED)**

**AND**

**DAVID KAMAU NDEGE ..... 1<sup>ST</sup> RESPONDENT**

**ROBERT NZAU KILONZO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicants have filed a second appeal to the Court of Appeal from the decision of the Court (Andayi, J.) in the Judgment on the Appeal herein delivered on 11/7/2025 and by Notice of Motion dated 25/7/2025 upon filing a Notice of Appeal dated 16/7/2025 have sought an order for stay of execution pending the hearing and determination of the Appeal before the Court of Appeal.
2. The facts of the application are set out in paragraphs 2 - 13 of the Supporting Affidavit sworn by the 1<sup>st</sup> Applicant as follows:
  - “2. That I also have written authority of the 2nd applicant to swear this affidavit on his behalf as well.
  3. That the subordinate court in Kerugoya CMCC 65/2020 made Judgement against the us in the slim of Ksh.3,137,428/=.



4. That through our Insurance Company paid Ksh.3,000,000/=, even as the appellant filed the appeal before this court.
5. That the judgment in this appeal was made on 11th July 2025 by Honorable Andayi E. F, Judge. (Attached is a copy of judgement made on 11th July 2025 marked as "DKN 1")
6. That this court made a determination that the lower court was in error and substituted the trial magistrate's judgement with the following orders:
  - i) Award of general damages as follows:
    - Loss of dependency: Ksh.28,1991,360/=
    - Pain and suffering: Ksh.20,000/=
    - Loss of expectations of life: Ksh.100,000/=
    - Special damages: Ksh.310,000/=
    - Total: Ksh.28,621,360/=
  - ii) Having apportioned liability at 30:70 the final award of damages was Ksh.20,034,952/=.
7. That we were aggrieved and dissatisfied with the said judgment and filed and served a Notice of Appeal dated 16th July 2025. (Attached is a copy of Notice of Appeal dated 16th July 2025 marked "DKN2").
8. That we have an extremely good appeal with high probability of success on the following grounds:
  - I. That the trial magistrate was a Chief Magistrate whose pecuniary jurisdiction is Ksh.20,000,000/= under section 7 (1) (a) of the Magistrates' Courts Act.
  - II. It was therefore unlawful for the learned Judge to substitute the Chief Magistrates' Judgement with an award which he had no jurisdiction to make.
  - III. From the findings in the judgement of the learned Judge, it is quite clear that the learned magistrate lacked pecuniary jurisdiction to hear and determine the suit: the judge ought to have either dismissed the appeal or declared the proceedings before the chief magistrate as having been a nullity for lack of jurisdiction.
  - IV. That it would be unlawful and against public policy for the respondent to execute a judgment made in excess of jurisdiction.
  - V. That the learned judge failed to fairly evaluate and analyze the submissions made on behalf of us.
  - VI. That the learned judge erred in disregarding precedents submitted by the us in regard to the damages awardable under the *[fatal accidents Act](#)* and the computation thereof.



9. That the appellant was duly paid Ksh.3,000,000/= upon judgment in the lower court.
  10. That the court herein granted stay of execution for 30 days but the said days will lapse during the courts vacation.
  11. That the amount awarded in the judgement is excessively high and in excess of jurisdiction and we may not even be able to raise the same.
  12. That the appellants have formally made a demand dated 22nd July 2025 while still acknowledging that Kshs 3,000,000/= was duly paid. (Attached is the letter dated 22nd July 2025 marked as "DKN3").
  13. That we are desirous of filing their record of appeal before the court of appeal and we have requested for certified copies of proceedings before this court. (Attached is a letter requesting for certified proceedings dated 16th July 2025 "DKN 4")."
3. By a Replying Affidavit sworn on 4/8/2025, the Respondents object that the Court is not able to assess the chances of success of the appeal and urge that security be given as follows:
- “ 4. That I have been informed by my advocates. information I believe to be true, that this Court is not able to determine whether or not the appeal raises any triable issues as the Applicants have not attached a copy of memorandum of appeal to the application. Their allegations that they are waiting for the court to issue them with typed proceedings is not a valid excuse as their grounds of appeal are based on the judgment not the proceedings.
  5. That I have been informed by my advocates, information I believe to be true, that the application does not meet the legal threshold for the grant of stay pending appeal as no substantial loss has been demonstrated by the Applicant. The deponent has merely stated they are likely to be put to civil jail. The fact that execution is likely to happen, even if it is done by putting the Applicant to civil jail does not amount to substantial loss: as execution is a process done within the law.
  6. That further to paragraph five (5) above, the applicant has neither made any commitment to provide security for the appeal nor given undertaking to comply with any conditions that this Court is likely to set. knowing very well that it is a condition that must be met in order for the court to grant orders sought herein.
  7. That in the view of the foregoing. it is my humble opinion that the application herein is a waste of courts time and the same is aimed at denying us the fruits of the judgment they intend to appeal against.
  8. That it is my humble prayer that should the court deem it fit to grant the prayers sought, the same should be on a condition that the applicant deposit the entire decretal sum of Ksh.17,328,989 - in a joint interest earning account, in the names of the advocates for the parties, within 14 days of Court's order. (The tabulation of the amount above is in the letter dated 22/7/2025 that form part of the Applicants' annexures that they have marked as DK -3)



9. That the applicants' allegations that he may not be able to pay the decretal amount raises questions as to his true intentions of this appeal, besides he is a man of means as he is a medical doctor employed by the Ministry of Health. He is also a business man within Kerugoya and beyond. (Annexed hereto and marked GWW-1 is a copy of investigation report confirming this same.)
  10. That this application is frivolous, an abuse of the process of the court and ought to be dismissed with costs to the Respondent.”
4. A Supplementary Affidavit sworn on 19/8/2025, with leave of the Court, was filed by the 1<sup>st</sup> Applicant emphasizing provision of security by reason of payment to the Respondent of some 3,000,000/- during the pendency of the appeal to the High Court as follows:
- “2. That this affidavit supplements the one I swore on 25TH July, 2025 and responds to the affidavit sworn by Georgina Wambui Waturu on 4th August 2025.
  3. That it is not true to state that [ have not set out the grounds of my appeal. The same are clearly set out at paragraph 8 of my supporting affidavit sworn on 25th July 2025.
  4. That the respondents cannot be seen to state that [ have not offered any security. The appellants have already been paid Ksh.3,000,000/= following the Judgement of the Chief Magistrates court which was for a sum of Ksh.3,137,428/=.
  5. That the judgement of the high court was in excess of the pecuniary jurisdiction of the Chief Magistrate's Court. It therefore means that if the court of appeal agrees with our appeal and finds that, in view of the judgment of the High court, the Chief Magistrates did not have jurisdiction to entertain the claim; then even the earlier award of the Chief Magistrate shall be set aside and the respondents will be liable to refund the Ksh.3,000,000/= paid to them.
  6. That although I was a doctor employed by the government of Kenya, I retired from employment on 28th January 2022. (Annexed hereto is a copy of Notice of Retirement dated 28th October 2021 marked as DKN 5”).
  7. That I do not run the businesses set at paragraph 8 of the investigation report attached to the respondents replying affidavit as annexure "GWW1".
  8. That I am only a shareholder and director in 2 companies which have a separate legal identity from me and whose respective nominal share capital is Ksh.100,000/=:
    - a) Medkam Pharmaceuticals Limited in which I hold 300 shares worth Ksh.30,000/- (Annexed hereto is a copy of CR 12 marked as "DKN 6").
    - b) Kerugoya Royal Annex Hotel Limited in which I hold 500 shares worth Kshs50,000/= (Annexed hereto is a copy of CR12 marked as "DKN 7")”



5. In Submissions dated 19/8/2025 filed on the application, the applicants emphasize alleged illegality of the Judgment of this Court (Andayi, J.), which is the subject of the appeal, as follows:

“Grounds Of Appeal

11. The applicants have set out their grounds of appeal at paragraphs 8 of the supporting affidavit sworn on 25th July 2025.
12. Their main issue is on jurisdiction and it is not in dispute that jurisdiction is everything. An order issued without jurisdiction is of no consequence.
13. It is our humble submissions that the honourable judge could not substitute the award of the Chief Magistrate with an award of Kshs 28,191,360/= (and net of Kshs 20,034,952/= after taking into account contributory negligence.
14. Section 7 (1) (a) of the magistrate's court Act provides,
  - "1. A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed -
    - (a) twenty million shillings, where the court is presided over by a chief magistrate;"
15. We submit that it is evidently clear that the judgment of this court was in violation of Section 7 (1) (a) of the Magistrates Court Act. If the findings of the judge were proper, his final orders would have been to strike out their suit before the Chief Magistrate for want of jurisdiction; and order for refund of Kshs 3,000,000= paid to the respondents.
16. We submit that, it would be unlawful and unconstitutional to allow execution proceedings in regard to a judgment or decree that is on the face of it unlawful for want of jurisdiction.
17. This Court in Fortune Sacco Society Ltd. Principal magistrate Court, Wanguru & Another [2025] KEHC 4914 KLR stated at paragraph 27,
  - "27. It would be (1/1 injustice if the Court permitted the determination by an incompetent tribunal, as charged here, to make a decision which is executed against the applicant, and in violation of its constitutional right to fair hearing under Article 50 of the Constitutional. The Court must, if an arguable case is established, permit tire full examination of the question of jurisdiction and violation of right to hearing be heard and determined by the High Court as Constitutional Court under Article 165 (3) (d) and as a supervisory court under Article 165 (6) and (7) of *the Constitution*."

6. In response, the Respondents' Submissions dated 26/8/2025 rely on the Order 42 Rule 6 provisions on stay of execution and urge that there is not demonstrated the likelihood of substantial loss to justify the stay of execution, and that security should be given in any event, as follows:

“Conclusion



The court is faced with a situation where it must make a determination that balances the rights for parties herein. This means securing interests of both parties herein, which can only be done by ordering the Applicant to deposit half of the decretal sum in a joint interest earning account to be held by advocates for all parties. This will ensure the Applicant prosecute their appeal without worry of execution. On the other hand, the Respondent will rest easy knowing that security for the due performance of the decree has been provided.

In *Arun C Sharma v Ashana Raikundalia* (supra) the Court held:

"The Court should always remember that both the Applicants and the Respondent have rights. The Applicant has a right to his appeal and the prospects that it shall not be reduced to pious aspiration or a barren result if they payout the decretal sum to a person who may not make a refund. The Respondent, on the other hand, has a right to the fruits of its judgment which should not be taken away and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the Applicant."

### **Decision of the court**

7. The present stay application in its nature and facts raise a judicial practice problem in that this Court is called upon by the applicant to consider the prima facie merits of the appeal against the judgment of this court differently constituted in a manner apparent that the Court would be sitting on appeal from its own decision, or worse from a decision of a court of concurrent jurisdiction.
8. Even if the Court at this stage need only establish whether there is an arguable appeal, this court would still have to consider the decision of a court of equal jurisdiction.
9. If, on the other hand, it were possible to deal with the application on the basis only of presence of substantial loss and provision of security, as urged by the Respondents, there would be a spectre of want of fair hearing on the part of the Applicants who have raised and relied on the alleged illegality in the judgment of the High Court being in excess of the pecuniary jurisdiction of the trial Chief Magistrate's Court where the suit was filed.
10. The remedy appears in the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules, which gives concurrent jurisdiction for stay of execution on both the court appealed from and the court to which appeal is preferred. As relevant, Order 42 Rule 6 provides as follows:

“6. Stay in case of appeal [Order 42, rule 6]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.



- (2) No order for stay of execution shall be made under subrule (1) unless—
  - (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

11. As the Court to which appeal is preferred, in this case the Court of Appeal, is able to entertain an application for stay of execution whether or not stay shall have been granted or refused by this Court, as the court appealed from, this Court should defer to the decision of the Court of Appeal. This course would, in saving costs of having to approach the court appealed from and the court to which appeal is preferred, give effect to the Overriding Objective of the civil process under sections 1A and 1B “to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act” by “the efficient use of the available judicial and administrative resources”.
12. An order for status quo to be maintained for a limited time to allow the Appellants/Applicants to approach the Court of Appeal for an order for stay of execution pending appeal shall be made as necessary.

### **Orders**

13. Accordingly, for the reasons set out above, this Court will defer to the Court of Appeal on the question of stay of execution pending appeal to it, and consequently, make the following directions of the Appellants’ application dated 25/7/2025:
  1. There shall be an order for status quo to be maintained for a period of thirty (30) days to allow the appellant to move the Court of Appeal for an order for stay of execution pending appeal to that Court.
  2. Should the appellant fail to move the Court of Appeal or to obtain the orders of stay of execution pending appeal, the order for status quo granted herein shall lapse on expiry of the period of thirty (30) days, unless the Court of Appeal otherwise directs.
14. The Costs of this application shall be costs in the Cause.  
Order accordingly.

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2025.**



**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. Wachira instructed by M/S Magee LLP Advocates for the Applicants.

Mr. Mwangi instructed by M/S Anne W. Kimani & Co. Advocates for the Respondent.

