



**Kamba v Matheka (Civil Appeal E330 of 2024)  
[2025] KEHC 14321 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 14321 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E330 OF 2024  
NIO ADAGI, J  
SEPTEMBER 30, 2025**

**BETWEEN**

**LEONARD MUNYAO KAMBA ..... APPLICANT**

**AND**

**FREDRICK MUMO MATHEKA ..... RESPONDENT**

**RULING**

**Introduction**

1. By an application dated 18th December 2024, Leonard Munyao Kamba (the Applicant) prays for stay of execution of the decree in CMCC No. 345 of 2020 pending hearing and determination of the appeal herein. The Applicant also prays for costs.
2. The application is premised on the provisions of Order 42 Rule 6 of the Civil Procedure Rules and Section 1A, 1B and 3A of the *Civil Procedure Act*.
3. The application is anchored on the two grounds listed on the face of the application being first, that the appeal has high chances of success and second, that no prejudice will be suffered by the Respondent. The application is also supported by the Applicant's supporting affidavit sworn on 18th December 2024 and a further affidavit sworn on 10th April 2025 together with annexures thereto.
4. The Respondent Fredrick Mumo Matheka opposed the application through his sworn Replying Affidavit dated 3rd February 2025.

**Brief background**

5. The background to this litigation, albeit in summary form is that on 6th August 2020, the Respondent filed suit in Machakos CMCC No. E345/2020 for compensation for personal injuries sustained on 26th May 2018 in a road traffic accident involving the Applicant's motor vehicle. On 22nd May 2023 when the matter came for hearing, a consent judgment on liability was recorded against the Applicant



at 100%. On 23rd May 2023, the Court delivered judgment in favour of the Respondent in the sum of Kshs.1,907,865/- with costs and interest.

6. That judgment was not appealed against and no payment of the decree was made to date.
7. The Respondent applied for execution of the decree and the Applicant filed an application for stay pending further directions in the trial court but the same was dismissed.
8. Aggrieved by the dismissal, the Applicant filed the instant application together with a Memorandum of Appeal both dated 18th December 2024.
9. Directions were given for the application to be canvassed by way of written submissions. The Applicant's submissions dated 26th May 2025 are filed by the law firm of P.M. Mutuku & Company Advocates while the Respondent's submissions are filed by the law firm of A.K Mutua Advocates.

### **The Applicant's case**

10. The Applicant contends that he has an arguable appeal, which has high chances of success as evidenced by the grounds enumerated in his Memorandum of Appeal. Essentially, the Applicant faults the trial court's decision as being illegal on the basis of the facts before this court. The Applicant avers that an accident occurred on 26/5/2018 involving motor vehicle Reg no. KCN XXXT and KBA XXXK. He was sued in a series of cases namely CMCC No. 27 of 2019, CMCC 688 of 2018, 689 of 2018, 690 of 2018, 114 of 2019 and 546 of 2018 all at Machakos Magistrates Court.
11. That CMCC No. 27 of 2019 was selected as the test suit. Case CMCC No. 345 of 2020 was filed later and by the time the suit was filed liability had been decided at 100% in the test suit. The Applicant states that he appealed the decision against the test suit through Machakos High Court Civil Appeal No. E0II of 2020 which was by then pending judgement.
12. That the suit in CMCC No. 345 of 2020 was fixed for hearing. Liability was recorded by consent at 100% and it was foolhardy to try it in the instant case as it was by the necessary implication of law.
13. That in the cause of time an application was filed in High Court Misc No. E097 of 2020 and stay orders were granted. The basis of the application was that the test suit order was not properly made. That the order of stay was granted to all matters that were made subject of the test suit. Suit CMCC No. 345 of 2020 had not been filed by then and hence it was not mentioned in the test suit.
14. The Applicant states that he had applied to include the case to be subjected to the order. That the decision in appeal case No. E0II of 2020 has a direct bearing on this suit and that the Applicant is likely to suffer unfairly if these orders are not granted.
15. The Applicant prays that this court be inclined to offer a relief to him in terms of a stay of execution pending the hearing of this appeal.

### **The Respondent's case**

16. The Respondent's case is that the present application is an afterthought of the worst kind and is meant to deny the Respondent from enjoying the fruits of his rightfully obtained judgment. It is worth noting that the present appeal is for refusal to order stay of execution but not challenging the judgment and Decree of the trial court. From since 23rd May 2023 when the judgment was entered to date, no appeal has been preferred against the said Decree and no payment has been made.
17. The Respondent states that the stay purportedly obtained in Machakos High Court Misc. application no. E097 of 2022 was by Registered Trustees of Africa Brotherhood Church over other matters and



the present suit was not part of them. The Applicant is not a party to the said suit hence cannot benefit from orders of another party when he is not involved.

18. That the Applicant sought for stay of execution in Machakos Civil Appeal No. E011 of 2020 and was given a conditional stay that he never complied with.
19. On 28th February 2024, the trial court issued warrants of attachment and sale against the Applicant who subsequently applied for stay of execution pending further directions.
20. On 8th December 2022, the said application for stay of execution was dismissed with costs and the trial court on 28th December 2024 issued a Notice To Show Cause that was due for hearing on 12th February 2025.
21. That the provisions upon which this application is premised envisages a situation whereby there is an appeal against the Decree of the Court and the Decree has never been appealed against.
22. The Respondent further argues that in any event, the Applicant has not satisfied the conditions for stay as provided for under Order 42 Rule 6 in that:-
  - i. He has not shown if he has an appeal with chances of success.
  - ii. He has not demonstrated that he will suffer irreparable loss & damage if stay not granted.
  - iii. He has not shown he will provide security for due performance of the decree
  - iv. He filed the application with undue delay without explanation.
23. The Respondent argues that the present appeal is on refusal of stay of execution and not the judgement or decree and it appears that the Applicant is on a shopping spree. The Respondent thus urge this court to dismiss the application with costs.

### **Analysis and Determination.**

24. I have carefully considered the application, the replying affidavit and the rival submissions tendered by the Parties' counsel in canvassing the application. The issue I form for determination is whether the application is meritorious.
25. The application for determination before this court is brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and Section 1A, 1B and 3A of the [Civil Procedure Act](#).
26. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
  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 orders set aside.



2. No order for stay of execution shall be made under sub rule 1 unless:-
  - a. The Court is satisfied that substantial loss may result to the 1<sup>st</sup> 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.

27. It is trite law that an appeal does not operate as an automatic stay of execution.

Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

### **Substantial loss**

28. Substantial loss was clearly explained in the case of James Wangalwa & Another vs 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”.

29. The Applicant is silent in his affidavits on how he stands to suffer substantial loss. He only states at paragraph 19 and 20 of the supporting affidavit that the decision in case No. E011 of 2020 has a direct bearing on this suit thus he is likely to suffer unfairly if the orders are not granted.

30. It is also trite law that execution is a lawful process and it is not a ground for granting stay of execution. The Applicant is required to show the manner in which execution will irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. The Appellant has failed to demonstrate substantial loss in my considered view.

### **Unreasonable delay in filing application**

31. On whether the application has been made without unreasonable delay. The decision being appealed against was delivered on 6th December 2024 and the instant application was filed on 16th January 2025. This is about 10 days, and taking into account the High Court December recess when time does not run, I find the application to have been filed without unreasonable delay.



## Security for costs

32. On the issue of security for costs, the purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

33. Evidently, the issue of security is discretionary and it is upon the court to determine it and set its terms. The trial court delivered a ruling and dismissed with costs the Applicant’s application seeking stay of execution of a money decree in Machakos CMCC No. E345 o 2020.
34. Upon thorougher perusal of the proceedings and facts presented in this appeal, it is clear that the appeal herein is challenging the trial court’s dismissal order and not the judgement or decree of the trial court.
35. It is also not in dispute that Machakos CMCC No. E345 o 2020 was not amongst the cases that were made subject of the test suit in Machakos CMCC No. 27 of 2029. It is my considered view that the Applicant having been aware of the test suit, ought to have raised the same when the suit subject of this appeal was filed and served upon him, instead the Applicant proceeded and separately recorded liability in the new suit. The said liability and subsequent damages awarded to the Respondent herein are yet to be challenged either through review or appeal. The decree therefore remains valid and lawful.
36. It is imperative that the right of appeal must be balanced against an equally weighty rigid right of the successful Party to enjoy the fruits of the judgment delivered in his/her favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

37. I notice that the Applicant has not offered any security for costs on the performance of the decree which in any event has not been challenged by the Applicant.
38. The Applicant cannot have a blanket stay of execution without providing reasonable security for the performance of the decree particularly on the amount in the decree.

## Disposition

39. Consequently, I find that there is no proper appeal before this court the basis upon which proceedings of stay of execution may be considered



40. The Applicant's application dated 18th December 2024 as well as the Appeal filed herein are found to be without merit and the same are dismissed with costs to the Respondent.
41. In the interest of administration of justice, I will grant the Applicant a 30 days stay of execution.
42. It is hereby so ordered.

**RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 30TH SEPTEMBER 2025**

**NOEL I. ADAGI**

**JUDGE**

**DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 30TH SEPTEMBER 2025**

In the presence of :

Mutuku..... for Applicant/Appellant

A. K. Mutua..... for Respondent

Milly..... Court Assistant

