



REPUBLIC OF KENYA



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**Kihumba v Mbogo (Civil Appeal E071 of 2024)
[2025] KEHC 13279 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13279 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E071 OF 2024
TW OUYA, J
SEPTEMBER 24, 2025**

BETWEEN

MARY MUTHONI KIHUMBA APPELLANT

AND

LOISE MARY MUTHONI MBOGO RESPONDENT

RULING

1. By a Notice of Motion dated 4th September 2024, the Applicant herein substantially seeks this honourable court to stay the execution of the decree in the Small Claims Court at Murang'a in SCCOMM E044/2024 delivered on 12th July 2024 pending hearing and determination of this application and appeal.
2. The first limb of the application is spent.
3. The Application was supported by grounds on the face of the record and the affidavit of Mary Muthoni Kihumba, the Applicant herein of even date. It is averred that judgement was entered against the respondent to the total of Kshs.207,610 and 45 days stay of execution granted. The said days were due to expire on 6th September 2024 and Applicant is apprehensive that the Respondent may make good her threat to proceed with execution as communicated vide letter dated 22nd August 2024.
4. The Applicant avers further that she stands to suffer irreparable loss if the stay he is seeking is not granted.
5. In response to the Application, the Respondent relied on the Replying Affidavit sworn on 16th September 2024 by Loise Mary Muthoni Mbogo, the Respondent herein. The Respondent deposed that the application has failed to meet the required threshold for granting the orders sought in that the judgement debtor has not demonstrated that substantial loss may result unless stay of execution is granted nor has she provided any security as a condition for granting stay.



6. The Respondent contends that the County Government of Murang'a is in a position to refund the decretal amount in the event the intended appeal succeeds. It is the respondent's position that the application is unmerited and should be dismissed. However, should the court be inclined to grant the same then the Applicant should be ordered to deposit the entire decretal amount in an interest earning escrow account.
7. This application was dispensed with through written submissions by both parties. The Applicant's position are premised on the argument that this application does not meet the threshold for grant of an order for stay as provided under order 42 rule 6 of the Civil Procedure rules namely; the likelihood of substantial loss and unreasonable delay and provision for security for performance. Reliance was placed upon the authorities of National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (UR) C. A. 238/2005; Gianfranco Mamenthi & Another v Africa Merchant Assurance Company and Issa Mbaya (Suing as the Legal Administrator of the Estate of the late Leonard Waiganjo Karanja) 2024 KEHC 1280 (KLR).
8. The Applicant further urged the court to use its discretionary power to balance out the interests of the successful litigant (Respondent) and the Applicant's unfettered right to file an appeal in making orders for depositing of security.
9. The Respondent made reference to order 42 rule 6 of the Civil procedure rules and argues that she has met the required threshold for grant of the orders sought. Reliance was placed on the authorities of Butt v Rent Restrictions Tribunal (1979) Tropical Commodities Suppliers Ltd & Others v international Credit Bank Ltd (2024) 2 EA 331; Gianfranco (supra) among others. In a nutshell, the Respondent argues that the Applicant has not demonstrated that she will suffer substantial loss if the order for stay is not granted but concedes that the applicant has averred her willingness and ability to make deposit for security and to abide by any orders of the court.
10. I have considered the application, the supporting and replying affidavits and the submissions filed as well as the authorities relied upon.
11. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:
 - 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.
12. In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that:

“...whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay..”



13. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.

“According to section 1A(2) of the [Civil Procedure Act](#) “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

14. In *Mbukoni Services Limited another v Mutinda Reuben Nzili 2 others Misc Application No. 77 of 2021*, the court stated that:

“32. . It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the [Civil Procedure Act](#) are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice.”

15. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. This was the position in *Jason Ngumba Kagu & 2 Others vs. Intra Africa Assurance Co. Limited [2014] eKLR* where it was held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether



by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

16. On the first principle, Platt, Ag.JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

17. On the part of Gachuhi, Ag.JA (as he then was) at 417 held:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

18. The general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

19. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. Suffice to say as was held in *Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991*, financial ability of a decree holder solely is not a reason for allowing stay.

20. I therefore appreciate the sentiments expressed by the High Court in *John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another* [2016] eKLR that:

“There is doubt the Applicant has shown that substantial loss would occur unless stay is granted. However, I will be guided by a greater sense of justice. Courts of law have said



that, with the entry of the overriding principle in our law and the anchorage of substantive justice in *the Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

21. In the case of Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation) (2004) E.A. LR 331, the Court defined substantial loss in the sense of Order 42 rule 6 as follows:

“...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 a loss that is merely nominal...”

22. It was therefore held in the case of Tabro Transporters Ltd. vs. Absalom Dova Lumbasi [2012] eKLR, thus:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”

23. Accordingly, I hereby grant the following orders:

- a. There will be stay of execution pending the hearing of this appeal on condition that the Appellant deposits the entire decretal sum in a joint interest earning account in the names of advocates for the respective parties in a bank agreeable to both parties within 30 days from the date hereof.
- b. That costs of this application will be in the intended appeal.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 24TH SEPTEMBER, 2025.

HON. T. W. OUYA

JUDGE

