



REPUBLIC OF KENYA



**Njau v Wangui (Civil Appeal E567 of 2025)  
[2025] KEHC 13914 (KLR) (Appeals) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13914 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**APPEALS**

**CIVIL APPEAL E567 OF 2025**

**TW CHERERE, J**

**SEPTEMBER 25, 2025**

**BETWEEN**

**DAVID MUNGAI NJAU ..... APPELLANT**

**AND**

**RAHAB WANJIKU WANGUI ..... RESPONDENT**

**RULING**

1. The Applicant/Appellant David Mungai Njau has brought an application dated 24<sup>th</sup> May 2025 under Order 42 rule 6, Order 51 rule 1 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act* and all enabling Provisions of Law seeking the following orders: - that
  1. This Honourable Court be pleased to issue an order staying execution of the ruling entered on 07<sup>th</sup> January 2025, in Milimani MCCC No E8257 of 2021 dismissing the Appellant's/ Applicant's application dated 11<sup>th</sup> October 2024 pending the inter-partes hearing of this Application
  2. This Honourable Court be pleased to issue an order staying execution of the ex-parte judgment entered on 02<sup>nd</sup> July 2024 in Milimani MCCC No E8257 of 2021 pending the inter-partes hearing of this Application;
  3. This Honourable Court be pleased to issue an order releasing the Applicant/Appellant's motor vehicle in custody of First Choice Auctioneers;
  4. The costs of the application be provided for;
2. The application is based on the grounds That: -



1. The primary suit Milimani MCCC No E8257 of 2021 proceeded ex-parte for hearing and ex-parte judgment was entered on 02<sup>nd</sup> July 2024
  2. Upon realization of the ex parte judgment the Appellant/Applicant filed an application dated 11<sup>th</sup> October 2024 seeking stay of execution of the ex-parte Judgment/Decree and the ex-parte proceedings.
  3. The application was canvassed by written submissions and a ruling was delivered on the 07<sup>th</sup> May 2025 dismissing it
  4. The Appellant/Applicant's insurer having been dissatisfied with the dismissal instructed its Advocates on record to appeal
  5. The Respondent has since proceeded to execute the said ex-parte judgment and has instructed First Choice Auctioneers who attached the Applicant/Appellant's motor vehicle on 26<sup>th</sup> May 2025 in readiness for sale
  6. With the imminent execution, irreparable harm will be visited upon the Appellant/Applicant thus warranting the issuance of the temporary stay of execution orders pending hearing and determination of the instant application.
  7. This application has been made timeously without undue delay.
  8. The Appellant/Applicant stands to suffer great prejudice unless stay of execution is not granted pending hearing and determination of the instant application as they would be condemned unheard contrary to the much-cherished canons of natural justice
3. The application is supported by the affidavit sworn on the 09<sup>th</sup> day of May 2025 by Christopher Mukhovi a Legal Officer serving with M/s. Fidelity Shield Insurance Company Limited, the insurer of the Appellant/Applicant in which he reiterates the grounds on the face of the application. The deponent additionally avers that the Applicant/Appellant is fully prepared to abide by any such terms and conditions as the court may deem fit including but not limited to deposit of security for due performance of the decree.
  4. When the application was placed before this court on 28<sup>th</sup> May 2025, I issued the following orders:
    1. There shall be stay of execution of the judgment in MCCC E8257 of 2021 upon the Applicant/Appellant depositing the total decretal sum in court
    2. The notice of motion dated 27<sup>th</sup> May 2025 be served for hearing on 01<sup>st</sup> July 2025
  5. The application is opposed through the affidavit of the Respondent, Rahab Wanjiku Wangui sworn on 19<sup>th</sup> June 2025. The affidavit is extensive but the salient issues relevant to the present application dated 27<sup>th</sup> May 2025 are That:
    1. The application lacks timeliness. The Respondent notes that although judgment was entered on 02<sup>nd</sup> July 2024, it took the threat of execution for the Appellant to file the application dated 11<sup>th</sup> October 2024 seeking to set aside the interlocutory judgment, an application lodged three months after delivery of the judgment.
    2. The Applicant/Appellant does not deserve the exercise of the Court's discretion in his favour, having slept on his rights for over three years and five months until judgment was delivered, and even then waited three further months to act.



3. The subsequent memorandum of appeal and the present application, both dated 27<sup>th</sup> May 2025, were filed twenty days after delivery of the impugned ruling. She terms this inordinate delay as evidence of an afterthought designed merely to forestall execution.
  4. This Court by its order of 28<sup>th</sup> May 2025 directed that stay of execution would take effect only upon the Appellant depositing the entire decretal sum in Court but the Applicant has never complied with that order, nor offered any explanation for such non-compliance.
  5. The application has in any event been overtaken by events since First Choice Auctioneers, acting on instructions, sold the Appellant's motor vehicle, and by letter dated 13<sup>th</sup> June 2025 informed her advocates that the vehicle had been sold for KES. 400,000. Out of this, auctioneer's fees of Kshs. 170,000 were deducted, leaving a balance of KES. 230,000, which was deposited into her advocates' client account.
  6. The application dated 24<sup>th</sup> May 2025 is frivolous and a waste of judicial time and should be dismissed so that Respondent may enjoy the fruits of her judgment and access much-needed medical treatment.
6. I have considered the application, the replying affidavit, and the Respondent's submissions the Appellant/Applicant having not filed any.
  7. The principles for stay of execution pending appeal are laid down under Order 42 Rule 6(2) of the *Civil Procedure Rules*, which provides:
    - “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.”
  8. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231 , the Court of Appeal held:
    - “It is now settled that the decision whether to extend time... is essentially discretionary... In general, the matters which this court takes into account... are, first, the length of the delay, secondly, the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding... and fourthly, the degree of prejudice to the respondent if the application is granted.”
  9. From the foregoing, the Applicant is required to satisfy three key conditions, namely that the application was brought timeously, that there is a likelihood of substantial loss being suffered if stay is denied, and that security for the due performance of the decree has been provided. In this case, the Court will in addition address the issue of the Applicant's non-compliance with the order requiring deposit of security as well as the fact that execution has already taken place.

### **Timeliness of the application**

10. Judgment in the primary suit was delivered on 02<sup>nd</sup> July 2024 but the Appellant/Applicant did not act until 11<sup>th</sup> October 2024 when he filed an application to set aside the interlocutory judgment, three months after judgment. The memorandum of appeal and the present application were lodged on 27<sup>th</sup>



May 2025, twenty days after the ruling sought to be impugned. I find that this delay has not been explained and undermines the plea for equitable relief.

### **Conditional stay and non-compliance**

11. On 28th May 2025, this Court granted a stay of execution on the express condition that the Appellant/Applicant deposits the entire decretal sum in Court, a condition with which he failed to comply. He now contends that the order was ambiguous for not prescribing specific timelines, but I find no merit in that argument. The order was clear and unequivocal that the stay was conditional upon such deposit, and having failed to meet that requirement, despite deponing in the supporting affidavit that he was ready to comply with any order on security, the Appellant/Applicant has forfeited the benefit of stay.
12. I would also emphasize that conditional stay orders are self-executing. As the Court of Appeal stated in *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR, where a party fails to satisfy the condition attached to a stay order, the stay lapses automatically without the need for any further order of the court. Consequently, the Appellant/Applicant's failure to deposit the decretal sum rendered the interim stay ineffective.

### **Execution and futility**

13. The Respondent has demonstrated that execution has already taken place. The Appellant's motor vehicle was sold by public auction for KES. 400,000, out of which KES. 170,000 was deducted as auctioneer's fees, leaving a balance of KES. 230,000 that was remitted to the Respondent's advocates. As the Court of Appeal emphasized in *Benjob Amalgamated Ltd & Another v Kenya Commercial Bank Ltd* [2014] eKLR, the Court will not make orders in futility. In the circumstances, the application for stay is overtaken by events and cannot be sustained.

### **Substantial loss**

14. In *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* [1986] eKLR, the Court of Appeal emphasised that:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting 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.”
15. Guided by that principle, I find that the Appellant has not placed before this Court any cogent evidence of substantial loss that would result if stay is denied. Mere assertions are insufficient, and in the absence of proof, there is no justification for keeping the Respondent from enjoying the fruits of her judgment.

### **Disposition**

16. The cumulative effect of the foregoing is that the Appellant/Applicant has failed to satisfy the threshold for stay of execution. The non-compliance with the order of 28<sup>th</sup> May 2025 and the fact that execution has taken place render the application unsustainable and moot.
17. Consequently, the Notice of Motion dated 27<sup>th</sup> May 2025 is hereby dismissed with costs to the Respondent.
18. For the avoidance of doubt, the dismissal of the application does not affect the pendency of the appeal if the Appellant/Applicant is still desirous of pursuing it. This appeal shall accordingly be mentioned before the Deputy Registrar on 02<sup>nd</sup> October 2025 to confirm the filing and the service of the record of appeal.



It is so ordered.

**DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Ubah

For Appellant/Applicant - Mr. Karanja hb for Mwanzia for G & G Advocates

For Respondent - Ms. Maina for Maina Kingara & Co. Advocates

