



**Orioki & another (Trustees of Devine Providence Franciscan) v Mbaluka  
t/a Mbaluka & Company Advocates (Civil Appeal E249 of 2025)  
[2025] KEHC 13360 (KLR) (Civ) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13360 (KLR)

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

**CIVIL**

**CIVIL APPEAL E249 OF 2025**

**AC MRIMA, J**

**SEPTEMBER 30, 2025**

**BETWEEN**

**JANE ORIOKI ..... 1<sup>ST</sup> APPLICANT**

**PAULINE MWENDE MUSEE ..... 2<sup>ND</sup> APPLICANT**

**TRUSTEES OF DEVINE PROVIDENCE FRANCISCAN**

**AND**

**JOEL KYATHA MBALUKA T/A MBALUKA & COMPANY**

**ADVOCATES ..... RESPONDENT**

**RULING**

1. The Notice of Motion dated 5<sup>th</sup> March 2025 which is subject of this ruling, is supported by the Affidavit of the 1<sup>st</sup> Applicant, Jane Orioki, deposed to on 4<sup>th</sup> March 2025 and a Further Supporting Affidavit of Aggrey Ogutu deposed to on 11<sup>th</sup> March 2025.
2. The application seeks the following reliefs: -
  1. Spent.
  2. Spent.
  3. That pending the hearing and determination of the Appeal, there be a stay of execution of the lower court decree in Nairobi CMCC No. 4517 of 2019 and the consequential orders including but not limited to warrant of arrest.
  4. That the costs of this Application be provided for.



3. In the grounds in support of the application, the Applicants stated that they have an arguable appeal which would be rendered nugatory if stay is not granted. They claimed that they had brought the application without undue delay and that they would suffer substantial loss and their right to access justice defeated if stay is not granted.
4. In the supporting affidavit, Jane Orioki gave the background of the dispute. She deposed that the ruling date of 30<sup>th</sup> July 2021 in respect of her application dated 27<sup>th</sup> August 2020 was given in the absence of her Counsel on 17<sup>th</sup> May 2021 and that the Respondent did not serve the Ruling Notice. It was her case further that that when the trial Court rendered its ruling on 30<sup>th</sup> July 2021, her Advocate was absent and was not served the conditions precedent therein. She also deposed that the Case Tracking System (CTS) did not show the ruling rendered on 30<sup>th</sup> July 2021 and the conditions attached to it. She claimed that the Court file had a history of disappearing when their application was pending ruling and it was not until she sought the intervention of the Hon. Chief Justice and the Judiciary's Ombudsman that the file resurfaced.
5. The 1<sup>st</sup> Applicant claimed that she was treated unfairly by the trial Court and was not accorded fair hearing which led to her application for recusal of the learned trial Magistrate more so since the trial Court directed her to pay Kshs. 300,000/- per month until payment in full of the judgment. She contended that she did not voluntarily pay the money as an admission to the judgment and that the trial Court never allowed her to contact her Advocate on the Notice to Show Cause why execution should not issue. In the end, she stated that she is a Catholic Nun involved in charity and does not have an income and thus unable to raise security.
6. In her written submissions dated 25<sup>th</sup> March 2025, the Applicants argued that they will suffer substantial loss if stay is not granted since there is in force a warrant of arrest. They claimed that they will be arrested and their imprisonment will occasion them loss that cannot be compensated. On the question whether there was undue delay, the Applicants submitted that the application was filed on 3<sup>rd</sup> March 2025 and the ruling appealed against was delivered on 28<sup>th</sup> February 2025, five days after the ruling, a period they claimed was not inordinate. On the limb of security for due performance of the decree, the Appellants, while relying on HEG -vs- SM (2020) eKLR, submitted that the requirement was discretionary and could not be used to deny an Appellant the right of appeal. It was their case that they are Catholic Nuns with no income or resources to afford the security required.
7. In asserting that they have an arguable appeal, the Applicants submitted that the trial Court failed to consider the fact that they were unaware of the ruling date and the terms of the ruling. They submitted that their Counsel was neither served with a ruling notice nor the ruling and they could not be expected to comply with the orders they were unaware of. The decision in Civil Case No. 144 of 2014, James Wanyoike & 2 Others -vs- CMC Motors Group Limited and 4 Others was relied upon to front the position that even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. The Applicants submitted that since warrants of arrest are hanging over their heads, and will have served time in jail by the time the appeal is heard, the whole appeal would be rendered nugatory if stay of execution is not granted.
8. The Applicants drew support from the case of Butt -vs- Rent Restriction Tribunal (1979) KLR where it was observed that the power to stay execution is discretionary and it ought to be exercised so as not to prevent an appeal.
9. On the question whether granting stay would occasion prejudice to the Respondent, the Applicant submitted that the appeal will determine if the default judgment will stay or not. They argued that the appeal will be heard immediately causing no prejudice to the Respondent.



10. Joel Kyatha Mbaluka T/A Mbaluka & Company Advocates challenged the application through the Replying Affidavit of Joel Kyatha Mbaluka deposed to on 27<sup>th</sup> August 2020. It was his case that the application is malicious and an abuse of court process. He deposed that the trial Court rendered its ruling in respect of the Applicant's application for review after it heard both parties and made the finding that the application had no merit. He submitted that the Appellants had not demonstrated sufficient cause for grant of stay of execution. He further deposed that the Applicants failed to file their defence and to pay the throw away costs as ordered by the trial Court which led to the reinstatement of the judgment.
11. He posited that he proceeded to execute the judgment three years after the delivery of the Ruling dated 30<sup>th</sup> July 2021 and that the Applicants filed the application dated 27<sup>th</sup> November 2024 seeking to review the orders which were dismissed leading to the instant appeal. He averred that the Applicants have not demonstrated the substantial loss they would suffer if the application was not allowed. It was its case that an application of stay ought not be concerned only with safeguarding an Applicant's right of appeal but also weigh such right against a successful litigant.
12. In its submissions dated 26<sup>th</sup> April 2025, the Respondent claimed that what the Applicants seek to stay a decree issued on 23<sup>rd</sup> December 2019, more than five years ago, which is not the subject of the appeal before this Court. As regards the conditions for the grant of stay provided for under Order 42 of the Civil Procedure Rules, the Respondent submitted that the Applicants had not demonstrated, as was observed by the Court of Appeal in *National Industrial Credit Bank Limited -vs- Aquinas Francis Wasike & Another (2006) eKLR*, how the refusal to grant the stay order would lead to substantial loss or would render their appeal nugatory.
13. He argued that the judgment in question was rendered more than five years ago and granting a stay will have the effect of denying the Respondent the fruits of his judgment. The Respondent drew support from the case of *Mohammed Salim T/A Choice Butchery -vs- Nasserpuria Memon Jamat (2013) eKLR* where the right to appeal was held to be one that must be balanced against the weighty right of the Plaintiff to enjoy the fruits of the judgment.
14. On the second condition, the Respondent submitted that since the decree was issued more than five years ago and the application was filed on 5<sup>th</sup> March 2025, there was unreasonable delay. In challenging the claim that the Applicants were unable to raise security for due performance of the decree, the Respondent submitted that Order 46 Rule 6(2)(b) makes it mandatory that stay cannot be granted unless there is security. To that end, the decision in *Godfrey K. Lukorito -vs- Teachers Service Commission (2020) eKLR* was relied upon.
15. The entirety of the Applicants' case is founded on Order 42 Rule 6 of the Civil Procedure Rules which sets out the principles upon which a Court can exercise its discretion on a party seeking stay of execution. The provisions establish the following principles: -
  - (i) That substantial loss may result to the Applicant unless the order is made
  - (ii) That the application has been made without unreasonable delay; and
  - (iii) 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.
16. This Court will, hence, consider the foregoing conditions in turn.



**i. Substantial loss:**

17. The claim of substantial loss is derived from contest that there are pending warrants of arrest against the Applicants and as such, if the trial Court judgment is not stayed, they are likely to be imprisoned thereby suffering substantial loss.
18. Having gone through the Amended Memorandum of Appeal, it is this Court's position is that since there are some constitutional issues raised therein hinging on the right to be heard, then such issues ought to be interrogated otherwise one's constitutionally-guaranteed right may be impugned; an act which in itself amounts to substantial loss. Without more, the condition is satisfied.

**ii. Delay**

19. The ruling appealed against was delivered on 28<sup>th</sup> February 2025 and the instant application was filed on 5<sup>th</sup> March 2025. That was a period of 5 days later; a duration that is not inordinate in the circumstances of this matter.

**iii. Security:**

20. Furnishing security for due performance of the decree is always at the discretion of the Court depending on the matter at hand. In this case, the Applicants stated that they were Catholic Nuns and it would be difficult for them to raise any monetary security at the moment. Whereas this Court agrees with the Respondent that monetary deposits are usually ordered as security for money decrees, this Court finds that given the economic status of the Applicants and coupled with the fact that the Record of Appeal is already filed, and the appeal can be determined in the very near future, then it will not be asking too much for the parties to deal with the main appeal on priority basis before this Court pronounces its final rendition.
21. This Court now finds favour with the application.
22. Deriving from the foregoing considerations, this Court finds that the Notice of Motion dated 5<sup>th</sup> March 2025 is merited and the following final orders hereby issue: -
  - (a) There be a stay of execution of the judgment in Nairobi MCCC No. 4517 of 2019 pending the determination of the appeal herein.
  - (b) The appeal shall be heard by way of written submissions. To that end, the Appellants shall file and serve their written submissions within 14 days of this ruling.
  - (c) Once served, the Respondent shall file and file written submissions within 14 days of service.
  - (d) The matter will be fixed for highlighting of submissions on a date to issue.
  - (e) The filing of any orders as part of the Record of Appeal is hereby dispensed with and the trial Court file will be availed.
  - (f) Time is of essence.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**A. C. MRIMA**

**JUDGE**



Ruling No. 1 virtually delivered in the presence of:

Mr. Ochieng' Ogutu, Learned Counsel for the Appellants/Applicants.

Miss Adongo, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

