



Githunguri Dairy Farmers Cooperative Society v Waweru & 22 others (Civil Appeal E845 of 2022) [2025] KEHC 14221 (KLR) (Civ) (9 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14221 (KLR)

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

CIVIL

CIVIL APPEAL E845 OF 2022

TW OUYA, J

OCTOBER 9, 2025

BETWEEN

GITHUNGURI DAIRY FARMERS COOPERATIVE SOCIETY APPELLANT

AND

PETER NGANGA WAWERU 1ST RESPONDENT
MICHAEL KINGOIRU KAMAU 2ND RESPONDENT
DAVID KARIUKI NJOROGE 3RD RESPONDENT
PETER NDICHU NJENGA 4TH RESPONDENT
STANLEY GAKWA KINIU 5TH RESPONDENT
PETER MAOTIE NJOROGE 6TH RESPONDENT
ELIZAPHAN GICHUHI KAGO 7TH RESPONDENT
SAMUEL KUNGU KANYOKO 8TH RESPONDENT
SAMUEL MBUGUA NJUGUNA 9TH RESPONDENT
STEPHEN MUNGAI NDUNGU 10TH RESPONDENT
LABAN MBUGUA NGATIA 11TH RESPONDENT
JAMES MIGWI NJUGUNA 12TH RESPONDENT
STEPHEN NJOROGE NGANGA 13TH RESPONDENT
PETER NJENGA MWANGI 14TH RESPONDENT
ELIZAPHAN KANARI MBERI 15TH RESPONDENT
MACHARIA KANYOKO KAMAU 16TH RESPONDENT



JAMES MUNDATI MOKO	17 TH RESPONDENT
DAVID MURIBA WAIHARO	18 TH RESPONDENT
JOSEPH GITAU MBUGUA	19 TH RESPONDENT
DAVID NJOROGE KIMANI	20 TH RESPONDENT
STEPHEN RANJI NJOROGE	21 ST RESPONDENT
JOSEPH NDICHU KIHANYA	22 ND RESPONDENT
JOHN KIBUE KANYINGI	23 RD RESPONDENT

(Being an appeal against the judgment and decree of the Cooperative Tribunal of Kenya at Nairobi in Tribunal Case No. 271 of 2010 delivered on 13th October 2022)

RULING

1. The application dated 16th December 2022 seeks stay of execution of the judgement of the Cooperative Tribunal delivered on 13th October 2022 pending the hearing and determination of the instant appeal. The appellant further seeks that the court restores the orders issued on 16th December 2010 and that the same remain in force pending the hearing and determination of the instant appeal.
2. The application is supported by the grounds on its face as well as the affidavit of George Kinyanjui of even date in support of the motion where it is averred that the stay ought to be granted because the appellant stands to suffer substantial loss in that it will be compelled to restore into its membership 21 claimants who used violence against the rest of the membership on 29th May 2010, yet the restoration will destroy the appellant's business as it stands to pay the Respondents Ksh. 3,150,000 general damages and an additional Ksh. 659,400.00 special damages awarded by the honourable tribunal.
3. It is further contended that on 6th December 2010, the Cooperative Tribunal had granted the Appellant interim orders to protect its business but the same had expired on 13th November 2022. The Appellant's right of appeal would be rendered nugatory if the Respondents execute the judgment during the pendency of the appeal. Granting the stay would therefore preserve the subject matter of the appeal in that the Respondents will be estopped from using violence against the members of the appellant and to destroy its business.
4. The Appellant contended that he was ready and willing to furnish a reasonable security for the performance of the decree as may ultimately be binding on it. Nevertheless, there would be no need for such security as no loss will be suffered by the Respondents if the status quo is maintained.
5. The Respondents opposed the Application through its Replying affidavit of 8th February 2023 sworn by the 6th Respondent, Peter Njoroge Magothe where it is averred that:
 - a. The instant motion was incompetently filed during the pendency of a similar application for stay of execution dated 9th November 2022 lodged at the Tribunal in CTC No. 270 of 2010 lodged on 09.11.2022;
 - b. On 4.01.2023, the Appellant lodged the Notice of withdrawal dated 03.11.2022 of the Notice of motion application dated 9th November 2022 well after parties had filed and exchanged their written submissions in terms of directions dated 15.12.2022



- c. On 18.01.2023, the Tribunal strongly reprimanded the appellant's advocates from engaging in obvious forum shopping in running to the High Court on a frantic search for a favorable court upon sensing defeat rather than take a ruling date before the tribunal
6. The law does not allow parties to engage in forum shopping as the appellant's advocates did before the Tribunal.
 7. The Respondent avers that the appellant be granted conditional stay of execution by being required to furnish within fourteen (14) days a bank guarantee in respect of the decreed general damages and special damages plus any other accrued interests.
 8. Nevertheless, the prayer for stay of execution for restoration of membership is opposed. The court may propose any suitable conditions in this regard.
 9. The interlocutory orders got spent when the judgment was rendered and the same cannot be relied on in purpose of an application under Order 42 rule 6.
 10. The application was canvassed through written submissions.
 11. The Appellant submitted that it stands to suffer substantial loss within the meaning of Order 42 rule 6 (2)(a) of the Civil Procedure Rules. Therefore, this honorable is clothed with jurisdiction to preserve the subject matter of the intended appeal. Reliance was placed on the case of African Safari Club v Safe Rentals Ltd Court of Appeal at Nairobi, Civil Application No. NAI 53 of 2010 to urge the position that after the enactment of the overriding objective, rules governing stay of execution was revolutionized and the law now requires that the court ensures that justice is done during and at the hearing of a suit or appeal taking into account the relative hardship of parties.
 12. It was further submitted that the asset sought to be preserved is made up of the appellant's business and bodily integrity of its members. Citing the case of Reliance Bank vs Noriake it was submitted that a stay of execution of an order will be given to prevent destruction of enterprises during the pendency of an appeal. Courts should have regard to substantive justice and to promote fairness and equality in the conduct of the litigation.
 13. Regarding the issue of security for costs, it is submitted that although the appellant is willing to furnish security for costs, the same would not be necessary as the circumstances of the case does not warrant security for costs.
 14. The appellant therefore urged that the application be allowed as prayed.
 15. The Respondents submitted that the application was an abuse of the process of the court to the extent that it was lodged for the purpose of dodging the scheduled ruling by the honorable tribunal on a fully canvassed application for stay, pending appeal dated 09.11.2022. Citing the case of Satya Bhama Gadhi v DPP & 3 others [2018] eKLR, the Respondent urged the position that it is the duty of the court to prevent their processes from being used as an instrument of oppression.
 16. Moreover, the Applicant deceived the court by alleging that the parallel application for stay of execution pending appeal dated 09.11.202 had been dismissed by the honorable tribunal on 15.12.2022 yet the said application was heard by way of written submissions and the applicant's advocates scuttled the same by applying to withdraw the said application. Therefore, the filing of the instant application was for ulterior purposes, to wit, the outsmarting of the honorable tribunal and stopping it from delivering its ruling.



17. Regarding substantial loss, it was submitted that the mere execution of a court order or decree cannot amount to substantial loss as espoused in *Nicholas Stephen Okaka & Another v Alfred Waga Wesonga* [2022] eKLR.
18. It is submitted that the legal principles applicable to an application under Order 42 Rule 6 are not the same as the ones applicable to rule 5 (2) (b). The applicant had therefore wrongly argued the principles.
19. Regarding the issue of security for costs, the Respondent submitted that pursuant to Order 42 Rule 6(2)(b) provides in mandatory terms that the applicant must obligatorily furnish security for the due performance of the said decree.
20. Furthermore, the applicant has failed to demonstrate on a balance of probabilities how the restoration of the Respondents' membership will destroy the applicant's turn over.
21. The Respondent therefore urged that the application be dismissed.
22. Although the Respondents have opposed the application through their replying affidavit dated 8th February 2023, they are open to the grant of stay of execution of orders on condition that the appellant furnishes security for the decretal sum. Nevertheless, they are opposed to the stay of the order seeking to reinstate their membership to the appellant/ applicant.
23. I have considered the application, the supporting affidavit, the submissions filed as well as the authorities relied upon.
24. 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.
25. 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.
 26. 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.
 27. Section 1A(2) of the *Civil Procedure Act* provides that:

“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” 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.

28. 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 intentment 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.

29. Odunga J, (as he then was) in the persuasive decision of *African Merchant Assurance Co. Ltd v Nyamai Kea & another* [2020] KEHC 1685 (KLR) stated thus:

“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. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.”

30. In the instant case, the Applicant has averred that though he is ready and willing to furnish the security, it does not believe that such security is necessary in the circumstances of the case. The Applicant having demonstrated willingness to furnish security for the decretal sum, I see no reason why the same should not be furnished as required by Order 42 rule 6 (2) (b).

31. This court appreciates the legal position in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another* [2018] eKLR, where it was held that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

32. As regards to the issue whether or not the applicant stands to suffer substantial loss in *Job Kilach vs. Nation Media Group & 2 Others Civil Application No. Nai. 168 of 2005* the Court of Appeal citing *Oraro & Rachier Advocates vs. Co-operative Bank of Kenya Limited Civil Application No. Nairobi 358 of 1999* held that where there is a decree against the applicant but the amount is colossal, it cannot be lost sight of the fact that the decretal sum is a very large sum, which by Kenyan standards very few individuals will be in a position to pay without being overly destabilized.

33. However, I 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.”

34. In the premises, I allow the application.
35. Final Orders: Stay of execution pending this appeal is granted on condition that the Applicant deposits the decretal sum in a joint interest earning account in Kenya Commercial Bank, in the names of the advocates for the parties herein within 30 days from the date hereof.
36. Thirty days stay of execution to apply.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH OCTOBER, 2025.

HON. T. W. Ouya

JUDGE

For Appellant.....Munyoki

For Respondent....No Appearance

Court Assistant...Brian

