



REPUBLIC OF KENYA



KENYA LAW
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**Kinyua v Melly (Civil Appeal E021 of 2023)
[2025] KEHC 14315 (KLR) (15 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14315 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E021 OF 2023
AN ONGERI, J
OCTOBER 15, 2025**

BETWEEN

SIMON MUNDIA KINYUA APPELLANT

AND

ISAAC KIPSEREM MELLY RESPONDENT

RULING

1. The application coming for consideration in this Ruling is the one dated 30th April 2025 brought under Article 50 and 159 of the *Constitution*, Section 1A, 1B, 3A and 65 of the *Civil Procedure Act*, Orders 40, 42 and 51 of the Civil Procedure Rules seeking for stay of execution of the Judgment delivered by this court on 24th January 2025 in Voi High Court Civil Appeal No. E021 of 2023 pending filing of an appeal in the Court of Appeal.
2. The Applicant's appeal was dismissed with costs to the Respondent and the costs have been taxed at Kshs.142,100/=
3. The Applicant submitted that he is seeking a stay of execution of the judgment delivered on 24th February 2025 in the High Court at Voi. The core of his argument is that without the stay, he will suffer irreparable loss and damage, primarily because the Respondent has already had costs taxed and awarded in both the original suit and the appeal, totaling Kshs. 309,300.
4. He contends that if he is forced to pay this sum and his subsequent appeal to the Court of Appeal succeeds, the Respondent will likely be unable to refund the money.
5. The Applicant asserts that his application is neither an abuse of court process nor an attempt to stay a negative order, but rather a necessary step to preserve the subject matter of his intended appeal and prevent a situation that would render the appeal nugatory.



6. He emphasizes that he filed a Notice of Appeal promptly on 5th March 2025 and that the delay in filing the full appeal is due to procedural hurdles in obtaining necessary documents from the court.
7. In support of his plea, he relies on established legal principles, citing the case of Machira T/A Machira & Co. v East Africa Standard (No. 2) on the issue of substantial loss and the inability to recover costs.
8. He also invokes the precedent set in B.D. v Rent Restriction Tribunal, which outlines the court's discretionary power to grant a stay to prevent an appeal from being rendered futile, stressing that such discretion should be exercised where there are special circumstances and no overwhelming hindrance.
9. The Applicant ultimately prays for the court's favor in granting the stay pending the filing and final determination of his appeal in the Court of Appeal.
10. The Respondent opted not to file any submissions.
11. The sole issue for determination is whether the Applicant is entitled to stay pending an appeal to the Court of Appeal.
12. The application for stay of execution pending appeal to the Court of Appeal is one that hinges on the discretionary powers of this court, guided by the well-settled principles under Order 42 Rule 6(2) of the Civil Procedure Rules.
13. The Applicant must demonstrate that substantial loss may result unless the stay is granted, that the application has been made without unreasonable delay, and that such security as the court orders for the due performance of the decree has been or will be furnished.
14. The overarching consideration is to ensure that the appeal, if successful, is not rendered nugatory.
15. On the first and most critical element of substantial loss, the Applicant's contention is that the Respondent would be unable to refund the decretal sum of Kshs. 142,100/= should the appeal succeed.
16. This is the cornerstone of establishing substantial loss. The Court of Appeal in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR clarified that the mere fact of an appeal being preferred is not a ground for granting a stay.
17. The Applicant must prove the likelihood of suffering substantial loss. In the present matter, the Applicant has deposed that being compelled to pay the taxed costs would occasion him irreparable damage.
18. This assertion, however, remains just that—an assertion. There is no material placed before this court, such as evidence regarding the Respondent's financial means, to support the claim that the Respondent would be incapable of repaying the Kshs. 142,100/= in costs.
19. The possibility that a successful appeal may be followed by a process of restitution, though inconvenient, does not per se constitute substantial loss.
20. Regarding the provision of security, Order 42 Rule 6(2)(b) is explicit that the court must be satisfied that the applicant has provided or is willing to provide security for the due performance of the decree.
21. The application before the court is conspicuously silent on this fundamental prerequisite.
22. The Applicant has not offered any security for the due performance of the decree, nor has he expressed any willingness to do so. The requirement for security is a condition precedent to the grant of a stay of execution.



23. Concerning the element of delay, the judgment was delivered on 24th January 2025, and the present application was filed on 30th April 2025.
24. A period of approximately three months has elapsed. In the circumstances, this delay is inordinate and unexplained.
25. Finally, the court must consider the nature of the decree sought to be stayed. The decree in question is for the payment of costs. There is a distinction between a stay of a money decree and a stay of a decree affecting the ownership or possession of property.
26. For a money decree, the applicant must demonstrate not just a fear, but a high degree of likelihood that the money will not be recovered. The Applicant herein has not crossed this threshold.
27. Furthermore, the discretionary relief of stay of execution must be balanced with the right of a successful litigant to enjoy the fruits of their judgment and the applicant's right of appeal.
28. To keep the Respondent out of his costs indefinitely, without the provision of security and based on unsubstantiated claims of substantial loss, would be an injustice.
29. In conclusion, having failed to establish the prerequisite conditions for the grant of a stay of execution, particularly the proof of substantial loss and the offer of security, the application dated 30th April 2025 is without merit and is hereby dismissed.
30. Each party to bear its own costs of the application.
31. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 15TH DAY OF OCTOBER 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

..... for the Appellant

..... for the Respondent

