

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. E050 OF 2024

TOWER SAVINGS CREDIT COOPERATIVE SOCIETY LTD.....1ST APPLICANT

RICHARD WACHIRA.....2ND APPLICANT

-VERSUS-

**ESTHER WAMBUI MAINA (Suing as the Administrator of the Estate of PATRICK MBURU MAINA.....
RESPONDENT**

RULING

1. The Applicants approached this court through a Notice of Motion dated 22nd January, 2025, seeking orders that;

1) Spent

2) Spent

3) This Honourable Court be pleased to issue an order staying the execution of the judgment and decree in Nyahururu CMCC E143 OF 2023 Esther Wambui Maina (Suing as the Administrator of the Estate of the late Patrick Mburu) v Richard Wachira & Towers Savings & Credit Cooperative Society Ltd pending hearing and determination of the appeal.

4) Costs of this application abide the outcome of the appeal.

2. The application is premised on grounds that;

(a) The Applicants have lodged an appeal from the judgment; the Respondent is in no position to refund the decretal sum; the appeal has a high chance of succeeding; the Appellants are amenable in furnishing security pending appeal as may be directed by the court; and, that it would be fair and in the interest of justice if orders sought are granted.

3. The application is supported by an affidavit deposed by Peter Ngola Makau, the legal Officer of Britam General Insurance Company Limited which is obligated to settle the decretal sum who avers *interlia* that if stay of execution is not granted, the appeal will be rendered nugatory which will occasion substantial and irreparable loss to the Applicant and insurer.

4. That based on the testimony of the plaintiff and transcript of proceedings, the Respondent is in no position to refund the decretal sum in case the same is paid out to them and the appeal is successful.

5. In response, John Ndungu Njuguna, the advocate for the Respondent filed a replying affidavit where he deposes that the appeal herein does not raise any triable issues, is unmerited and has nil chances of succeeding as the trial court's determination was proper and in accordance with

the evidence on record hence the application is being used to hoodwink the court to deny the Respondent the fruits of the judgment.

6. That the mere fact that execution may ensue does not amount to substantial loss. That the Applicant's allegation that the Respondent is not a person of means is not backed by evidence to warrant shifting of the burden upon her to prove otherwise and having alleged they must prove, and that no reasons have been advanced as to why the Respondent should not be allowed to access part of the decretal money pending hearing and determination of the appeal.
7. I have duly considered the application, supporting affidavits, annexures thereto and rival arguments. Grant of stay of execution is discretionary which behooves the court to consider circumstances of the court as well as the interest of justice. The principles governing the same are provided by **Order 42 Rule 6(1) (2) of the Civil Procedure Rules** which enacts that;

(1)No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal

is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2)No order for stay of execution shall be made under sub rule (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 that regard, the court must be satisfied that substantial loss may result; the application was made without due delay and the Applicant must be willing to provide security for due performance of the decree.
- 9.** On the issue if substantial loss resulting if stay of execution is not granted; In ***Kenya Shell Ltd v Benjamin Karuga Kibiru & Another [1986] eKLR*** the court stated that;

“...substantial loss, and such loss cannot be inferred in this case.

But this court must look at the matter from the point of view of rule 5(2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory.”

10. In *James Wangalwa & Another v Agnes Naliaka Chesoto [2012] eKLR* the court stated thus;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question

that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. The Appellants argue that unless stay pending appeal is granted they will be condemned to pay Ksh.2,022,550 plus costs and interest which is a substantial amount such that if the appeal succeeds they will not be able to recover the decretal sum as the Respondent has not demonstrated her ability to refund the decretal sum.

12. The argument put forth by the Respondent is that the Applicants failed to prove that she is not a person of means as they just made allegations to that effect without providing evidence. In that regard reliance is placed on

Antoine Ndiaye v African Virtual University [2015] KEHC 6783 (KLR) the High Court stated:

“The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must proof. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here... He must prove specific details and particulars... This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Except, however, once the Applicant has discharged his legal burden and has adduced such prima facie evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent. And it is only where financial limitation or something of sort is established that the evidential burden is created on the shoulders of the Respondent, and he may be called upon to furnish an affidavit of means”

13. However, in ***National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] KECA 333(KLR)*** the Court of Appeal stated that:

“Once an Applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”

14. In the circumstances the evidential burden shifts to the Respondent to demonstrate that she has sufficient means with the capacity to refund the amount if the appeal succeeds. In the instant matter, apart from allegation, the Respondent has not demonstrated the ability to repay the decretal sum in case the appeal succeeds. The appeal is against both liability and quantum. In event that the appeal succeeds, there may be the risk of nonpayment resulting into loss of the decretal amount.

15. That notwithstanding, on the issue of the appeal succeeding, looking at the memorandum of appeal, the trial magistrate is faulted for finding that the Appellants were fully liable for the accident. That the court failed to find that the deceased was equally, partly or largely culpable for the accident. What indeed they are alleging is that the deceased contributed to the accident.

16. On the question whether the application was made timeously without due delay, the judgment in the matter

was delivered on 19th November, 2024. The aggrieved party was advised on the right to appeal of 30 days.

17. Section 79G of the Civil Procedure Act provides as follows;

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

18. The Memorandum of Appeal dated 17th December, 2025 was filed on 18th December, 2024, which was not only done within time but promptly without delay.

19. The Appellants are amenable to tendering security for due performance of the decree as per the direction of the court. The Respondent wondered as to why they could not access part of the decretal sum. Since the argument put forth is that there was contribution of negligence there is no reason why the Respondent should not access part of the sum as the appeal is pursued.

20. In the premises, I grant orders as follows;

(1) There be stay of execution of the judgment and decree in Nyahururu CMCC No. E143 of 2023 pending hearing and determination of the appeal on condition that the Applicants release Ksh.1,000,000/- to the

Respondent being part of the decretal amount for the due performance of the decree within 30 days of today, 21st October, 2025.

(2) In default, the orders granted shall stand vacated and execution to issue.

(3) The record of appeal be filed and served within 60 days' of today.

(4) Costs of the application shall in the cause.

Dated, signed and delivered virtually this 21st day of October, 2025.

.....

L.N. MUTENDE

JUDGE