



**Mbogo v Tito (Small Claims Appeal E021 of 2025)
[2025] KEHC 15572 (KLR) (31 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SMALL CLAIMS APPEAL E021 OF 2025
A MABEYA, J
OCTOBER 31, 2025**

BETWEEN

MOSES OTIENO MBOGO APPELLANT

AND

KENNETH OTIENO TITO RESPONDENT

RULING

1. On 17/9/2025, the respondent obtained an interlocutory judgment against the applicant in the Small Claims Court SCC No. E102 of 2025. The applicant swiftly applied to set aside that interlocutory judgment.
2. By a ruling delivered on 17/9/2025, Hon. Serem Adjudicator dismissed the application and ordered each party to bear own costs.
3. By a Memorandum of Appeal dated 28/9/2025, the applicant appealed to this Court setting out 6 grounds of appeal. Subsequently, the applicant took out a Motion on Notice dated 7/10/2025 under Order 42 Rule 6, Order 22 Rule 22 of the Civil Procedure Rules and sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*.
4. In the Motion, the applicant sought 4 broad orders for stay of execution as follows: -
 - “2. That this Honourable Court be pleased to stay the execution of the Ruling entered herein on 17/9/2025 in the Small Claims Case No. E102 of 2025 and any other consequential orders issued pursuant thereto pending the hearing and determination of this Appeal.
 3. That there be a stay of execution by way of warrant of arrest, proclamation, attachment and any other form of execution against the appellant/applicant pending the hearing and determination of this appeal.



4. That there be a stay of way of the warrant of arrest issued against the applicant
 5. That there be a stay of execution by way of warrant of attachment dated 2nd of October, 2025 and the proclamation dated 7th October, 2025.”
5. The grounds for the Motion as set out in its body and the supporting affidavit sworn on 9/10/2025 were that; the Small Claims Court had dismissed his application for review, he was aggrieved and had preferred an appeal to this Court, that the intended appeal has high chances of succeeding. That the respondent had taken out warrants of attachment ready to execute. That the appeal will be rendered nugatory if execution takes place.
 6. The Motion was opposed by the respondent vide his replying affidavit sworn on 16/10/2025. He deposed that the order of 17/9/2025 appealed against was a negative order incapable of being stayed since it only dismissed the applicant’s application. That the appeal has no chances of succeeding. That the applicant had failed to annex a draft defence in his application to the lower court. That the application was dismissed on the basis that the judgment was regular.
 7. The parties orally argued the Motion which arguments the Court has considered.
 8. To begin with, this is a Motion for stay of execution of the order of 17/9/2025. I have looked at the order of 17/9/2025. It was an order dismissing an application to set aside the interlocutory judgment. There was no positive order that required the applicant to do anything.
 9. I have always known that stay of execution refers to an order that is issued to stop the operation of an order that requires one to do something i.e a positive order. A negative order, such as one that dismisses an application, is incapable of stay.
 10. In Kenya Commercial Bank Ltd vs Tamarind Meadows Ltd & 7 Others (2016) eKLR, the Court of Appeal held: -

“In Kanwal Sarjit Singh Dhiman vs Keshavji Jivraj Shah (2008) eKLR; the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows: -

The 2nd prayer in the application for stay (of execution) of the order of the Superior Court made on 18th September, 2006 merely dismissed the application for setting aside the judgment and costs. By the order, the Superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only...”
 11. In the same manner, the order of 17/9/2025 by the Small Claims Court in this case was a negative order incapable of being executed. Therefore, no stay can issue against it.
 12. Had the applicant stopped at prayer No. 2 of his Motion, this would have marked the end of the application. However, he also prayed for stay of execution of the warrants that had been issued. The Court therefore proposes to consider those prayers since they are against positive actions.
 13. The warrants are in execution of the interlocutory judgment. That Judgment has not been appealed against. However, the Memorandum of Appeal pending before Court seeks that an application seeking to set aside that interlocutory judgment be allowed. By inference therefore, there is a challenge against that judgment. If the pending appeal succeeds, the end result will be that that interlocutory judgment will not stand.



14. The jurisdiction under Order 42 Rule 6 is clear. An application for stay must be made timeously, an applicant must demonstrate that he will suffer substantial loss if the stay is not granted and finally, he must offer security for the due performance of the order or decree that might ultimately be binding on him.
15. In the present case, the order appealed against was made on 17/9/2025 and the present application was lodged on 7/10/2025, a period of 18 days. The application was therefore made timeously.
16. On substantial loss, that is the cornerstone of the jurisdiction for stay under Order 42 Rule 6 of the Civil Procedure Rules. In *James Wangalwa & Another (2012) eKLR*, it was held: -

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion. 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 Civil Procedure Rules. This is to 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 care of the applicant as the successful party in the appeal... 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.”
17. Substantial loss is not a matter of cause. It must be pleaded or alleged and be established. A party must swear positively on oath that if stay is not granted, he will suffer substantial loss. Then he must establish the circumstances that prove such substantial loss.
18. In the present case, no such averment was made. The applicant only stated that if execution is levied the appeal will be rendered nugatory. That is not substantial loss. None having been pleaded, none could be inferred.
19. In any event, no security was offered for the due performance of the order or decree that might be found to ultimately be binding on the applicant. That requirement is therefore missing.
20. In view of the foregoing, the Motion dated 7/10/2025 is found to be without merit and is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2025.

A. MABEYA, FCI Arb

JUDGE

