



**Mose & another v Rutoh (Succession Appeal E001 of 2025)
[2025] KEHC 15376 (KLR) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15376 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
SUCCESSION APPEAL E001 OF 2025
CM KARIUKI, J
OCTOBER 30, 2025**

BETWEEN

BENJAMIN OMBATI MOSE 1ST APPLICANT

MOSE INVESTMENTS 2ND APPLICANT

AND

PHILEMON KIPSIGE RUTOH RESPONDENT

*(Being an appeal from the Judgment delivered on 15th April, 2025,
by Hon. Mutuku Esther Mwikali in SUCCOMM/E013/2025, Narok)*

RULING

1. The Application dated 28/04/2025 seeks the orders for the stay of Judgment No. E013/2025 Civils' Court Narok pending hearing and determination of the Appeal. It is anchored on order 42 (6) CPC and premised on the fact that, during the hearing of the matter, the Applicant logged in to a different link, not the one the trial court was using for the virtual sessions.
2. Later, the Claimant's email reached the Applicant's Advocate, who advised him to log in at 10.30 a.m., while the time he saw it was 11.20 a.m. He asked Claimant to share the proper link, but he never received a response. Later, he was notified that the matter had been heard in his absence. This prompted the filing of the instant Application. Eventually, the Judgment was delivered. An appeal was lodged on 23/04/2025 to impugn the proceedings.
3. The Application is also supported by an Affidavit of Benjamin Ombati Mose, sworn on 28/04/2025, reiterating the grounds in the motion. The memorandum of appeal is attached as an annexure. In reply, the Respondent, via an Affidavit of Philemon Kipsige Rutoh, sworn on 20/05/2025, denies that the Applicant's Advocate logged into the wrong link, as he had previously used the appropriate link and knew the matter was before Hon. Mutuku's Court.



4. The Application, allegedly filed to set aside proceedings, was considered but fixed for mention to a date, after which the Respondent/Applicant withdrew the same, and the issue of *ex parte* hearing of the suit was shifted to the merits of the trial court, as the application impugning proceedings has been withdrawn.
5. The Appeal has low chances of success. Thus, the need for the Respondent to be allowed to enjoy the fruits of his Judgment, as the Appeal has no chances of success. The Respondent did not file submissions.
6. The Applicant argues the Application under three limbs, namely;
 1. That Appeal has a chance of success,
 2. The Applicant may suffer irreparable damage and
 3. Whether the Application was brought expeditiously.
7. Order 42, rule 6 of the Kenyan Civil Procedure Rules outlines the process for applying for a stay of execution pending an appeal, requiring a party to show substantial loss and make the Application without unreasonable delay. The Applicant must also provide security for the due performance of the decree, and the court has discretion to grant or refuse the stay based on the specific circumstances. Conditions for granting a stay
8. No automatic stay: An appeal does not automatically operate as a stay of execution. The court must first order it. Substantial loss: The Applicant must demonstrate that they will suffer significant loss if the stay is not granted. This is the main condition for granting a stay.
9. Without unreasonable delay: The Application for the stay must be made without unreasonable delay. Security: The court must be satisfied that the Applicant has provided or will provide security for the performance of the decree. This is a mandatory condition, especially in monetary decrees.
10. Discretionary power: The power to grant or refuse a stay is a discretionary power that courts exercise in the interest of justice. The court will consider the special circumstances of the case, ensuring a fair and just decision.
11. My perusal of the Application disclosed that the only substantial question is whether irreparable harm would result if the Applicant is not granted the sought stay of execution. The Applicant has not disclosed the amount awarded, a crucial detail for the court's decision-making process. This is a fundamental omission that may warrant the court's dismissal of the instant Application, as it is essential for a fair and just decision.
12. This matter is thus focused on the Quantum of award, not the liability, as the Applicant has failed to pursue setting aside the proceedings and thus the matter be reheard in the trial Court. The instant Appeal will only deal with evidence tendered by the Respondent side.
13. The Applicant had offered to deposit the decretal amount as a condition for a stay, which I find the Respondent was not averse to. Therefore, the court will grant the Applicant a condition of stay in the following terms;
 1. The Applicant is to deposit half of the decretal amount with the Applicant's Advocate and the other half in an interest-earning account in the joint names of the parties' Advocate within 30 days as a condition for the stay.



2. The Applicant is to pay the costs of the applications assessed at KShs. 15,000/= / = before the lapse of 30 days from the date herein, and in default, execution to issue.

DATED AND DELIVERED AT NAROK VIA MICROSOFT TEAMS THIS 30TH OCTOBER 2025.

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CHARLES KARIUKI
JUDGE

