



**Mutienee v Mbuvi (Civil Appeal E051 of 2025)  
[2025] KEHC 15108 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15108 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E051 OF 2025  
RC RUTTO, J  
OCTOBER 23, 2025**

**BETWEEN**

**NICHOLAS MUTIENEE ..... APPELLANT**

**AND**

**STEPHEN MUTISO MBUVI ..... RESPONDENT**

**RULING**

1. Before this Court for determination is a Notice of Motion dated 5<sup>th</sup> March 2025. The Applicants seeks a stay of execution of the judgment and decree issued on 31<sup>st</sup> January 2025 in Civil Suit No. E172 of 2023 pending the hearing and determination of an appeal filed. Additionally, the Applicant seeks an order to stay the execution and sale of goods that were attached pursuant to a judgment and decree issued by the court.
2. The grounds for the Applicant's application, are set out in the Applicant's undated supporting affidavit. He expresses dissatisfaction with the judgment delivered on 31<sup>st</sup> January 2025. He states that the lower court granted a thirty (30) days stay of execution upon delivery of the judgment. However, before the expiry of that period, the Respondent obtained a warrant of attachment and proclaimed his goods. The Applicant contends that the intended appeal has high chances of success and risks being rendered nugatory if the stay orders sought are not granted. He also states that on 26<sup>th</sup> February 2025, the Respondent proceeded to attach his goods pursuant to the warrant of execution issued.
3. The application was opposed through a Replying Affidavit sworn on 30<sup>th</sup> May 2025. In summary, the Respondent deposes that the Applicant has failed to demonstrated sufficient cause to warrant the grant of stay of execution. He contends that no substantial loss has been shown and that the mere existence or intention to file, an appeal does not justify the grant of stay. The Respondent further alleges that the Applicant has not approached the Court with clean hands, citing unreasonable delayed in filing the application and non-compliance with the earlier orders of the Court. He adds that he would suffer prejudice if execution is further delayed, having already incurred costs and made financial arrangements



based on the judgment.. Moreover, the Applicant has not offered any security for the due performance of the decree.

4. Pursuant to directions issued by this Court, the application was canvassed by way of written submissions. The Applicant filed his submissions dated 2<sup>nd</sup> October 2025. As at the time of writing this ruling, the Respondent had not filed any submissions.

### **Applicant's Submissions**

5. The Applicant began his submissions by citing Order 42 Rule 6(2) of the Civil Procedure Rules, the case of *Butt v Rent Restriction Tribunal* [1982] eKLR, *Victory Construction v BM* (a minor suing through next friend PMM) [2019] eKLR, *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, and *RWW v EKW* [2019] eKLR. He submitted that, although execution is a lawful right of a decree holder, the Court must intervene where such execution would destroy the substratum of the appeal and render it nugatory.
6. On substantial loss, the Applicant argues that execution would cause irreparable harm by undermining the substratum of the appeal. He argued that he has demonstrated that once execution proceeds, there is a likelihood that any sums paid or property attached may not be recoverable should the appeal succeed. On delay, the Applicant maintained that the application was filed promptly on 5<sup>th</sup> March 2025, shortly after the judgment was delivered, and that there has been no unreasonable delay. On security, the Applicant expresses his willingness to comply with any conditions that the Court may impose, in line with the practice approved in *Victory Construction v BM* [2019] eKLR.
7. The Applicant further submits that the intended appeal is arguable and raises serious questions of law and fact. He emphasised that it is settled law that an applicant need not demonstrate that the appeal will succeed, only that it is not frivolous. On the issue of prejudice, he contends that the Respondent's interests can be adequately safeguarded by an order for security, while he stands to suffer irreparable loss if execution proceeds.
8. In conclusion, the Applicant concluded urges the Court to allow the application as prayed.

### **Analysis and Determination**

9. I have considered the affidavits filed by both parties and the Applicant's submissions in support of the motion. In my view that there is only one issue for determination that is, Whether the court should grant a stay of execution of the judgment entered on 31<sup>st</sup> January 2025 pending the hearing and determination of the appeal.
10. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -

“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 orders 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 1<sup>st</sup> 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.
11. Therefore, under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:
- a. Substantial loss may result unless the stay is granted;
  - b. That the application has been made without unreasonable delay; and
  - c. Security has been provided for the due performance of the decree or order.
12. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] where the Court of Appeal outlined the considerations for granting or refusing a stay of execution pending appeal. The court said that: -
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
13. Regarding the first condition, the Applicant must clearly demonstrate the nature of the substantial loss they would stand to suffer if the decretal sum is paid to the Respondent. In *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated as follows: -
- “...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”



14. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“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...”

15. The Applicant contends that the Respondent has already initiated execution proceedings, including attachments of goods, and that the sale of those goods is imminent unless this Court grants an order of stay. He argues that he will suffer substantial loss and that the appeal will be rendered nugatory. The Respondent, however, maintains that no substantial loss has been demonstrated and that the mere existence or intention to file, an appeal does not in itself justify the grant of a stay.

16. I note that the Applicant has not discharged the burden of proving substantial loss. No details have been provided to support this contention. In the case of *Machira t/a Machira & Co. Advocates vs. East African Standard (No 2)* (2002) KLR 63, the court held that;

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...”.

17. I agree with the Court in the above cited authority that the burden rests squarely on the applicant to demonstrate, with specificity, the substantial loss likely to be suffered if stay is not granted. The burden does not shift to the Respondent to prove their ability to refund the decretal sum or to demonstrate means, unless and until the Applicant has first discharged their own legal burden.

18. I am persuaded by the court’s decision in the case of *Antoine Ndiaye v African Virtual University* [2015] KEHC 6783 (KLR) where the court held that,

(14) ..... The inquiry for purposes of stay pending appeal under Order 42 Rule 6 of the CPR is not really about the merits of the appeal but rather the loss which will be occasioned by satisfaction of the appeal in the event the appeal succeeds.”

19. In the present application, the Applicant has failed to establish that substantial loss will occur unless an order for stay of execution is granted. This ground therefore fails.

20. On the second condition, whether the application was made without unreasonable delay, judgment was delivered on 31<sup>st</sup> January 2025 and the trial court granted a temporary stay of execution for thirty (30) days. The instant application was filed on 5<sup>th</sup> March 2025, which is within a reasonable period. I therefore find that the application was filed timeously.

21. On the third condition on security for costs, the Applicant ought to satisfy the requirement of providing security. The Court in *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, stated 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.”

22. From the foregoing, it is evident that the issue of security is a discretionary matter for the Court to determine. Having considered the Applicant’s submissions, I note that while the Applicant has not proposed any specific terms of security, he has undertaken to abide by the directions of the Court in that regard. Although it is preferable for a party to propose concrete terms, the Court retains the discretion to impose appropriate conditions. It is, nonetheless sufficient for an applicant to express willingness to abide by the Court’s directions on security, as this demonstrates readiness to comply with any order made and constitutes an act of good faith.
23. In light of the foregoing, it is my finding that the Applicant has failed to satisfy the requisite conditions under Order 42 Rule 6 of the Civil Procedure Rules to warrant the grant of stay of execution pending appeal.
24. It is trite that the three (3) conditions for the grant of stay of execution pending appeal must be satisfied conjunctively and not disjunctively. Although the Applicant brought the present application without undue delay, he failed to adequately demonstrate the substantial loss he is likely to suffer and he further failed to furnish security as stipulated under Order 42 Rule 6(2)(b).
25. For the reasons stated above, I find that the application dated 5<sup>th</sup> March 2025 lacks merit and the same is accordingly dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 23<sup>RD</sup> DAY OF OCTOBER 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

.....for Applicant:

.....for Respondent:

Selina Court Assistant:

