



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngetich v Temor (Small Claims Appeal E010 of 2025)  
[2025] KEHC 15048 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15048 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
SMALL CLAIMS APPEAL E010 OF 2025  
RN NYAKUNDI, J  
OCTOBER 23, 2025**

**BETWEEN**

**BENARD NGETICH ..... APPELLANT**

**AND**

**FLORA JEPNGETICH TEMOR ..... RESPONDENT**

**RULING**

1. Before this Court is a notice of motion under Certificate of Urgency dated 13<sup>th</sup> August 2025 where the Applicant sought for the following orders:
  - a. Spent
  - b. That the Honorable court be pleased to stay execution of the Ruling delivered by the Honorable court on 1<sup>st</sup> August 2025, pending the hearing and determination of the application interparties.
  - c. That all the honorable court be pleased to stay execution of the Ruling delivered by the honorable court on 1<sup>st</sup> August 2025 pending the hearing and determination of the intended appeal.
  - d. That cost of this application be borne by the Claimant.
2. That the application is anchored on the following grounds:
  - a. That appellant is dissatisfied with the ruling of trial court delivered on 1<sup>st</sup> August 2025 and seeks to appeal the said decision in its entirety.
  - b. That before the filing of that application dismissed by the trial court the appellant had been placed in civil jail and now seeks to avert such happening before appeal is heard.



- c. That there is need for stay of execution of the said ruling and its consequential orders in order to avert irreparable and substantial loss and prevent the appeal being nugatory.
  - d. The intended appeal is arguable and has overwhelming chances of success.
  - e. That the applicant has moved this honourable court as promptly as possible and without undue delay.
  - f. That the appellant has been wrongfully convicted ad his rights to a fair hearing as dictated by Article 50 of *the Constitution* of Kenya has been curtailed hitherto.
  - g. The appellant wishes to be heard by the court and produce evidence of that will vindicate him from all the proceedings under this case and subsequently acquit him of the burden implicated upon him.
  - h. That the appellant is asked to pay humongous amount of money, which is based on an agreement he was only a witness.
  - i. It is in the interest of justice and fairness that there be stay of execution and setting aside of Ruling dated 1<sup>st</sup> August 2025 and appellant be accorded opportunity to prosecute the matter de novo.
  - j. Unless this application is certified urgent and the orders sought herein are granted, the appellant stands to suffer irreparable loss and damage thus denying his right to be heard and defend himself against a suit which he fully denies in to.
3. Which application is further based on the supporting affidavit sworn by the applicant who depones as follows:
- a. That I have a defence which raises triable issues with chances of success.
  - b. That the Respondent herein instituted suit against me and obtained a ruling against me on 1<sup>st</sup> August 2025.
  - c. That being aggrieved and dissatisfied with the said Ruling I have instructed my advocates on record to appeal against the said Ruling.
  - d. That I was not duly served with the subsequent pleading relating to the suit nor other proceedings before the exparte judgment was entered.
  - e. That pursuant to Art 50 of *the Constitution* of Kenya I was not properly given a chance to represent myself since I was not served with the notice to enter appearance and other pleadings and thence the matter proceeded to exparte judgment hence curtailing my rights as enshrined in *the Constitution*.
  - f. That I have a defense that absolves me from being a party to the suit as the loan agreement dated 17<sup>th</sup> August 2023 lists the Claimant and the 1<sup>st</sup> Respondent as the parties to the suit.
  - g. That my Counsel on record in the instant application dated 11<sup>th</sup> June 2025 appeared on the said date with intention to seek leave to properly appear on my behalf by the Honorable Court proceeded to dismiss the matter.
  - h. That the claimant did not serve me of the said application and/or any other subsequent proceedings, which culminated to issuance of judgment and decree dated 8<sup>th</sup> December 2024.



- i. That and without prejudice to the foregoing I was not served with notice of entry of default judgment and the warrant of arrest and subsequent committal to civil jail came as an ambush.
  - j. That it is in the interest of justice and fairness that there be stay of execution and setting aside of ruling of 1<sup>st</sup> August 2025 and other consequential orders and the matter set for hearing on for me to advance my defense in this matter.
  - k. That unless this application is certified urgent and the orders sought herein are granted, I stand to suffer irreparable loss and damage thus rendering these proceedings nugatory and a mere academic exercise.
  - l. That I am advised by my Advocates on record that I have a constitutional right to present my defense in the instant case given the chances of success.
  - m. That the matter came up on 14<sup>th</sup> November 2024 vide a Notice to show cause concerning Ksh 1,069,200.
  - n. That the Respondent will suffer no prejudice if the orders sought herein are granted.
  - o. That I am ready and willing to abide by such terms and conditions as may be set by this honourable court for stay of execution of the judgment and decree of this honorable court issued on 8<sup>th</sup> December 2024 and the subsequent Ruling dated 1<sup>st</sup> August 2025 and all the consequential orders.
  - p. That this application is brought in good faith and without delay.
  - q. That I therefore pray that this application be allowed as drawn.
4. In response to the application, the respondent through Flora Jepngetich Temor filed a replying affidavit who deponed as follows:
- a. That I am the claimant herein and I am well versed with the matter therefore competent to make and swear this affidavit.
  - b. That I have read Respondent/Applicant's application dated 13/08/2025 and where necessary I have had the same explained to me by my advocates on record and such I wish to respond as hereunder.
  - c. That I am being informed by my advocates on record, which information I verily believe to be true that for the honorable court to stay execution of the decree herein the respondent has to meet the threshold provided for under Rules 28(3)(a) of the Small Claims Court Rules 2019 by demonstrating tangible and sufficient reasons to warrant stay of execution by the court.
  - d. That I am being informed by my advocates on record which information I verily to be true that the appellant herein did not meet the threshold hence the reason his applicant was disallowed.
  - e. That I am being informed by my advocates on record, which information I verily believe to be true that the appellant herein made a clear calculator when drafting the said agreement in which he claims to be a witness, but he is the center man who received the subject amount together with others not joined in this appeal.
  - f. That I am being informed by my advocates on record which information I verily believe to be true that the appellant was indolent at the time the suit was instituted at the small claims court and he ignored proceedings only to decide to make a follow up after being arrested and committed to civil jail.



- g. That I am being informed by my advocates on record which information I verily believe to be true the appellant has not triable issues that he wants to bring at this appeal as the same is unlikely to succeed and thus he should not be given any chance to waste the judicial time.
- h. That the assertions by the respondent that he could not have been served with any pleadings or notices so that they could have a chance to give the side of the story is untrue as I am informed by my advocates on record which information I verily believe to be true that the appellant was duly served with the pleadings but chose to ignore in entirety only to run to court when he has been arrested and committed to civil jai.
- i. That the appellant herein having failed to enter appearance and file response within the statutory time, they moved and requested for interlocutory judgment against the respondent and the matter thereafter proceeded for execution.
- j. That the appellant has prayed for setting aside of the default judgment that was duly entered against him and as such the same should not be set aside since parties are bound by their pleadings.
- k. That I am further advised by my advocates on record that the applicant has annexed to the application memorandum of appeal which raises no triable issues, the same is a sham since the contents therein are mere denials. The same is frivolous, scandalous and entertaining the same would be a waste of judicial time.
- l. That the assertion that they were not served are not mere hearsays and therefore it is clear that indeed the respondent/applicant is not in concrete dispute of service and the application is brought forth to interfere with my right to enjoy the fruits of the judgment.
- m. That the said application is in my firm belief devoid of merits in that the appellant has not seriously demonstrated on the face of the application, as legally required, that there is any just cause to warrant setting aside of the court's judgment and decree issued at the trial court.
- n. That equity aids the vigilant and not the indolent, the appellant herein was issued with maximum time to make his case at the trial court but decided to relax only to file several applications in a bid to have chance to present his case, the same is brought in bad faith and should not be accepted as the same will be curtailing my rights to enjoy the fruits of valid court judgment.
- o. That this application has been brought in bad faith and the same should be dismissed.
- p. That is swear this affidavit in opposition of the application dated 13/08/2025.

### **Analysis and determination**

- 5. Order 46 Rule 6 (2) of the Civil Procedure Rules, provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-
  - “ 1. Substantial loss may result to the applicant unless the order was made;
  - 2. The application was made without unreasonable delay; and
  - 3. 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.”



6. A consistent approach emerges from the decisions in *Kiplagat Kotut v Rose Jebor Kipngok* [2015] eKLR and *Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others* [2012] eKLR, whereby stay of execution applications are granted only upon fulfillment of the conditions stipulated in Order 42 Rule 6 of the Civil Procedure Rules.
7. The three conditions prescribed under Order 42 Rule 6 of the Civil Procedure Rules are cumulative in nature and cannot be considered in isolation. The conjunctive term "and" signifies that compliance with all three conditions must occur simultaneously.
8. In light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. The aims of the overriding objective include the just determination of the proceedings, the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources, and the timely disposal of the proceedings at a cost affordable by the respective parties.
9. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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 ... 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.”
10. Substantial loss in the sense of Order 42 Rule 6 has been described as a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal. In *Kenya Shell Limited v. Benjamin Karuga Kigibu & Ruth Wairimu Karuga* [1982-1988] 1 KAR 1018, the Court of Appeal stated that:

“It is usually a good rule to see if Order 42 Rule 6 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay.”
11. In the instant case, the Applicant avers that he stands to suffer substantial loss if stay of execution is not granted. The decretal sum relates to Kshs. 1,069,200/=. The Applicant further avers that the Respondent has not demonstrated ability to refund the sum if the appeal succeeds. The Applicant also raises fundamental grounds of appeal including that he was not properly served with pleadings, was denied the right to a fair hearing under Article 50 of *the Constitution*, and was merely a witness to the loan agreement rather than a party thereto.
12. The Respondent, while opposing the application, has not provided any evidence of financial capacity to refund the decretal sum should the appeal succeed. The law is clear that once the Applicant has discharged the legal burden and has adduced prima facie evidence, the evidential burden shifts to the Respondent to demonstrate ability to refund. In the absence of such evidence from the Respondent, and considering the grounds of appeal which raise serious questions including constitutional rights



to fair hearing and service of process, I am satisfied that the Applicant faces the risk of substantial loss unless stay is granted.

13. The rationale behind the condition of without unreasonable delay is to guide the court not to order stay of execution only meant to delay the trial process or enforcement of a decree. The right to be heard on appeal should not be seen to defeat the ends of justice. A court of equity frowns at a stale claimant who sleeps on their rights and only approaches the court after a long period of time.
14. In the present case, the Ruling against which stay is sought was delivered on 1<sup>st</sup> August 2025. The present application was filed on 13<sup>th</sup> August 2025 under a Certificate of Urgency, which is approximately 12 days after the Ruling. The Applicant has also filed a Memorandum of Appeal. In these circumstances, I am satisfied that there has been no unreasonable delay in bringing this application. The application has been brought promptly and expeditiously.
15. On the question of security of costs, the applicant filed an affidavit of means in which he indicated that he is a small-scale businessman and he has been unwell for the better part of August, 2025. That on average he earns Kshs. 50,000/= per month as his gross earnings upon settling all the personal and household liabilities. He further stated that whereas he earns a modest income with liabilities, he wishes to defend the suit and requested that the personal bond be adjusted to at least Kenya Shillings One Hundred Thousand.
16. In terms of the condition on security for costs there is need to address the question whether punitive order for one to deposit the decretal sum is likely to impede the right to access to courts under Article 48 of *the constitution*. In my view, the question of whether a deposit of the entire decretal sum or half of it as a condition for stay of execution has got to be determined on a case by case basis balancing the need for the deposit i.e security for cost against the constitutional right to a fair hearing under Article 50 of *the constitution*. The Kenyan courts interpret the right to access to courts in Art. 48 of *the constitution* not as absolute but as a right that must be balanced against other consideration. The question of whether a security for costs order in consonant with order 42 Rule 6 of the Civil Procedure Rules is an unreasonable embedment to accessing justice is to be determined on a case to case basis which includes factors such as the financial position of the litigant and the nature of the case. The Supreme Court in WESTMONT HOLDINGS SDN BHD and CENTRAL BANK OF KENYA & 20 OTHERS PET. NO 16 E023 OF 2021 made the following observations inter-alia: That and order for the security of costs to be deposited as a condition for stay of execution is unreasonable as it impedes the appellants acts to justice by imposing a condition precedent before a matter can be heard contrary to Article 48, 50, & 159 of *the constitution*.

The right to equality before the law and non-discrimination under Article 27 of *the constitution* essentially means that the person in the street enjoys equality rights by enabling him or her to challenge any decision from an inferior court to a superior court as a constitutional imperative. In matters of appeal, the courts must facilitate the promotion of equality and fair discrimination likely to arise on punitive monetary conditions under the rubric of the condition on security for costs to be deposited in court. That is the very reason that if this court were to insist on the initial condition of 1million imposed at the very beginning of this proceedings, the right to equality before the law in Article 27 and the right to a fair hearing will be impaired. The Applicant intended appellant has shown sufficient cause of his impecunious circumstances calling for this court to intervene in so far as this litigation is concerned.

17. I have considered the affidavit of means and the Applicant's financial circumstances. The Applicant has through his affidavit demonstrated that he is unable to raise the full decretal sum of Kshs. 1,069,200/= and have it deposited within the stipulated time. Insistence on deposit of the entire decretal sum would



effectively deny the Applicant the constitutional right to appeal, as it would place an insurmountable financial barrier in the path of justice. The purpose of security is not to frustrate the right of appeal but to provide reasonable assurance of the decree's performance should the appeal fail.

18. In the interest of justice and given the constitutional dimensions of this matter, particularly the allegations of denial of fair hearing and improper service, it is only fair that the Applicant is allowed to exercise his right of appeal. The court must balance the need for security against the fundamental right of access to justice. In this case, requiring security of Kshs. 100,000/= strikes a reasonable balance between protecting the Respondent's interests and ensuring that the Applicant's constitutional right to appeal is not rendered illusory due to financial incapacity.
19. The purpose of security under Order 42 Rule 6 is to guarantee due performance of the decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor. Civil process differs from punitive measures as the judgment creates a debt relationship. The modeling of the law under Order 42 Rule 6(2)(b) is to ensure the discretion of the court is not fettered. It is the court that orders the kind of security the applicant should give.
20. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

21. I am conscious that both parties have rights which must be reconciled: the Appellant's constitutional right to appeal which includes the right that the appeal should not be rendered nugatory, and the Respondent's right as the decree holder to the fruits of the judgment. The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.
22. In this case, the grounds of appeal raise serious constitutional questions including the right to fair hearing under Article 50 of *the Constitution* and issues of proper service of process. These are not frivolous grounds but go to the fundamental fairness of the proceedings. While the Respondent characterizes the appeal as lacking merit, it is not the function of this court at this stage to determine the merits of the appeal. That is a matter for the appellate process.
23. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the Applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.
24. Accordingly, I hereby allow the Applicant/Appellant's application dated 13<sup>th</sup> August 2025 and grant stay of execution of the Ruling delivered on 1st August 2025 and all consequential orders emanating therefrom, including the judgment and decree dated 8<sup>th</sup> December 2024, pending the hearing and determination of the appeal on the following conditions:



- a. The Applicant/Appellant shall deposit a sum of Kshs. 100,000/= (One Hundred Thousand Shillings) into an escrow account in an interest earning account at a reputable commercial bank in the joint names of Ketter N. K. Advocates and Mwaka & Company Advocates, within 21 days from the date of this ruling;
- b. In the event the Applicant fails to comply with the condition in paragraph (a) above within the stipulated period of 21 days, the stay of execution granted herein shall automatically lapse and the Respondent shall be at liberty to proceed with execution of the decree;
- c. The Appellant shall file and serve a record of appeal within thirty (30) days from the date of this ruling;
- d. The costs of this application shall be in the cause.

25. Orders accordingly.

**DATED SIGNED AND DELIVERED VIA EMAIL AND CTS AT ELDORET THIS 23<sup>RD</sup> DAY OF OCTOBER, 2025**

.....

**R. NYAKUNDI**  
**JUDGE.**

