



REPUBLIC OF KENYA



KENYA LAW
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**Nyagah & another v Julius (Civil Appeal E053 of 2023)
[2025] KEHC 14907 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14907 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E053 OF 2023
EM MURIITHI, J
OCTOBER 23, 2025**

BETWEEN

JAMES NYAGAH 1ST APPLICANT

MATTHEW NJAGI NJERU 2ND APPLICANT

AND

JAMES MUCHIRA JULIUS RESPONDENT

RULING

1. The applicant filed a notice of motion dated 31st July, 2025 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be also pleased to stay any execution of the Judgment delivered on 17th July, 2025, decree, or any actions related to the execution proceedings, pending the hearing and final determination of the Appeal.
 4. That the Court be pleased to grant any other order or direction it deems fit, just, and equitable to meet the ends of justice in the circumstances of this case.
 5. That the costs of this Application be in the cause.
2. The application is based on the grounds on the face of the application and the supporting affidavit of the applicant. The applicants case is that judgment in this matter was delivered on 17th July, 2025 by this Court in Kerugoya Civil Appeal Case No. E053 of 2023 wherein the Appellants were ordered to pay the Respondent the total sum of Kshs. 1,846,700.00, together with the costs of the Appeal.
3. The applicants avers that the Advocate attending the matter, Counsel Herman Tambo, attended Court earlier that day and applied for stay of execution orally before the Honourable Judge, but the Judge



advised that any request for stay must be made through a formal written application after delivery of the judgment. That being dissatisfied with the Judgement of this Honourable Court, they have since lodged an Appeal at the Court of Appeal.

4. Further, the Respondent is at liberty to execute the decree arising from the judgment, which would render the appeal futile. Hence, they seek to stay any execution of the Judgment delivered on 17th July, 2025, decree, or any actions related to the execution proceedings, pending the hearing and final determination of the Appeal.
5. Lastly, the applicants avers that he does not know the Respondent personally and have indeed never met him, therefore, should the Court compel the satisfaction of the Decretal sum in his favour before the determination of the appeal, and the appeal is found in their favour, it would be difficult to recover the sum from him.
6. The respondent filed a Replying Affidavit sworn on 5th September, 2025. The respondent avers that the application also offends the sub judice rule. The applicants have filed a similar application in the court of appeal being Court Of Appeal Nyeri Misc Civil Application No. E119 of 2025 and the Court of Appeal has already directed that the parties do canvas the application by written submission and both parties have filed submissions and are awaiting the Court's ruling.
7. The respondent avers that the outcome of this application could have a bearing on the Court of Appeal ruling on stay of execution and they should wait for the Court of Appeal to first determine the issue of stay of execution which is the court they went to in the first instance and the fact that they were not given an interim stay is not a reason to come seek the same before this court.
8. Further, the applicants did not deposit the decretal sum of Kshs. 1,278,370 in a joint interest earning account as ordered by the court. Moreover, the applicants have not filed their grounds of appeal.
9. Lastly, the respondent avers that he has been kept out of the fruits of his judgment since 23/6/2023 when the lower court made its judgment and bearing in mind that the accident occurred on 25/6/2021.

Issue

10. Whether the court shall entertain the application for, and whether, stay of execution pending appeal should be granted.

Analysis

11. The applicant seeks that this Honourable Court be also pleased to stay any execution of the Judgment delivered on 17th July, 2025, decree, or any actions related to the execution proceedings, pending the hearing and final determination of the Appeal.
12. The law governing stay of execution pending appeal is Order 42 Rule 6[2] of the Civil Procedure Rules, 2010, which provides that:

- “ [2] No order for stay of execution shall be made under subrule [1] unless—
- a. the court is satisfied that substantial loss may result to the applicant unless the order is made;
 - b. the application has been made without unreasonable delay; and



- c. such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given.”

Substantial Loss

13. The applicants contend that the decretal sum of Kshs. 1,846,700 is substantial, and they may be unable to recover it should the appeal succeed. The respondent has not provided any evidence of his financial capacity to refund the sum if the appeal is successful.
14. The Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR held that once an applicant raises the issue of the respondent’s inability to refund, the burden shifts to the respondent to show that he can repay the sum if required.
15. In the absence of such evidence, we are persuaded that the applicants have demonstrated a likelihood of substantial loss.

Delay

16. The judgment was delivered on 17th July 2025, and the application was filed on 31st July 2025 — within two weeks. The application was made timeously.

Security

17. The applicants have expressed willingness to abide by any conditions this Court may impose regarding security. The respondent alleges they have failed to deposit an earlier ordered sum of Kshs.1,278,370. In *Jamii Bora Bank Limited & Another v Samuel Wambueu Ndirangu* 2022 eKLR the court [F. Muchemi, J.] expounded on the import of the condition of furnishing a security. It thereunder reasoned as follows:

- “23. The applicant ought to satisfy the condition of security. In the persuasive decision of *Gianfranco Manenthi & Another vs Africa merchant Assurance Co. Ltd* [2019] eKLR the court observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6[1] of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The



court would order for the release of the deposited decretal amount to the respondent in the appeal...

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

18. The non-compliance with prior orders weighs against the applicants. The decision in *Hunker Trading Company Limited v Elf Oil Kenya Limited* [2010] EKLR is relevant.

Sub Judice and forum shopping

19. The respondent has shown that a similar application for stay is pending before the Court of Appeal.
20. The Court of Appeal is seized of the matter. If it had considered it appropriate, it could have given a stay of execution. The Rule of sub judice is clear that –

“ 6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

[Act No. 10 of 1969, Sch.]”

21. The applicant is obliged to move the Court of Appeal under certificate of urgency, if it is considered that there is merit in urgency of the matter.
22. To impose a stay of execution on a matter pending consideration by the Court of Appeal is to hamstring the Court and make its consideration of the question whether to stay execution pending appeal redundant.
23. The application for stay of execution before the High Court a similar application has been filed and is pending hearing and determination before the Court of Appeal is an abuse of the process as it is a reversal of role and competence of the Courts. It is the court to which appeal is preferred that has final jurisdiction to consider an application for stay under Order 42 Rule 6 [1] of the Civil procedure Rules, whether or not the same application will have been considered by the Court appealed from, as follows:

“ [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.”

24. The application to the court to which appeal is preferred as contemplated in the rule 6 [1] of Order 42 has already been made before the Court of Appeal. This Court is bound by the decision of that Court and the present application is sub judice, and it will be stayed.

Order

25. Accordingly, for the reasons set out above, the application for stay of execution pending appeal is before this Court is stayed pending the decision of the Court of Appeal.
26. Costs in the Cause.
27. Orders accordingly.

DATED AND DELIVERED THIS 23RD DAY OF OCTOBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Wawira for the Appellant.

Ms. A. Thungu for the Respondent.

