



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO E030 OF 2023

ACHIEVERS COLLEGE OF PROFESSIONALS LIMITED.....APPELLANT
VERSUS

MARY WAWIRA MWANIKI T/A

ICONS COLLEGE OF PROFESSIONAL STUDIES.....RESPONDENT

RULING

[1] The applicant filed a Notice of Motion dated 30th July, 2025 seeking the following orders:

1. *Spent.*
2. *Spent.*
3. *That this Honorable court be pleased to issue an order of stay of execution of its judgement delivered on 17/07/2025 pending the hearing and determination of an intended appeal.*
4. *That costs of this Application be provided for.*

[2] The application is based on the grounds set out in the application and the supporting affidavit of John Mukundi. The applicant's case is that this Honorable court delivered its judgement on 17/7/2025 dismissing the Applicant's Appeal. The Applicant intends to file a second Appeal in the court of Appeal against the whole judgement of this Honorable court. The Applicant has prepared the appeal and is awaiting supply of certified copies of the proceedings in order to prepare the record of Appeal.

[3] Further, the applicant avers that he will suffer substantial loss if execution proceeds and it will be difficult to recover the Decretal sum should the Applicant succeed in the intended appeal. The applicant has brought the application timeously.

- [4] Lastly, the applicant avers that had deposited Ksh 1,000,000/= in a joint interest earning account as security. The applicant runs a college whose students will suffer irreparably if stay of execution is not granted.
- [5] The respondent filed a Replying Affidavit on 4th August, 2025 that the applicant has not demonstrated what substantial loss he will suffer if the stay is not granted. The respondent avers that the applicant's belief that she will not be able to repay the decretal sum solely based on its lack of knowledge as to her financial capability does not give rise to the presumption that she is unable to repay the decretal sum, the Applicant have to demonstrate that fact.
- [6] Further, the respondent avers that the intended appeal at the Court of Appeal is also meant to occasion further delay of enjoyment of the fruits of her successful litigation.
- [7] Lastly, the Applicant should be ordered to pay the entire decretal sum plus the interest; in the alternative, the Applicant should be ordered to pay the decretal amount and the interest to be held in an interest earning savings account held in joint names of both advocates on record.
- [8] The applicants filed a further affidavit dated 26th September, 2025 and averred that he has filed an Appeal being NYERI CIVIL APPEAL NO. E190 OF 2025 and that the applicant is a church run institution which accommodates students for financially challenged families.
- [9] Further, if execution proceeds the students enrolled in the college will be totally affected both in their tuition and accommodation thus the appeal shall be rendered nugatory. The Respondent will not be able to refund the Decretal amount should the appeal be successful.

Applicant submissions

- [10] On substantial loss the applicant has deponed that it shall suffer substantial loss if stay of execution is not granted herein.
- [11] The Applicant runs a church sponsored college and students are currently proceeding with their studies. In the event that the Applicant is unable to pay the Decretal sum then its assets will be auctioned to realise the Decretal sum. That possibility is evident in that the college intakes students from poor families and who pay meagre fees.

Should execution proceed and the assets of the Applicant are sold, the students will be out on the streets.

[12] On delay, the judgement of this Honourable court was delivered on 17/7/2025. The Applicant filed the application herein on 30/7/2025. The period of 13 days cannot be termed as unreasonable delay.

[13] On security, the Applicant deponed that he had deposited security in the names of counsels as had been ordered by this Honourable court when it was granted stay of execution pending the Appeal that was determined by this court. The Applicant prays that it be granted similar terms as had been set by this court and that the deposited amount remains as security for grant of stay of execution pending the hearing and determination of the Appeal.

Respondent submissions

[14] On substantial loss the Respondent submits that the Applicant has not shown the substantial loss that will result if the stay is not granted. The fact that students of the Applicant are likely to be affected is not and cannot be equated to substantial loss when enforcing a judgment on merit against the Applicant.

[15] That only proves that the Applicant has sought stay simply to delay or forestall the performance of the decree.

[16] On security, the respondent submits that the decretal sum plus interest as of 17.07.2025 was Kshs.6, 620, 750/= and thus a deposit of Kshs 1, 000, 000/= is unfair and unjust.

[17] In applications for stay of execution, security operates as a commitment by the Applicant for the performance of the decree, citing Gikonyo, J., in ***Arun C Sharma v Sashana Raikundalia T/A A Raikundalia & Co Advocates & 2 Others*** [2014] eKLR as follows:

The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment-debtor...Civil process is quite different because, in a civil process, the judgment is like a debt hence the Applicants become and are judgment-debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the

Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume, the security must be one which can serve that purpose.

[18] On the balancing the parallel prepositions, the best way to balance these parallel prepositions will be to allow the Respondent to proceed with the execution to enable her enjoy the fruits of her judgment. Furthermore, the Respondent has successfully litigated against the Appellant in both the lower court and the High court. Alternatively, the court should order the Applicant to pay the Respondent half of the decretal amount and deposit half of the decretal sum in a fixed interest earning account.

Issue

[19] The issue before the court is whether stay of execution pending hearing and determination of the appeal should be granted.

Analysis

[20] Under Order 42 Rule 6(2) of the Civil Procedure Rules, the court may order stay of execution where:

- (a) The applicant demonstrates substantial loss may result unless the order is made;
- (b) The application has been made without unreasonable delay; and
- (c) The applicant provides such security as the court may order for due performance of the decree.

Whether the Application was filed without unreasonable delay

[21] The judgment sought to be stayed was delivered on 17th July, 2025 and the present application was filed on 30th July, 2025, a period of about 13 days. I find that the application was brought timeously.

Whether the Applicant will suffer substantial loss

[22] It has been stated that Substantial loss is the cornerstone of an application for stay. In **Kenya Shell Ltd v Kibiru & Another** [1986] KLR 410, the Court of Appeal held that:

“It is not sufficient by merely stating that substantial loss will result. The applicant must demonstrate what specific loss he stands to suffer.”

[23] The Applicant asserts that execution will paralyze its college operations and adversely affect students from poor families. While this may show hardship, the primary concern of the court is whether, if the decretal amount is paid, recovery will be impossible or difficult in the event the appeal succeeds.

[24] As stated by the Court of Appeal in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another** [2006] eKLR:

“Once an applicant expresses a reasonable fear that the respondent will be unable to repay, the evidential burden shifts to the respondent to show her resources.”

[25] In the present case, the Respondent has not provided any proof of financial capacity to refund the decretal sum should the appeal succeed. The Court therefore accepts that the Applicant has demonstrated likelihood of substantial loss, if stay is not granted.

Security for due performance

[26] Security is required under Order 42 Rule 6(2)(b) of the Civil Procedure Rules for the due performance of such decree or order as may upon hearing and determination of the appeal be decreed to be binding on the applicant.”

[27] The Applicant has already deposited Kshs.1,000,000/= in a joint interest earning account as security when the appeal to this Court was pending hearing and determination.

[28] Considering the decretal amount of approximately Kshs.2,800,000/=:, and the passage of time necessary before the hearing and determination appeal to the Court of Appeal, this court finds the current deposit insufficient for purposes of security for further appeal, where the first appellate court has already dismissed the appeal and there being a prospect of further delay in the final determination of the appeal on second appeal obviously escalating the final decretal sum in the event of an unsuccessful appeal.

[29] The Court considers it appropriate to call for further security in the matter as necessary.

ORDERS

[30] Accordingly, for the reasons set out above, the Court makes the following orders on the application dated 30/7/2025:

[31] An order for stay of execution pending appeal to the Court of Appeal is granted.

[32] As condition for the grant of stay of execution, the security for due performance of the eventual decree shall be maintained at the ksh.1,000,000/- already deposited in a joint interest earning account in the names of the Counsel for the parties together with a Bank Guarantee to be deposited with the court within 45 days for the balance of the decretal sum together with interest and costs as may be adjudged against the appellant upon the hearing and determination of the appeal to the Court of Appeal.

[33] In default, the order for stay of execution pending appeal shall lapse.

[34] Costs of this application shall await the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED THIS 6TH DAY OF NOVEMBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Kinyanjui for the Appellant/Applicant.

Mr. Musyimi for Mr. Gichimu for Respondent.