



**Jubilee Allianz General Insurance (K) Limited v Odero; Odero (Suing as Legal Administrator to the Estate Mariaan Kenzie) & 4 others (Interested Parties) (Civil Appeal E059 of 2025) [2025] KEHC 15902 (KLR) (5 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 15902 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E059 OF 2025  
DK KEMEL, J  
NOVEMBER 5, 2025**

**BETWEEN**

**JUBILEE ALLIANZ GENERAL INSURANCE (K) LIMITED ..... APPELLANT**

**AND**

**KENEDY OMONDI ODERO ..... RESPONDENT**

**AND**

**JOSEPH OJWANG ODERO (SUING AS LEGAL ADMINISTRATOR TO THE ESTATE MARIAAN KENZIE) ..... INTERESTED PARTY**

**JOSEPH OJWANG ODERO (SUING AS FATHER AND NEXT FRIEND TO MELVIN SYPROSE OJWANG) ..... INTERESTED PARTY**

**JOSEPH OJWANG ODERO ..... INTERESTED PARTY**

**HAZEL OMANGA AOKO ..... INTERESTED PARTY**

**JOSEPH OJWANG ODERO (SUING AS FATHER AND NEXT FRIEND TO ALFRED MARK OJWANG) ..... INTERESTED PARTY**

**RULING**

1. What is placed before me is a Notice of Motion application dated 27/08/2025 brought pursuant to sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 42 Rule 6 of the Civil Procedure Rules, 2010. The same seeks the following orders:
  - i. Spent.
  - ii. Spent.



- iii. That pending the hearing and determination of the appeal, the honorable court be pleased to issue an order for stay of execution against the judgment and decree of the subordinate court issued in Madiany MCCC No. E009 of 2025 Kennedy Omondi Odero v Jubilee Allianz General Insurance Ltd delivered on 30/07/2025.
  - iv. That the warrants of attachment dated 26/08/2025 and Proclamation obtained by Eshikoni Auctioneers be set aside *ex debito justitiae*.
  - v. That the Honorable court be pleased to grant any further orders as it deems fit to further the ends of justice.
2. The application is supported by an affidavit of Patience Mirara, the Legal Officer of the Applicant sworn on even date wherein she deponed *inter alia*; that at the time of delivery of the judgment in the subordinate court, the trial magistrate granted 30 days stay of execution; that before the expiry of the 30 days' stays of execution, the Respondent irregularly instructed Eshikoni Auctioneers to take out warrants of attachment and sale and proceed to proclaim the Applicant's goods; that the warrants of attachment and sale are therefore irregular since they were obtained before the expiry of the stay period; that the intended appeal will be rendered nugatory if the order for stay is not granted.
  3. The Respondent opposed the application vide a replying affidavit dated 11<sup>th</sup> September 2025 wherein he averred *inter alia*; that neither the judgment nor the court proceedings indicated that the Appellant was granted a 30 days stay of execution; that having confirmed that there was no stay granted, he went ahead and instructed the said auctioneers to proceed with the execution of the judgment or decree; that the Respondent does not oppose the application for stay pursuant to paragraph 7 of the supporting affidavit by the applicant save that the applicant should deposit the entire decretal amount plus costs in a joint interest earning account in the names of both counsels within 30 days from the date of the court's order failing which execution shall issue and that the applicant should pay the auctioneers costs as shall be assessed.
  4. The application was canvassed by way of written submissions. However, it is only the Applicant who complied.
  5. The Applicant submitted that on 28<sup>th</sup> August 2025, the court had issued an interim order of stay. Be that as it may, he submitted that the order granting stay of execution was necessary in order to preserve the subject of the appeal. He placed reliance on the High court Civil appeal No.106 of 2023: Abson Motors Limited v Nyongesa (2023)KEHC 23643(KLR) where Magare J cited the case of RWW v EKW(2019)KEHC 6523 (KLR) where the court considered the purpose of stay of execution pending appeal as follows:
 

“The purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However, in so doing, the court should weigh this right against the right of a successful litigant who should not be deprived of the fruits of his/her judgment....”
  6. The Applicant submitted further that the Respondent did not disclose or furnish the court with documentary evidence to prove financial standings and should the appeal succeed and taking into account the time it may take to have the appeal heard and determined, if execution proceeds, the appeal will be rendered nugatory as the same will have been overtaken by events.



7. It was submitted that once an applicant expresses fear that the Respondents may not be in a position to settle the decretal amount, the burden shifts to the Respondent to show that he has the means to pay since that is a matter which is peculiarly within his knowledge as per section 112 of the *Evidence Act*.
8. Learned counsel relied on the Court of Appeal case of National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another (2006) KECA 333(KLR) where it was stated that:

“While the legal duty is on the Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the Respondent or lack of them. Once an applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”
9. On the issue of security, the Applicant submitted that it is the court which determines the kind of security that should be furnished by the Applicant as a condition for the stay of execution pending an appeal.
10. Having considered the application together with the rival affidavits and submissions on record, I find the issue for determination is whether the application has merit.
11. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that the power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; that the application should be made without undue delay and that the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See *Amal Hauliers Limited v Abdulnasi Abukar Hassan* (2017) eKLR & *Butt v Rent Tribunal* (1982) KLR 417.
12. Further, an order of stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the same, shall also consider the overriding objective stipulated under sections 1A and 1B of the *Civil Procedure Act*. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589.
13. The Court of Appeal in *Stanley Kangethe Kinyanjui v Tony Keter & Others* [2013] eKLR summarized the principles for granting an order of stay of execution as follows. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory.
14. In the instant case, the applicant argued that the application was filed without undue delay. It is noted from the record that the trial magistrate rendered his judgment on 30<sup>th</sup> July 2025 and that the appeal was filed on 22<sup>nd</sup> August 2025 and that the application for stay was made and filed on 27<sup>th</sup> August 2025. Indeed, there was no undue delay in filing the same. On the aspect of an arguable appeal, the same need not be one that should succeed. Looking at the filed memorandum of appeal dated 27<sup>th</sup> August 2025, I am satisfied that indeed the Applicant has an arguable appeal.



15. On the nugatory aspect of the appeal, it was contended by the Applicant that Eshikoni auctioneers had been instructed to take out warrants of attachment and sale and proceeded to proclaim the Applicant's goods. On this basis, the Applicant implores the court to grant the orders for stay of execution.
16. Finally, it is noted that the Applicant has sought for an order to set aside the proclamation ex debito justitiae on the ground that the trial court had granted an order of stay of execution for 30 days as from 30/7/2025 and that as at 26/8/2025 the said 30 days had not elapsed. I must point out that upon perusal of the lower court record, it is clear that there was no such order for stay of execution. In fact what is apparent is the fact that it is only the usual 30 days right of appeal which should not be confused with an order for stay. Hence, as at 26/8/2025, there was no orders for stay of execution and thus the Respondent was at liberty to execute the decree. Consequently, the prayer No. 4 sought by the Applicant is without any merit and must be rejected and that the Applicant must meet the charges of the Auctioneer if agreed and or assessed.
17. Considering all relevant factors, and in order not to render the intended appeal illusory, I find that an order that the decretal sums be deposited into a joint interest earning account in the names of both Advocates for the parties would be appropriate in the circumstances. Consequently, I find merit in the Appellant's application dated 27/8/2025. The same is allowed in terms of prayer No.3 on condition that the Applicant deposits the entire decretal sums in a joint interest earning account in the names of the counsels for the Applicant and the Respondent within thirty (30) days from the date hereof failing which the order of stay shall lapse. The Applicant is ordered to pay the Auctioneer's charges as agreed and or assessed. The costs of the application shall abide in the appeal.

It is so ordered.

**DATED AND DELIVERED AT SIAYA THIS 5<sup>TH</sup> DAY OF NOVEMBER, 2025**

**D. KEMEI**

**JUDGE**

In the presence of:

Mumo for Ochieng.....for Appellant/Applicant

N/A Okoyo Omondi.....for Respondent

M/s Okumu.....1<sup>st</sup> Interested Party

M/s Okumu .....2<sup>nd</sup> Interested Party

M/s Okumu .....3<sup>rd</sup> Interested Party

M/s Okumu .....4<sup>th</sup> Interested Party

M/s Okumu .....5<sup>th</sup> Interested Party

Maureen/Kimaiyo.....Court Assistant

