Kaiyoni v Talam (Civil Appeal E017 of 2025)
[2025] KEHC 16339 (KLR) (12 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16339 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E017 OF 2025

RN NYAKUNDI, J

NOVEMBER 12, 2025

BETWEEN

WINNIE KAIYONI ..... APPLICANT

AND

ISAAC TALAM ..... RESPONDENT

RULING

Representation:

M/S Arusei and Company Advocates

M/S Tarigo Kiptoo and Company Advocates

1. Before this Court is an application dated 15th day of October 2025 seeking the following orders:
    a. Spent.
    b. That this Honourable Court be pleased to grant a stay of execution of the judgment and decree delivered by Hon. Rodgers Otieno on the 19th September, 2025 in SCCC E3108 of 2024, Isaac Talam -vs-Winnie Kaivoni at the Small Claims Court Eldoret, pending the hearing and determination of the application and/or until further orders of the court.
    c. That this Honourable court be pleased to grant a stay of execution of the judgment and decree delivered by Hon. Rodgers Otieno on the 19th September, 2025 in SCCC E3108 of 2024, Isaac Talam-vs-Winnie Kaiyon at the Small Claims Court Eldoret, pending the hearing and determination of this Appeal and/or until further orders of the court.
    d. That costs of this application be in the Appeal.
2. Which application is supported by the annexed affidavit of Winnie Kaiyoni and supported by the following grounds and other grounds to be adduced at the hearing of this application:

a. That on the 19th September,2025 the Small Claims Court at Eldoret (Hon. Rodgers Otieno) delivered Judgement in SCCC E3108 OF 2024, Isaac Talam-vs- Winnie Kaivoni in favour of the respondent herein for the sum of Kshs. 715,580.02, costs of the claim and interests thereon at court rates.

b. That the decree and Certificate of costs has been extracted and the same totals to Kshs. 799,880.02.

c. That following the above Judgement, the appellant/applicant lodged a Memorandum of Appeal at the High Court challenging the decision on substantial and arguable grounds being eight solid grounds of Appeal (this appeal). These are the grounds:

    a. That the Learned Adjudicator/Senior Resident Magistrate erred in law and in fact in allowing a claim for special damages of Kenya Shillings Seven Hundred and Twelve Thousand, Seven Hundred and Sixty Eight (Kshs.712,768.00) which claim though pleaded was not strictly proved at the hearing.

    b. That the Learned Adjudicator/Senior Resident Magistrate erred in law and in fact in allowing a claim of Kenya Shillings Seven Hundred and Twelve Thousand, Seven Hundred and Sixty Eight(Kshs.712,768.00) plus costs and interests for a claim that was not proved to the requisite standard of a balance of probability and therefore the Judgement was not only wrong but gratuitous.

    c. That the Learned Adjudicator/Senior Resident Magistrate erred in law and in fact in not analyzing the claim holistically and with circumspection and in allowing the claim for Kenya Shillings Seven Hundred and Twelve Thousand, Seven Hundred and Sixty Eight (Kshs.712,768.00) when the amount of Kshs.512,786.00(cash) was not cogently and sufficiently demonstrated on how the sum of Kshs.512,786.00 (cash)reached the appellant leaving that claim to a conjecture.

    d. That the Learned Adjudicator/Senior Resident Magistrate erred in law and in fact in relying upon the “agreement" advanced by the respondent that was drawn at the Chief's Office, Saos/Kibias Location, when that agreement was irregular and void. Not only were there no minutes written to record the attendance at the meeting and the proceedings thereon but that the appellant "signed" the said document under coercion and duress after the Chief refused to listen to her claim and threatened to imprison her unless she paid the amount claimed. The defence of coercion ought to have analysed fully and the reasons for its rejection by the trial court sufficiently given. Further the evidence of the Chief was accepted by the trial court as the “gospel truth" without question.

    e. That the Learned Adjudicator/Senior Resident Magistrate erred in law and in fact in not considering the appellant evidence who countered the respondent case and stated that the respondent has falsely and irregularly inflated the sum due by to Kshs.512,786.00(cash), an amount that was arbitrary, unjustified and legally unenforceable and therefore ought not to be granted.

    f. That the Learned Adjudicator/Senior Resident Magistrate erred in law and in fact in enforcing "an illegal contract" for the excess sum of Kshs.512,786.00 when that illegality was duly brought to the notice of the court and by so accepting the illegality, the trial court assisted the respondent to sanitize an illegality.

g. That the Learned Adjudicator/Senior Resident Magistrate erred in law and in fact in failing to pass adverse inference against the respondent for failure to call to court an alleged eye witness one Benson Kipsambu, said to have witnessed the exchange of Kshs.512,786.00 in cash and that failure to call that witness rendered the claim for Kshs.512,786.00(cash) as unproved and warranted the adverse inference that the evidence of Benson Kipsambu was unfavourable to the respondent.

h. That all in all and in a nutshell, the Learned Adjudicator/ Senior Resident Magistrate erred in law and in fact in allowing a claim for the sum of Kshs. 512,786.00 while the claim remains unproved unsubstantiated and did not reach a balance of probability and ought to have been dismissed with costs....."

d. That additionally the applicant who preferred an Appeal to the higher court, stares at a real threat of execution at any time from now and if that is done and if the applicant properties are carted away, she will suffer irreparably. The substantial loss to be suffered is real and substantial.

e. That if the execution is levied, not only will the applicant suffer substantially, but also that there is no guarantee that if the appeal succeeds in future, the applicant will be able to recover her assets back.

f. That the respondent had extracted the decree and Certificate of costs and subsequently issued a demand for Kshs.799,880.02 to the appellant to pay the above amount within 7 days and in default the respondent will proceed on with the execution. The demand Notice is dated the 2nd October,2025.

g. Order 42 Rule 6(2) of the CPR grants this court discretion to order a stay of execution where cause is shown. In the circumstances here, execution threatening the very purpose of the appeal and causing injustice, justify such discretionary relief in the interest of justice.

h. That if the execution proceeds while an appeal is pending, that would make the appeal's outcome a nugatory. The High Court ought to preserve the status quo and ensure the appeal remains meaningful and not rendered academic.

i. That the application has been brought without undue and unreasonable delay.

j. That in view of the foregoing it is just, proportionate and in the interest of justice that the application is allowed.

3. In support of the application is the supporting affidavit of the applicant dated 15th October 2025 whose averments echo the grounds of the application.

4. In response to the application the Respondent swore a replying affidavit with the following averments:

a. That I am the above-tamed male adult of sound mind and disposition and the Respondent herein hence competent enough to make and swear this affidavit.

b. That my Advocate on record Mr. Tarigo, have read and explained to me the contents of the Application dated 15th October, 2025 together with supporting affidavit sworn by Winnie Kaiyoni on the same day, together with the annexures therein, and now I wish to respond to the same as follows;-

c. That the Application for stay of execution pending Appeal is incompetent, improper and has not been brought in good faith and the same is fatally defective.

d. That the Application before the court lacks merit and substratum and is merely an academic exercise.

e. That the Honourable Small Claims Court delivered a well -reasoned Judgement in my favour on the19th of September, 2025, for the sum of Kshs.712,768.00 plus costs and interest, and I am lawfully entitled to enjoy the fruits of this Judgement.

f. That I am advised by my advocate on record, Mr. Tarigo, which advice I verily believe to be true, that it is the duty of the Applicant to show that she will suffer substantial loss if stay is not granted and that material particulars of loss must be shown by way of an Affidavit by the Applicant; it is not enough to only state that loss will-be suffered. The Applicant in this Application has not demonstrated evidence of substantial loss in the event that stay is not granted.

g. That I am advised by my advocate on record, Mr. Tarigo, which advice I verily believe to be true, that stay of execution is a discretionary relief and that both parties have rights that need to be considered and/or protected. When an issue of money decrees is involved, the court should balance the interests of both parties and not shut down successful litigants from enjoying the fruits of its rightfully obtained judgement.

h. That the Applicant has not demonstrated that I am a person of straw who will be unable to refund the decretal sum should the Appeal ultimately succeed. I am a man of financial means and, therefore, in a position to refund the money should the Appeal succeed; hence no substantial loss can occur.

i. That on the contrary, should the stay be granted, I will be the one who suffers substantial loss by being unjustly denied the fruits of my judgement for an indeterminate period, effectively rendering the judgement nugatory.

j. That I am further advised by my advocate on record, Mr. Tarigo, which advice I verily believe to be true, that the eight (8) grounds of appeal lodged by the Applicant are merely re-tallying of the arguments already heard, considered, and dismissed by the Learned Adjudicator.

k. That trial court properly analyzed the claim of Kshs.712,768/= and found it to be proven on a balance of probability, hence the Appeal lacks an overwhelming prospect of success.

l. That the Application of stay, therefore, is an abuse of the court process intended not only to delay my enjoyment of the judgement and avoid the lawful obligation to pay the debt.

m. That the Applicant has failed to fulfil the mandatory requirement of Order 42 Rule 6 (2)(b) of the Civil Procedure Rules,2010 by not offering any credible, sufficient, realizable security for the due performance of the Decree which totals Kshs. 712,768/= plus costs and interest.

n. That in the highly unlikely event that this Honourable court considers granting a conditional stay, such stay should be granted on the condition that half the decretal amount be paid to the Respondent and the other half of the decretal amount be deposited in a joint interest earning account of both Advocates for the parties pending hearing and determination of the appeal.

o. That the Application for Stay of Execution is devoid of merit and does not meet the legal criteria set out in the Civil Procedure Rules, 2010 and granting it will prejudice the Respondent.

p. That I swear this Affidavit in vehement opposition to the Applicant's Application which is not merited and I pray that the same be dismissed with costs

Decision

5. The relief of stay of execution of an impugned judgment from the Court below is governed by Order 42 Rule 6 of the Civil Procedure Rules which essentially provides as follows:

> Stay in case of appeal [Order 42, rule 6]
>
> (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.
>
> (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 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.

6. This rule has been construed or basically interpreted by the Court in the Case of Stephen Wanjohi v Central Glass Industries Ltd (1991) KLR thus;

(a) "For the court to order a stay of execution there must be: -

(i) Sufficient cause

(ii) Substantial loss

(iii) No unreasonable delay

(iv) Security

(b) The grant of stay is discretionary and the High Court is also a Court of equity.

(c) It is not just to deny a successful party the benefit of judgment because he is poor.

(d) The curt does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which, prima facie he is entitled pending appeal.

(e) Financial ability of a decree holder sorely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income.

7. In the jurisdiction exercise by the court of Appeal on stay of execution Rule 5 (2) (b) remains to be the legal verse to guide the Judges in exercising discretion which essentially provides that the powers

donated by the rule is purely discretionally and is unfettered. The key factors include; for the Applicant to succeed he or she must show firstly that his appeal or intended appeal is arguable, or put another way, it is not frivolous, and secondly, that unless he is granted a stay the appeal or intended appeal if successful will be rendered nugatory. See Trust Bank Limited and another v Investech bank Ltd and Others, Nairobi Civil Applications numbers 258 and 315 of 1999. See also Odunga's Digest on Civil Case Law and Procedure pg 7293.

8. As to what constitutes substantial loss under Order 42 Rule 6(2) of the CPR is clearly articulated in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR, Thus;

> " 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 execution has been levied and completed, that is to say, the attached properties has 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 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 will render the Appeal nugatory."

9. In the instant application I have reviewed the notice of motion, the supporting affidavit and the replying affidavit by the Respondent at this stage it is not crystal clear that the intended appeal is an academic treatise or one which is a sham or what is commonly described as an appeal with low chances of success. That is what the Respondent has invited this Court to consider to decline the exercise of discretion in favour of the Applicant. First and foremost, right of appeal is entrenched in *the Constitution* that an aggrieved party or litigant is at liberty to exercise that right to a Superior Court on the grounds generally referred to as the memorandum of appeal. This court at the interlocutory stage faced with rival submissions and affidavits from the disputants is unlikely to conclusively rule in one way or another on the merits of the appeal until and unless those issues have been properly canvassed under Article 50 of *the Constitution* on fair trial rights.

10. The remedy under Article 42 Rule 6 of the CPR is one which the Court clothed with unfettered discretion to decline or grant it on a case to case basis dependent upon the facts and circumstances of that case. In my considered view, the right of appeal court from a Small Claims Court is on a point of law to the High Court. The Court therefore will reserve the right to dismiss summarily an appeal filed which is not in consonant with Section 38 of the Small Claims Act.

11. Where the decree has drawn raises issues like an illegal contract or the substratum of the evidential material and in balancing the competing rights of both parties the scale of discretion does tilt in favour of the Applicant in line with the provisions of Section 1A, 1B, 3 and 3A of the *Civil Procedure Act* as read in conjunction with Article 48 and 50 of *the Constitution* on access to justice and the components of fair trial rights.

12. For those reasons, the stay of execution is granted of the Judgment in SCCC E3108 of 2024, Isaac Talam -vs- Winnie Kaivoni. In furtherance to this order the submissions be filed against the judgment of the trial Court by the Appellant within 14 days from today's date. Thereafter the Respondent shall file a rejoinder written submissions on being served within 14 days. Given the procedural law governing the Small Claims Court there is a presumption that the strict rules of the Law of *Evidence Act* do not apply, the parties shall endeavor to move with speed to file the brief record of appeal for purpose of expediting the determination of the appeal on the merits. The status conference in this matter shall be heard on the 4th of December 2025 to set a Judgment date. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF NOVEMBER 2025.

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R. NYAKUNDI

JUDGE