



REPUBLIC OF KENYA



KENYA LAW
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**Kaboro & another v Miano & another (Civil Appeal E049 of 2025)
[2025] KEHC 15863 (KLR) (6 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 15863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E049 OF 2025
EM MURIITHI, J
NOVEMBER 6, 2025**

BETWEEN

MOSES MWAI KABORO 1ST APPELLANT

MUGAMBI RUTERE T/A GIANT AUCTIONEER 2ND APPELLANT

AND

DAVID MURIITHI MIANO 1ST RESPONDENT

ABIJAH WARUGURU 2ND RESPONDENT

RULING

1. The applicant filed a Notice of Motion dated 22nd May, 2025 seeking the following orders:
 1. Spent.
 2. Spent.
 3. The honorable court be pleased to grant an order of stay of execution of the judgment /decree of Kerugoya Chief Magistrate Court Civil Case No. 156 of 2015 pending the hearing and determination of the appeal.
 4. Such further and/or other orders be made as the court may deem fit and expedient.
2. The application is based on the grounds set out in the application and the supporting affidavit of Moses Mwai. The applicants' case is that they filed a Memorandum of Appeal dated 10th April 2025 raising about 11 grounds of facts and law against the impugned judgment. That as they were making a follow up on the fate of the certified copy of the judgment they stumbled upon a copy of request for decree by the Respondents dated 21st March 2025 showing their determination to execute the judgment hereto which was delivered on 14th March 2025 and was enjoying under a 30 days stay up to 14th April 2025.



3. The applicants aver that the failure by the trial court to upload the certified copy of the judgment is occasioning them hardship and preventing them from mounting a credible appeal against the judgment that seeks to recover a colossal sum of over KShs. 4 million from them. Further, they aver that the intended appeal is arguable and has overwhelming chances of success given the issue of the Plots Nos. 69 & 25 Kimunye market has never been fully settled.
4. Lastly, if the orders sought in this application are not granted as a matter of urgency they are likely to suffer irreparable harm and the intended appeal shall be rendered nugatory.
5. The Respondent filed a Replying Affidavit of 30th June, 2025 urging that the application herein is defective as the appeal has been filed out of time. The Judgement in this suit was delivered on 14th March 2025 and the Appellants/ Applicants ought to have promptly filed their Appeal by 14th April 2025.
6. Further, the respondents aver that the appellant/ applicant ought to deposit in court half of the decretal amount of Ksh. 2,656.656.50 and the other half (Ksh.2,656.656.50) to be paid to their Advocate on record for onward transmission to the respondents as a condition for Appeal or alternatively that the entire decretal sum of Ksh.5,313,313 be deposited in a joint interest earning account between the respondents Advocate and the Appellants Advocate.
7. Lastly, it is fair and expedient in all circumstances of the case that the security be deposited as they have stated herein above for efficient and effective administration of justice.
8. The applicants filed a further affidavit dated 8th October, 2025 responding to the Replying Affidavit that they have a competent Appeal before court, filed on 10/4/2025 as annexures marked MMK3 will show that the Memorandum of Appeal dated 10/4/2025 was paid for on 10/4/2025 for a sum of Kshs 1550/= meaning it was lodged within the 30 days' period.
9. Lastly, they aver that they do not seek to block any execution awarding the Respondent the fruits of judgement. They are only seeking their day in court since Kshs 5,313,313/= being claimed by the Respondent is colossal sum which in their circumstances cannot be able to raise as security.

Applicants' submissions

10. The applicants submit that the respondents have not shown that their ability to refund the awarded sum to the Appellant/Applicant should the Appeal succeed after execution or the ability to deposit the sum awarded in Court before the Appeal is heard and determined.
11. Lastly, the Appellant /Applicant has in his Affidavit proved his impecunious and inability to deposit the 5.3Million in Court as security and asking the Court to deposit in Court is akin to denying him access to justice by imposing on him conditions precedent to the hearing of an Appeal.

Respondent's submissions

12. They submit that the Appellant/ Applicant has not made any offer for deposit of security of costs. They rely on the decision of the Honorable court in James Wangalwa & Another V Agnes Naliaka Cheseto (2012] KEHC 1094 (KLR) where the Court held as follows:

I agree with the respondent that the Applicants have not offered or proposed any security for the due performance of the decree of the lower court. This should be done as a sign of good faith that the Applicant is ready and willing to commit to giving security. But my reading of order 42 rule 6(2) (b) of the CPR reveals that, it is the court that orders the kind of security



the applicant should give as may ultimately be binding on the applicant. This modelling of the law is to ensure the discretion of the court is not fettered.

13. The Respondent submit that the Appellant/ Applicant ought to deposit in court half of the decretal amount of Ksh. 2,656.656.50 and the other half (Ksh. 2,656.656.50) to be paid to the Respondent's Advocate on record for onward transmission to the respondents as condition for Appeal or alternatively that the entire decretal sum of Ksh. 5,313,313 be deposited in a joint interest earning account between the parties' advocates.

Issue

14. Whether stay of execution pending hearing and determination of the appeal should be granted.

Analysis

15. 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.
16. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal held that the power to grant stay is discretionary, to be exercised in such a manner that the appeal is not rendered nugatory if successful, while ensuring no undue prejudice to the respondent.
17. The judgment in the lower court was delivered on 14th March 2025 and the Memorandum of Appeal was filed on 10th April 2025. The Court has confirmed on the Court Tracking System (CTS) that the appellant's Memorandum of Appeal was filed on 10/4/2025 at 16:47:46 hours. Consequently, the appeal was filed within the statutory 30 days provided under Section 79G of the *Civil Procedure Act*.
18. On substantial loss, the Court agrees with the applicants that the decretal sum of Kshs. 5,313,313 is colossal and execution before appeal determination of the appeal would occasion hardship and possibly render the appeal nugatory, as it has not been shown that the respondents have financial ability to refund the said sum in the event the appeal succeeds. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the court held that once an applicant expresses reasonable fear that the respondent cannot repay, the evidential burden shifts to the respondent to show ability to refund, which the respondents herein have not done.
19. On delay, the application was filed promptly on 22nd May 2025 after the lapse of the initial stay period on 14th April 2025, which in the circumstances cannot be said to be inordinate.
20. Regarding security, while the applicants have deponed to their inability to raise the full decretal sum, the law does not require full payment but reasonable security. In *Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another* [2018] eKLR, the court held that the nature of security must balance both parties' interests and should not impede access to justice.

Orders

21. Accordingly, for the reasons set out above, the Court in exercise discretion to order a reasonable deposit that safeguards both parties' interests, directs that stay of execution of judgment/decree of the trial court pending appeal is granted.



22. The applicant shall as a condition for stay of execution deposit into an interest earning account in the names of counsel for the parties the sum of Ksh.2,000,000/- within thirty (30) days.
23. The appellant shall file the Record of Appeal within sixty (60) days
24. In default of deposit of security, the stay of execution shall lapse.
25. Costs shall await the outcome of the appeal.

Orders accordingly.

DATED AND DELIVERED THIS 6TH DAY OF NOVEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Chomba for the Applicant.

Ms. Wambui for Respondent.

