



REPUBLIC OF KENYA



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Kimani v Kinuthia & another (Suing as administrators of the Estate of Felix Kinuthia Mbuto) & another (Civil Appeal E078 of 2022) [2025] KEHC 16127 (KLR) (6 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16127 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E078 OF 2022
TW OUYA, J
NOVEMBER 6, 2025**

BETWEEN

CHARLES MWANGI KIMANI APPLICANT

AND

**NANCY WAIRIMU KINUTHIA & JOYCE WANJIKU KINUTHIA (SUING
AS ADMINISTRATORS OF THE ESTATE OF FELIX KINUTHIA
MBUTO) RESPONDENT**

AND

ATTORNEY GENERAL THIRD PARTY

RULING

1. The Applicant has moved this honourable court vide a Notice of Motion Application dated 19th December 2022 seeking among others stay of execution of the judgment in Murang'a CMCC no. 49 of 201
2. The application is supported by the grounds on its face as well as the affidavit of Charles Mwangi Kimani of even date on grounds that the 1st Respondent was awarded a decretal sum of Ksh. 599,164.80 plus cost and interest at court rates upon liability being assessed at 100%. The Applicant therefore intends to appeal against the entire judgement of the trial court and if the stay of execution is not granted, the appeal would be rendered nugatory as the 1st Respondent would proceed to execute the decree.
3. As a result, the Applicant would suffer irreparable loss as the Applicant is reasonably apprehensive that if the decretal sum is paid to the Respondent, the respondent might not be in a position to refund the same if the appeal is successful as the intended appeal has high chance of success.



4. The applicant further avers that he is ready to deposit security in court by way of a bank guarantee from Family bank.
5. The 1st Respondent opposed the Application on the basis that the Applicant failed to testify before the trial court when he had the chance to do so.
6. On the issue of security for the decretal sum, the Respondent averred that the Applicant ought to deposit the decretal sum together with costs in an interest earning joint account with parties' advocates and not a bank guarantee.
7. The application was canvassed through written submissions.
8. The Applicant submitted that the intended appeal is arguable and raises issues that merit consideration by the High Court. It was also submitted that if the stay order is not granted the appeal would be rendered nugatory and the applicant would suffer irreparable damage as the Respondent may proceed to execute the trial court's judgment.
9. The Respondent on the other hand submitted that the intended appeal was not arguable, hence there was no need to stay execution of the decree pending appeal. Nevertheless, if the court is inclined to grant a stay order, the same Applicant should be ordered to deposit the decretal sum in a joint interest earning account and not to supply a bank guarantee.
10. I have considered the notice of motion, affidavit in support and grounds of opposition. I have considered the case of Kiplagat Kotut vs Rose Jebor Kipngok [2015] eKLR, where it was determined that a stay of execution will not be granted unless the conditions in Order 42 Rule 6 of the Civil Procedure Rules are satisfied.
11. Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-
 - i. Substantial loss may result to the applicant unless the order was made;
 - ii. The application was made without unreasonable delay; and
 - iii. 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.
12. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is "and". It connotes that all three (3) conditions must be met simultaneously.
13. It is the considered view of this court that substantial loss does not have to be a lot of money. It is sufficient if an applicant seeking a stay of execution demonstrates that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.
14. I have noted that the Respondent has not provided any affidavit of means. The court has nothing to determine whether the 1st Respondent would be in a position to refund the decretal sum in the event the appeal succeeds. In the absence of such proof, this court is satisfied that the Appellant would suffer substantial loss. He has thus satisfied the first condition of being granted a stay of execution pending appeal.



15. Regarding the question of unreasonable delay. I have noted that the judgment subject of this application was rendered on 2nd December 2022, while the Application herein was lodged on 19th December 2022. I find that the instant application was filed without any delay. Therefore, the Applicant has satisfied this limb for the grant of stay of execution pending appeal.
16. The Applicant demonstrated his willingness to furnish security.
17. In *Arun C. Sharma vs Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:

“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 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. From the foregoing decisions, it is evident that the issue of security is discretionary and it is upon the court to determine the same. Notably, in his application, the applicant stated that he is willing to offer security in the form of a bank guarantee if called upon by this Honourable Court to do so. The Applicant has offered to provide security and has therefore satisfied this ground for stay.
19. I have noted that although the Applicant has offered a bank guarantee as security, the Respondent has rejected the same while opting that the decretal sum be deposited in a joint account. Nevertheless, the Respondent has not advanced any reason for rejecting the security proposed by the Applicant. Noting that the legal requirement is the payment of any security, I find that the bank guarantee is sufficient security to safeguard the interests of the Respondent.
20. In the persuasive decision of *Siegfried Busch vs MCSK* [2013] eKLR, the court observed thus:

“A superior court to which an application has been made must recognise and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”
21. Accordingly, having considered the parties’ pleadings, affidavits, Written Submissions and the case law relied in support of their respective cases, it is the considered view of this court that the Applicant is entitled to exercise his right of appeal. It is therefore in the interests of justice that a stay of execution pending the hearing and determination of the Appeal of the Learned Trial Magistrate’s judgment be granted so as not to render his appeal nugatory.
22. The upshot of this court’s ruling is that the Applicant’s Notice of Motion application dated 19th December 2022 is disposed in the following terms:
 - i. There will be a stay of execution pending this appeal on condition that the Applicant deposits the decretal sum in a joint interest earning account in the joint names of both counsel for the Applicant and Respondents in a reputable bank within 30 days from the date hereof.
 - ii. The Applicant to ensure that the record of appeal is prepared and directions on the appeal taken within 30 days from the date of this ruling. In default, the orders of stay issued herein shall stand vacated.



DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 6TH DAY OF NOVEMBER, 2025.

HON. T. W. OUYA

JUDGE

