



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Karanja (Civil Appeal E221 of 2024)
[2025] KEHC 16767 (KLR) (17 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E221 OF 2024
PN GICHOHI, J
NOVEMBER 17, 2025**

BETWEEN

KIARAHO MWANGI APPLICANT

AND

KARIUKI KARANJA RESPONDENT

RULING

1. By a Notice of Motion dated 17th October, 2024 and brought under Section 1A, 3A, 79 G and 95 of the *Civil Procedure Act*, Order 22 Rule 22(1), Order 42 Rule 6, Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules, Article 159 (2) of *the Constitution* and all other enabling provisions of the Law, seeking for Orders;-
 1. Spent.
 2. There be a stay of execution of the judgment and decree of Kshs. 413,060/= plus costs and interests in Nakuru Small Claims No. E724 of 2023 (kariuki Karanja -vs- Kiaraho Mwangi) pending the hearing and determination of this application inter-partes.
 3. There be a stay of execution of the judgment and decree of Kshs. 413,060/= plus costs and interest pending the hearing and determination of Nakuru HCCA No. E221 of 2024; Kiaraho Mwangi -vs- Kariuki Karanja.
 4. The costs of this application be provided for.
2. The Application is premised on the grounds on the face of the Motion and supported by the Affidavit of the Applicant sworn on even date where he stated that he is dissatisfied with the trial Court's entire judgment delivered in favour of the Respondent on 20th September, 2024, for the sum of Kshs. 413,060/= excluding costs and interests.



3. He stated that stay of Execution Orders which were granted by the trial court lapsed on 20th October, 2024 thus necessitating the filling of this application as he is apprehensive that the Respondent may at any time proceed and execute the decree before the Appeal is heard and determined.
4. He deponed that his appeal is arguable and meritorious with a high likelihood of success, and that granting the stay is in the interest of justice and fairness.

Response

5. Upon being served, the Respondent filed a Replying Affidavit sworn on 18th November, 2024 and opposed the application. He termed the Appellant's application one without merit and an abuse of the court process.
6. He asserted that the appeal has no chance of success and does not raise triable issues. Furthermore, he argued that the application for stay of execution should have been filed first in the trial court, and no reason was provided for not doing so. He therefore prayed that the application to be referred back to the trial court.
7. He stated that the Applicant had not only failed to demonstrate evidence of substantial loss that he would suffer but also failed to offer any security as a condition for granting a stay.
8. He emphasised that execution is a lawful process, and as the decree holder, he has rights to full benefits of the decree. He viewed the application as a ploy to delay him from enjoying the fruits of the judgment.
9. He therefore urged the Court to strike out a balance between the tortfeasor(Appellant) and the decree holder(Respondent) adding that should the Court be inclined to grant a stay, then he proposed that half of the decretal amount be paid to him and the other half be deposited in an interest-earning account in the joint names of the advocates for both parties, along with costs, noting that the Appeal is only on quantum.

Applicant's submissions

10. In support of his argument that the appeal has high chances of success and raises arguable issues, the Application referred to among others, the case of M/S Maiyan Consulting Engineers & Contractors Ltd v Kenya Rural Roads Authority & Anor [2016] eKLR where it was stated that an arguable appeal does not necessarily mean one that must succeed, but rather one that raises a serious question for determination.
11. Accordingly, he maintained that the grounds raised in his Memorandum of Appeal meet the threshold, particularly the argument that the trial court erred in finding him liable for assault without a prior criminal conviction.
12. Regarding substantial loss, he argued that he will suffer irreparable prejudice if the stay is not granted. To support his argument, he placed reliance on the case of Anne Mugure Nganga V Housing Finance Company Of Kenya Limited [2021] eKLR, where it was held that substantial loss refers to a loss that cannot be compensated by an award of costs or damages.
13. He argued that if the decretal sum is executed, he will suffer substantial loss, especially given that he has appealed the entire judgment. Reference was made of the case of Kasumba v Kalu [2004] 1 KLR 437, where the court held that substantial loss includes the risk of being unable to recover the decretal sum if the appeal succeeds. The Applicant therefore asserted that if the money is paid out and the appeal succeeds, they may have difficulty recovering it.



14. While acknowledging the importance of providing security as a condition for stay of execution, he referenced the case of *Dr. Salim Nganga Kadhi & Another v John Waweru Maina & 2 others* [2014] eKLR, where it was stated that the main purpose of ordering security for performance is to ensure that should the appeal fail, the Applicant will be able to satisfy the decree. He therefore maintained his willingness to abide by any reasonable conditions set by the court regarding security.
15. Lastly, he emphasised that this application has been made without undue delay as the judgment was delivered on 20th September, 2024, and the application was filed on 17th October, 2024, which is within the 30-day stay period granted by the trial court.
16. Citing the case of *Kasumba v Kalu* (Supra), he noted that promptness in filing a stay application is a key factor and further asserted that his application was made promptly. In conclusion, he urged the court to allow the application.

Respondent's Submissions

17. He argued that the application is a misuse of the doctrine of exhaustion as the Appellant should have first sought stay orders in the trial court before approaching the High Court. He asserted that an appellate court can only grant such orders if the trial court has refused them, and therefore urged the court to dismiss the application.
18. On the conditions for granting a stay of execution under Order 42 Rule 6 of the Civil Procedure Rules, he emphasised that the Applicant must demonstrate substantial loss and offer security.
19. In support, he cited the case of *Samuel Kariuki Njuguna & Another v Kinangop Dairy Limited* [2021] eKLR, where it was held that substantial loss means a loss of such a nature that if a stay is not granted, and the appeal succeeds, the successful appellant would not be able to obtain back what he had lost.
20. On that basis, the Respondent submitted that the Appellant failed to prove that he will suffer substantial loss if the stay is not granted.
21. Regarding security, the Respondent referenced the case of *Samuel Kariuki Njuguna & Another* (Supra), where the Court asserted that the general rule is that security for due performance of the decree or order as may ultimately be binding on him should be given.
22. He argued that the Appellant has not offered any security and that execution is a lawful process, entitling the decree holder to the full benefits of the judgment.
23. Concerning the prospects of the appeal, the Respondent cited *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, where the court held that a stay of execution is not a right, and that it will only be granted where sufficient cause is shown by the applicant that it will suffer substantial loss and has provided security for the performance of the decree. The Respondent argued that the appeal lacks merit.
24. He maintained that the Appellant's appeal, which is primarily on the quantum of damages, does not have a high chance of success and that, granting a stay would merely delay him from enjoying the fruits of his judgment.
25. In conclusion, he submitted that if the court is inclined to grant a stay, then he proposed that half of the decretal amount be paid to him, and the other half plus costs be deposited in an interest-earning account in the joint names of the advocates for both parties so as to balance the interests of both parties.



Analysis and determination

26. From the material placed before this Court, the only issue for determination is whether an order of stay of execution pending appeal should issue.
27. To start with, the Respondent raised a preliminary issue being the doctrine of exhaustion. His argument was that the Applicant was obligated to first seek stay of execution before the lower court, and if denied, then it would have been permissible to file the same before this Court.
28. Regarding such issue, the Court of Appeal has expressed itself on the application of Order 42 Rule 6(1) of the Civil Procedure Rules in both its original and appellate jurisdictions in several decisions, while considering its own Rule 5 (2)(b) which is essentially at pari materia with Order 42 Rule 6(1) of the Civil Procedure Rules.
29. Indeed, in the case of Equity Bank Limited v West Link Mbo Limited (Civil Application 78 of 2011) [2013] KECA 320 (KLR), Githinji JA held: -

“It is trite law that in dealing with Rule 5 (2)(b) applications, the court exercise discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction. (Githunguri vs Jimba Credit Corporation Ltd No. 2 [1988] KLR 838.”

30. In the same case, Musinga JA observed in the judgment:-

“It follows therefore that as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence and a litigant can move this Court for grant of an order of stay under rule 5 (2) (b) of this Court’s Rules. The Court is said to be exercising special independent original jurisdiction because in considering whether to grant or refuse an application for stay it is not hearing an appeal from the High Court decision. It can grant orders of stay, irrespective of whether or not such an application had been made in the High Court.”

31. The Court of Appeal has clearly interpreted that a stay of execution application can be filed directly in the Appellate Court, exercising its special independent original jurisdiction, even if it wasn't raised in the trial court. By parity of reasoning, filing this stay application in this Appellate Court, bypassing the trial court, is permissible under Order 42 Rule 6 of the Civil Procedure Rules.
32. On the application for stay of execution, the principles are well set out as acknowledged by the parties herein. Order 42 Rule 6 (2) of the Civil Procedure Rules which provides that;-

“(2) No order to stay of execution shall be made under sub-rule (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.”



33. Accordingly, the Applicant is obliged to satisfy the above elements have been time and again reiterated by superior courts as seen in classic case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 where Madan JA (as he was then) held:-

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 459: “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

34. On the first consideration whether the application was filed timeously. The judgment of the trial Court in this matter was delivered on 20th September, 2024. This Appeal was lodged on 9th October, 2024, while the Application for stay herein was filed on 22nd October, 2024. Accordingly, though the Application was made 2 days late, the delay is not inordinate in the circumstances.
35. On the second consideration, the Applicant contends that he will suffer irreparable loss and damage if the orders sought are not granted. However, he did not state the specific loss he will suffer if the stay of Execution is denied. Substantial loss was enunciated in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR, where Platt JA stated that;-

“But this court must look at the matter from the point of view of rule 5(2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent’s circumstances, but the information that was forthcoming did not confirm the applicant’s misgivings. It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

36. The onus of proving substantial loss rests upon and must be discharged by the applicant. It is not enough to state that loss will be suffered, but the applicant ought to show what loss will be suffered. In this case, the applicant argued in his submissions that if stay is not granted and the Respondent execute the decree, he might not recover the decretal sum if the Appeal succeeds.
37. On security for due performance. *F Gikonyo J in Arun C. Sharma v. Ashana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR, held that:- “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 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.”



38. The Applicant in this matter has not proposed any security before this court and left it for determination by this Court. On the other hand, the Respondent proposed for half of the decretal sum to be paid to him and the balance be deposited in a joint interest earning account in the names of their advocates on record.
39. A look at Memorandum of Appeal dated 4th October, 2024 shows that the Appellant has questioned his joinder in this suit in his personal capacity as a police officer and the fact that there were no criminal proceedings to establish his guilt preceded the compensatory suit.
40. It is clear that the issues raised in the Appeal are arguable and in the event stay is not granted at this stage the Appeal might be rendered nugatory. In the circumstances and in order to balance the rights of the applicant to Appeal, with the corresponding right of the Respondents to enjoy the fruits of his judgement. This Court shall exercise its discretion and make the following Orders: -
1. There will be a stay of execution of the judgment and decree of delivered by Hon. Dominic Macharia(Adjudicator) on 20th September, 2024 of Kshs. 413,060/= plus costs and interest pending the hearing and determination of Nakuru HCCA No. E221 of 2024; Kiaraho Mwangi Vs Kariuki Karanja.
 2. The Applicant shall deposit the entire decretal sum in Court within the next thirty (30) days from the date hereof.
 3. In default of (2) above, the stay of execution shall automatically lapse.
 4. Costs of the application to abide the outcome of the Appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF NOVEMBER, 2025.

PATRICIA GICHOHI

JUDGE

N/A for Appellant

Ms Kirui for Respondent

Kamau, Court Assistant

