



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

CIVIL APPEAL NO. E137 OF 2025

MUTURIA

MORRIS.....APPLICANT/APELLANT

VERSUS

**IRENE NTINYARI AND ZABINA MWENDWA THURANIRA
(Suing as the legal representatives of the estate of
DANIEL MWIRIKI).....**

.....RESPONDENTS

R U L I N G

1. For determination is the Notice of Motion dated 2/7/2025 brought under sections 1A, 1B, 3A, 63 (e), 79G and 95 of the Civil Procedure Act, Order 22 Rule 22 of the Civil Procedure Rules and Article 159 (2) (d) & (e) of the Constitution, seeking that:

1. Spent

2. Spent

3. This Honourable Court be pleased to order stay of execution of the judgment delivered against the Appellant herein on 16th June, 2025 in Githongo Chief Magistrate's Court Civil Case No. E020 of 2023, the resultant decree and all consequential orders therein pending the hearing and determination of the Appeal.

4. The costs of this Application be provided for.

2. The application is premised on the grounds on the face of it and supported by an affidavit sworn by Dolphine Moindi, the legal officer of Takaful Insurance of Africa Limited, the Insurer, on even date. He averred that on 16/6/2025, judgment was entered against the Appellant, which he has appealed against. The appeal has a high chance of success, and unless the stay is granted, the Appellant will suffer substantial loss and irreparable damage. The Appellant is reasonably apprehensive that if the sum of Ksh. 2,584,000 is paid to the Respondents, they would be in no financial position to refund it if the appeal is successful. The application was filed timeously without reasonable delay, and the Appellant is willing to deposit at

least half of the decretal sum in court or in a joint interest earning account in the names of the Advocates herein.

3. The Respondents opposed the application vide a replying affidavit sworn by Irene Ntinyari, the 1st Respondent herein, on 14/7/2025. She averred that the Appellant had not paid any part of the decretal sum, despite having been granted 45 days stay of execution by the trial court. Further, the Appellant had not furnished any security for the due performance of the decree, and thus, he was not entitled to the orders sought. The application should be struck out on the grounds that it was filed by Dolphine Moindi, a stranger to these proceedings, with no written authority from the Appellant. The application is incompetent since it is grounded on extraneous issues, and no decree has been annexed thereto.
4. The application was canvassed by written submissions, which were duly filed by counsel.

Determination

5. The singular issue for determination is whether the orders sought should be granted.

6. Before delving into the merits of the application, I must preliminarily address the issue whether the same is incompetent, having been filed by a stranger to these proceedings. The supporting affidavit to the application is sworn by Dolphine Moindi, the Insurer's legal officer. The Insurer, as the principal indemnifier of the decretal sum, is undoubtedly an integral party to these proceedings, and its participation at this juncture does not invalidate them.
7. On the merits, Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows; ***“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.”***
8. I am guided by the holding of the Court of Appeal in ***Butt v Rent Restriction Tribunal [1979] eKLR*** that; ***“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.

9. The application was filed timeously on 8/7/2025, while the impugning judgment was delivered on 16/6/2025. In view of the 45 days stay of execution granted by the trial court, I find that the application was filed without unreasonable delay.
10. The cornerstone consideration in every application for stay is substantial loss, and the burden of proof lies on the Applicant, as was held by the Court of Appeal in ***Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] KECA 94 (KLR)*** that; ***“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.”

11. The Respondents have not rebutted the Appellant’s legitimate apprehension of loss of the decretal sum in the event of a successful appeal. The decretal sum herein is quite substantial, and the Appellant’s apprehension that the same might be unrecoverable from the Respondents if the appeal ultimately succeeds, is substantial loss.

12. I appreciate the Appellant’s willingness to furnish security for the due performance of the decree.

13. Consequently, I find that the application dated 2/7/2025 is merited and it is allowed in the following terms;

1. Stay of execution of the judgment delivered against the Appellant herein on 16th June, 2025, in Githongo Chief Magistrate’s Court Civil Case No. E020 of 2023, the resultant decree and all consequential orders

therein pending the hearing and determination of the Appeal is hereby issued.

2. The Appellant shall deposit half of the decretal sum being Ksh.1,292,000 in a joint Advocates' interest earning account within 30 days from the date hereof.
3. The Appellant to compile, file and serve the Record of Appeal within 45 days from the date hereof.
4. In the event of default, the stay hereinabove granted shall lapse, and the Respondents shall be at liberty to execute.

Mention on 14/4/2026.

DATED AND DELIVERED AT MERU THIS 13TH DAY OF NOVEMBER, 2025

S.M. GITHINJI

JUDGE

APPEARANCES:

Mr. Nyaga Holding brief Kiogora Arithi for the Respondent.

Miss Wanjiru holding brief for Mr. Ndichu for the Appellant/
Applicant.