

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. E187 OF 2023

HENRY GITONGA KIRWEYA (Suing as the donee of power of attorney on behalf of

JOSEPH MWITHIGA KIRWEYA)**APPELLANT/RESPONDENT**

VERSUS

JOHN GITHU KARUGA

.....**RESPONDENT/APPLICANT**

RULING

1. Before this court is the Notice of Motion dated 29th April, 2025 through which the applicant seeks the following orders;

1 & 2 Spent.

3. That this Honourable Court be pleased to grant a stay of execution of the judgment/decreed of Hon. Priscah Nyotah Senior Resident Magistrate delivered on 26th July, 2023 in Nakuru CMCC E605 of 2022 pending the hearing and determination of the appeal and cross-appeal herein.

4. That costs be provided for.

2. The same is premised on the grounds on its face and the applicant's supporting affidavit.

The appellant/respondent opposed the application through a replying affidavit sworn on 12th May, 2025.

Respondent/Applicant's case.

The applicant in his grounds and supporting affidavit sworn on 29th April, 2025 states that he has filed a cross-appeal, which

together with the appeal are ripe for hearing. That in his cross-appeal he has challenged the entire lower court Judgment ordering him to pay USD 27,000 to the appellant/respondent. He is fearful that if the execution by the appellant/respondent is not halted he will suffer unrepairable harm as he will lose all his moveable properties which are his tools of trade.

3. To his application he annexed copies of the said proclamation – JG4 issued by the appellant/respondent.

Appellant/Respondent's case

4. The respondent filed his replying affidavit sworn on 12th may, 2025. He averred that the applicant had been given sufficient time within which to present his case before the lower court. That in trying to avoid execution the applicant had brought a fake objector LUGXURIOUZ GARDEN RESORT on board which was unsuccessful, (Ruling dated 9/4/2025).
5. Further that the applicant only woke up when his properties were proclaimed by the respondent vide the notice and warrants dated 24/4/2025 to avert execution (HGK – 5). To add on this, he states that the applicant has not offered any security, for the performance of the decree as one of the conditions for grant of stay of execution pending appeal.
6. It is his plea that in the event that the application is allowed there be a condition for the applicant to pay him half the decretal sum (Ksh.5,159,399/=) while the other half is deposited into an interest earning account in the names of both advocates OR the entire sum is deposited in a joint interest earning account in the names of both their advocates. He thus urged the court to dismiss the application.
7. The application was disposed of by way of written submissions.

Respondent/Applicant's submissions

8. These were filed by Raydon Mwangi & Associates and are dated 23rd July, 2025. Counsel submitted that the application has been made in good faith, and the appeal was ready for hearing. He identified two issues for determination.

The first issue was whether the applicant has an arguable appeal that is not frivolous. On this he contended that from the evidence there was no proof of the transfer of any money to the applicant's account.

9. Reference was made to the case of **Narok County Government & another v Mwavali (Civil Application No. E071 of 2023) [2024] KECA 1799 (KLR)** where it was stated as follows;

“On the first principle, as to whether or not the appeal is arguable, we have to consider whether there is at least a single bona fide arguable ground that has been raised by the applicants warranting ventilation before this court on appeal. In Kenya Medical Lab Technicians & Technologists Board v Prime Communications Limited [2014] eKLR this Court stated that in considering whether an appeal is arguable, it is not a requirement that the appeal will necessarily succeed, rather, it is sufficient if the appeal appears to be one that deserves to be fully argued before the Court and besides, an appeal is considered arguable even if it raises a single bona fide ground.”

10. He thus submitted that from the grounds raised in the applicant's cross appeal, it has been shown that he has an arguable appeal.

11. On whether if successful the appeal would be rendered nugatory if stay was not granted, counsel submitted that from the Judgment the amount as at April, 2025 was Ksh.4,440,383/= which was not little money. He argued that if stay of execution was not granted the respondent would move to execute the applicant's properties, yet his financial standing was unknown. He still relied on the case of **Narok County Government & another v Mwavali** (supra) in support of this submissions. He thus urged the court to allow the application to allow the applicant ventilate his grounds of appeal.

Appellant/Respondent's submissions

12. These were filed by Sheth & Wathigo advocates and are dated 24th July, 2025.

On whether the applicant is entitled to the orders sought counsel referred to Order 42 Rule 6 of the Civil Procedure Rules 2010. He argued that the power of the court to grant stay of execution is discretionary. In support he cited the cases of;

- (i) **Allyder Trading Company Ltd v Lucy Jepngetich Mikei Civil Appeal No. 135 of 2014 [2016] eKLR.**
- (ii) **Civil Application No. Nairobi 6 of 1979 Butt v Rent Restriction Tribunal.**
- (iii) **RWN v EKN [2019] eKLR.**

13. On whether substantial loss may result if stay is not granted and while relying on the case of **Good News Church of Africa v Board of Management Eldoret Secondary School [2021]** counsel submitted that the applicant had to show how the execution would unrepairably affect him or render the appeal nugatory.

It is his contention that this has not been done and in any event it is the respondent who will suffer substantial loss if the application is allowed. The reason being that he has a valid Judgment dated 26th July, 2023.

14. In explaining what substantial loss is, counsel referred to the case of **Meteine Ole Kilelu & 10 others vs Moses K. Nailole Civil Appeal No. 340 of 2008** where the Court of Appeal stated;

“where the decree appealed against is a monetary decree, the applicant has to show that either once the execution is done, after refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence.”

15. He also referred to the case **of Kenya Shell Limited vs Kibiru & another [1986] 410** and heavily relied on the ruling by Platt Ag JA (as he then was) stressing that the respondent is the one who lent the applicant the money in issue for his business. Thus, he is a man of means and can comfortably refund the applicant in case the cross appeal succeeds.

It is counsel’s contention that the applicant was given a period of six (6) months within which to file his compliance documents but he did not.

16. On whether there was unreasonable delay in lodging the appeal counsel answered in the affirmative. He stated that the applicant took 45 days to file the application after delivery of the stay of execution order granted by the court. In support he

cited the case of **M'ndaka Mbiuki vs James Mbaabu Mugwiria Meru Civil Appeal No. 45 of 2015 [2016] eKLR.**

17. Finally, on the issue of security for due performance of the decree counsel cited the case of **Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates as stated in Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR.**

It is his submission that the court has unfettered discretion to issue any orders to preserve the subject matter pending the hearing of the appeal. Further that in this case the applicant has not offered any security for performance of the decree. He urged the court to dismiss the application for failure to meet all the three requirements of Order 42 Rule 6 Civil Procedure Rules.

18. Having carefully considered the application, affidavit, submissions by both parties, I find the main issue falling for determination to be whether the applicant has made out a case for issuance of the order for stay of execution pending appeal.

19. This issue of stay of execution pending appeal is governed by Order 42 rule 6 of the Civil Procedure Rules which provides as follows;

(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.*
- (3) *Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

20. From the above provisions it can be seen that there are critical conditions which must be complied with by the one seeking stay of execution.

These are;

- (i) Proof of substantial loss if the stay of execution order is not granted.
- (ii) The applicant must provide security for the performance of the decree.

Substantial Loss

21. When a party seeks stay of execution he/she must demonstrate that he/she will suffer a “substantial loss” if the court does not grant the requested relief. Merely claiming substantial loss is not enough. The applicant must provide concrete reasons and evidence to prove that the loss would be an extreme hardship, which cannot be easily compensated.

22. Perusal of the grounds of appeal by the appellant/respondent shows he is challenging portions of the Judgment by the lower court. The grounds of the cross-appeal on the other hand show that the respondent/applicant is challenging the whole Judgment of the lower court.

The respondent/applicant claims to have been locked out of the hearing, which is a critical issue to be addressed in the appeal.

23. The decree herein shows the amount to be paid by the applicant to be Ksh.3,500,000/= less costs and interest which is not little money. The applicant claims to fear that if the amount is paid and the cross appeal succeeds he may not be refunded his money by the respondent. On the other hand the respondent argues that he has the means of refunding the money as he was the lender and not the borrower.

24. In the instant case the court as the pillar of Justice must protect the interests of both parties, as it exercises its discretionary powers.

The respondent must not be denied his right to enjoyment of the fruits of his Judgment. On the other hand the appeal should not be rendered nugatory by the failure to grant the stay of execution sought.

25. The Appeal and Cross-Appeal herein were filed on 4th August, 2023 and 23rd August, 2023 respectively. Apparently an

application for stay of execution was filed in the lower court. It is dated 21st June, 2023. I have perused the record and I do not see any decision made in respect of that application. However there is a ruling filed in respect of an application dated 8th November, 2024 which objected to the proclamation of goods in this matter. The application was dismissed on 9th April, 2025.

26. It was after the said dismissal that the applicant herein filed the Notice of Motion dated 29th April, 2025. The same was filed on 30th April, 2025 which was 21 days after the said ruling and not 45 days as claimed by the respondent. I therefore do not find any delay in the filing of this application.
27. Coming to the issue of security for due performance, it is plain clear that the applicant did not furnish the court with any proposed security for the due performance of the decree. The court has to be assured of the due performance of the decree under all circumstances otherwise the whole exercise would be futile.

In the case of **Arun C Sharma** (supra) **Justice Gikonyo on this issue stated this;**

“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 debtorCivil 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.”

28. Having considered all the material above, the law and decided cases I am of the view that both parties must be given an opportunity to argue their appeals. Secondly there must be security for the due performance of the decree herein. Bearing all the above in mind I find merit in the application and allow the prayer for stay of execution of the Judgement/decree in Nakuru CMCC No. E605 of 2022 pending the hearing and determination of the appeal and cross-appeal herein. This is however on condition that the respondent/applicant deposits half of the decretal sum in a joint interest earning account in the names of both counsel, within 45 days from the date of this ruling. Failure to comply will lead to an automatic waiver of the order of the stay of execution.
29. The upshot is that the Notice of Motion dated 29th April, 2025 has merit and is allowed subject to the stated condition. Costs shall be in the cause.
30. Orders accordingly.

Delivered virtually, dated & signed this 28th day of November, 2025 in open Court at Nakuru.

**H.I. ONG’UDI
JUDGE**