



REPUBLIC OF KENYA



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**Kyalo v Njoroge (Miscellaneous Civil Application E281 of 2025)
[2025] KEHC 17467 (KLR) (28 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17467 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E281 OF 2025
HI ONG'UDI, J
NOVEMBER 28, 2025**

BETWEEN

CYRUS MUMO KYALO APPLICANT

AND

SAMUEL MWAURA NJOROGE RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated 24th September, 2025 where the applicant is seeking for the following orders:
 - a. Spent.
 - b. This Honourable Court be pleased to grant the Applicant leave to appeal out of time in respect to the judgment decree delivered in Nakuru SCCC E103 of 2024 Samuel Mwaura Njuguna V Cyrus Mumo Kyalo.
 - c. spent
 - d. This Honourable Court be pleased to grant an order of stay of execution of the judgment and or the decree delivered on or about 13 08 2025 and all consequential orders arising therefrom pending the hearing and determination of the intended Appeal herein.
 - e. This Honourable Court be pleased to issue an order that the entire decretal sum awarded by the trial court of Kshs. 350,690 = plus costs and interests only be deposited in joint interest earning account in the names of both advocates as security pending hearing and determination of the intended Appeal herein.
 - f. This Honourable Court be pleased to issue any other order as it may deem just, appropriate and expedient in the interest of justice.



- g. Costs of this application be provided for.
2. The application is supported by the grounds on its face plus the applicants supporting affidavit.
3. The respondent filed a replying affidavit opposing the application. He averred that he was on treatment and needed finances to support him. He proposed that he be paid half of the decretal sum while the other half is deposited in an interest earning account for the period pending the appeal.
4. He further states that the applicant is being speculative, and has not come to court in good faith.
5. The application was disposed of by written submissions.

Applicant's submissions

6. These were filed by KRK advocates LLP. Counsel referred to the case of Halai & another V Thorton & Turpin (1963) LTD [1990] KLR 365 cited in Industrial Cause Number 1715 of 2011, Elena Don doladova Korir V Kenyatta University [2014] KLR at Nairobi where the Court of Appeal Gicheru JA, Cheson & Cockar Ag JA (as they all were) held that:

“The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay”

7. On substantial loss counsel submitted that the respondent had not shown that in case of a successful appeal he would be able to refund the money if paid. That he had not filed any documents to show his financial standing. Reference was made to the case of Amal Hauliers Ltd V Abdulnasir Abukar Hassan [2017] eKLR.
8. He further argued that the application has been made without unreasonable delay and immediately sought stay pending appeal. He added that the applicant is willing to deposit the entire decretal amount in an interest earning account in the joint names of both advocates. On this he relied on the case of Omwerema & another V Namunyak Nkurrinah Advocate (Civil Appeal No. E002 of 2022) [2003] KEHC 22364 (KLR) (18 September 2023) (Ruling) where the court held as follows:

“Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *akn ke act 1924 3 Civil Procedure Act*, the court orders stay of execution pending the hearing and determination of the appeal herein the sum of money deposited in a joint interest earning account at KCB shall be held therein as security pending determination of the appeal; for the due performance of the decree that may become binding upon the applicant”.

9. Finally, counsel submitted that the applicants intended appeal has high chances of success as shown in the draft memorandum of appeal. He thus urged the court to grant the orders sought.

Respondents submissions

10. These were filed by Koome & Koome advocates and are dated 20th September, 2025. Counsel submitted that the prerequisite conditions for the grant of stay are well encapsulated in Order 42 Rule 6 of the Civil Procedure Rules. That this was reiterated in the case of Vegpro Kenya Limited V Susan Wanja [2017] KEHC 6118 (KLR). Counsel further submitted that it is mandatory for all the three (3)



conditions to be fulfilled before any order of stay pending appeal is granted. On this he referred to the cases of Trust bank Limited V Ajay Shah & 3 others [2012] eKLR and Peter Ndungu Ngae & 3 others V John Mugane Karomo [2015] eKLR.

11. On substantial loss he submitted that the applicant has a duty to demonstrate substantial loss by placing before the court solid information to show the risk of suffering substantial loss. He referred to the case of: Kenya Shell Ltd V Benjamin Karuga Kiburi & another (1989) eKLR among others. It is his submission that the applicant did not establish any substantial loss he may suffer if the stay is denied. He pointed out that the applicant dwelt more on the success of the appeal instead of the substantial loss to be incurred if the orders sought are not granted.
12. Additionally, he argued that the applicant had not filed the application without undue delay. He finally stressed on the proposal that the respondent should receive half the decretal sum. Reliance was placed on the case of Michael Ntouthi V Abraham Kivondo Musau 2021 eKLR where Ondunga J (as he then was) held thus:

“Taking all relevant factors into account and in order to render the intended appeal illusory while at the same time securing the interest of the successful plaintiff I grant stay of execution of the decree herein on condition that the applicant pays to the respondent half of the decretal sum and gives a bankers guarantee to pay the remaining half together with costs and accruing interest from a refutable financial institution specific to its appeal for the whole duration of the appeal .The said conditions to be met within 30 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the respondent will be at liberty to execute”
13. He urged the court to dismiss the application with costs.

Analysis and determination

14. I have carefully considered the application, both affidavits, draft memorandum of appeal, both parties' submissions and the law. The main issue falling for determination is whether the application is merited.
15. From the material before me, there is no objection to the granting of leave to the applicant to file appeal out of time. The issue of contention is on the stay of execution Order 42 rule 6 of the Civil Procedure Rules provides as follows:

6(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.

16. The Judgment by the trial court was delivered on 13th August, 2025. The application herein was filed on 26th September, 2025. An appeal ought to have been filed within 30 days. i.e by 13th September, 2025. The application herein was therefore filed 13 days outside the period the Appeal ought to have been filed. Considering all the circumstances I find two (2) weeks not to be unreasonable delay. Moreover, there is no serious contention on this by the respondent.
17. The main contest is on the conditions for the stay of execution. According to the applicant the decretal sum is Ksh 350,690 = plus costs and interest. On the other hand, the respondent talks of Ksh 135,000 = as being half the decretal sum. Since no decree has been filed herein this court is not sure of what the decretal amount is. That aside, the applicant is questioning the respondent's financial ability to refund the sums paid in the event of a successful appeal.
18. Going by the requirements under Order 42 Rule 6 of Civil Procedure Rules and the cited cases above, I note the following The respondent has a Judgment decree in his favour This court has a duty to protect the interests of the party that has a Judgment in his her favour. At the same the interest of the party pursuing an appeal must also be protected to ensure no loss in the event of a successful appeal. See Michael Ntouti V Abraham Kivondo Musau (supra) and Omwerema & another V Namunyak Nkurrinah advocate (supra).
19. From the replying affidavit its shown that the respondent suffered some injuries. The fact that he is undergoing treatment is not disputed by the applicant. The applicant is willing to deposit the entire decretal sum in a joint interest earning account.
20. Upon taking into account all the relevant factors in this matter, I find the Notice of Motion dated 24th September, 2025 to be merited and I allow it, in the following terms:
- i. Leave to file appeal out of time in respect of the Judgment decree in Nakuru SCCC No. E103 2024 Samuel Mwaura Njuguna V Cyrus Mumo Kyalo is granted.
 - ii. The Memorandum of Appeal to be filed and served within fifteen (15 days) from today.
 - iii. There shall be stay of execution of the impugned Judgment decree on condition that the appellants releases Kshs 150,000 = to the respondent within 7 days from today's date.
21. The balance of the decretal sum to be deposited in a joint interest earning account in the names of both counsel for the applicant and respondent. This should be complied with within thirty (30) days from today's date.
22. Failure to comply with the above conditions will lead to automatic vacation of the stay of execution and the respondent will be at liberty to proceed with execution of the Judgment decree.
23. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 28TH DAY OF NOVEMBER, 2025 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE

