

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
CIVIL APPEAL NO. E031 OF 2025

MICHAEL

MURIITHI

NGUKUAPPLICANT

VERSUS

CHRISTOPHER KARIUKI NJERU.....RESPONDENT

RULING

The Application

1. The applicant filed a notice of motion dated 14th April 2025 seeking orders that:
 - 1) Spent:
 - 2) Spent;
 - 3) Pending hearing and determination of the appeal, the court be pleased to order stay of execution of the judgment in Siakago MCCC No. E016 of 2022; and
 - 4) Costs be borne by the respondents.
2. The application was supported by the grounds set out on its face and in the supporting affidavit thereof.
3. The applicant deposed that it is necessary that an order for stay of execution be granted since the appeal has high chances of success. If the order is denied, the appeal will be rendered nugatory. He indicated that he is willing to comply with any conditions that the court will set. It was also the applicant's averment that the application has been brought without unreasonable delay. That the respondent is a man of no means and he may not be able to refund the decree amount if the appeal succeeds.

Replying Affidavit

4. The respondent filed a replying affidavit stating that the application has no merit and the appeal has no chance of success. The decree in question is a money decree and its execution will not result in irreparable loss. In any event, the applicant has not offered any security and the fact that he has filed an appeal is not enough reason to grant stay.

5. Further, the respondent states that the applicant is seeking to protract the case and deny him the fruits of his judgment. He suggested that if stay of execution should be granted, the applicant should be ordered to deposit the full decretal amount into an interest earning account held jointly by the advocates of both parties.

Further Affidavit

6. In his further affidavit, the applicant stated that it a steep condition to require him to deposit the full decretal amount since he does not have the means. That his insurer is no longer in existence, a fact that he asked the court to take judicial notice of. He prayed that the court imposes reasonable conditions for stay.

Parties' Submissions

7. The court directed that the application be canvassed by way of written submissions.
8. In his submissions, the applicant relied on Order 42 Rule 6 of the Civil Procedure Rules and the cases of **Njeru & another v Musau [2023] KEHC 18690 (KLR)**, **Century Oil Trading Company v Kenya Shell Limited [2007] KEHC 3016 (KLR)**, **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] KECA 333 (KLR)** and **Nduhiu Gitahi Vs Warugongo (1988) KLR 621; IKAR 100**. He urged the court to grant the stay of execution order with conditions as it shall deem fit.
9. The respondent also relied on Order 42 Rule 6(1) & (2) of the Civil Procedure Rules and argued that the applicant has not demonstrated what substantial loss he would suffer if the stay order is denied. That he has not offered security and the prayer is meant to deny him enjoyment of the fruits of his judgment.
10. He relied on the cases of **Kenya Hotel Properties Limited v Willesden Investments Ltd [2011] KECA 388 (KLR)**, **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR)**, **Arun.C. Sharma v Ashana Raikundalia & 5 others [2015] KEHC 5039 (KLR)** and **Equity Bank Limited v Taiga Adams Company Limited [2006] KEHC 860 (KLR)**.

Issue for Determination

11. The issue for determination is whether an order of stay of execution should be made in the circumstances.

Analysis and Determination

12. Stay of execution is governed by Order 42 Rule 6(2) of the Civil Procedure Rules as follows:

“(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. [Emphasis added]

13. Was the application for stay filed without delay? The impugned judgment was delivered on 04th April 2025. The memorandum of appeal was timeously filed on 12th April 2025. A few days later, the application herein was filed. The application was promptly filed in time with no delay.

14. The second element to consider is whether denial of the order will result in substantial loss that is irreparable. The applicant argued that if execution is levied, the subject matter of the appeal will be lost thus rendering the appeal nugatory. A decree holder has the right to execute for the decretal amount. In fact, execution is a lawful process, meaning that the judgment-debtor’s loss in the process of execution is not unfair because judgment was entered against it. These were the sentiments of the court in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto (supra)** where it was held that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions.

Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

15. In this case, if the apprehension of execution is the only ground, the applicant has failed to demonstrate what substantial loss he would suffer, loss that is likely to render its intended appeal nugatory.

16. The third element for consideration is security for the due performance of the decree. The applicant has not offered any security for performance as provided under Order 42 Rule 6(2)(b) of the Civil Procedure Rules. The respondent suggested that the full decretal sum be deposited into a joint interest earning account. In his further affidavit, the applicant stated that he could not afford to pay the full decretal amount at the moment since he did not have the means. However, he stated that he was willing to comply with any other reasonable condition that the court might set in that regard.

17. In my view, security avails the necessary goodwill to ensure that both parties will pursue their rights without impunity. Stay of execution is a discretionary relief that must be applied judiciously. That means, one party's rights must be balanced with the other parties.

Disposition

18. On the strength of Sections 1A, 1B and 3A of the Civil Procedure Act, I do hereby grant a stay order against execution on the following conditions:

- a) that the applicant shall deposit sixty percent (60%) of the decretal amount into an interest earning account to be held in the names of the advocates for both parties.
- b) The said amount is to be deposited into such account within 21 days of the order herein.
- c) The parties shall co-operate in the opening and operation of the said joint account and a record shall be kept of their communications to that effect which may be demanded by the Court at any time.
- d) In default of compliance with the timelines or any orders herein, the stay herein shall automatically lapse and execution may proceed.

19. Orders accordingly.

Delivered electronically, dated and signed at Embu High Court this 19th day of November, 2025, pursuant to notices issued on 10th November and 12th November, 2025 as to electronic delivery.

R. MWONGO
JUDGE