



REPUBLIC OF KENYA



**KENYA LAW**  
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**Situma v Nyamari (Civil Appeal E084 of 2025)  
[2025] KEHC 16998 (KLR) (20 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16998 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E084 OF 2025  
MS SHARIFF, J  
NOVEMBER 20, 2025**

**BETWEEN**

**SHABAN WALELA SITUMA ..... APPLICANT**

**AND**

**ERIC NYAKUNDI NYAMARI ..... RESPONDENT**

**RULING**

**A. Application**

1. The Appellant/Applicant has moved this court vide a Notice of Motion dated 31<sup>st</sup> October 2025 seeking orders for stay of execution pending the hearing and determination of the appeal filed herein and that he be allowed to deposit the title deed of parcel No E. Bukusu/S. Kanduyi/18894 as security instead of money as ordered by the lower court.
2. The application is based on the grounds on the face of it and the Affidavit sworn in support of the same on 31<sup>st</sup> October 2025, by Shaban Walela Situma, the Applicant herein. The Applicant contended that judgement was entered against him on 25<sup>th</sup> May 2025 and being aggrieved by the same he instructed his Counsel to file an appeal herein.
3. The Applicant is deposed that auctioneers proclaimed his properties on 30<sup>th</sup> June 2025; that he instructed his Counsel to file an application for stay and a ruling was delivered on 21<sup>st</sup> October 2025 declining his main prayer to deposit his title deed as security in Court but was instead granted stay orders on condition that he deposits the entire decretal amount in court within 30 days ; that he has an arguable appeal with good prospects of success; that the stay granted by the lower Court lapsed on 21<sup>st</sup> November 2025, and he is willing to offer to deposit his title deed for land parcel No. E. Bukusu/S. Kanduyi/18894 measuring 0.20 Ha together with developments all valued at Ksh 4,100,000 as security for the due performance of the decree in the event that he loses the appeal.



4. The application was opposed by the Respondent vide his Replying Affidavit sworn on 5<sup>th</sup> November 2025 wherein he states that the application is frivolous, vexatious, scandalous and an abuse of the due process of the Court. He deposed that the Appellant was granted a stay of execution by the trial Court and this second application is simply an attempt by the Applicant to delay expeditious disposal of the appeal filed herein. Further that as per the dints of Order 42 Rule 6(2) of the Civil Procedure (Amendment) Rules 2020, stay of execution should be granted if the Applicant furnishes security and the lower court duly granted the Applicant an order for stay of execution conditional on his depositing the entire judgment sum in Court within 30 days, which conditions ought to subsist. Lastly, the Respondent deposes that he is averse to the deposit of the title deed of parcel No. E. Bukusu/S. Kanduyi/18894 as it will be difficult to realize the security in case the appeal fails, and since this is a case of money decree, security for the same has to be in form of money.
5. The application was canvassed by way of written submissions.

## **B. Submissions**

6. In a nutshell, the Applicant herein submitted that he seeks following orders:
  - a. Stay of execution of the decree issued in Bungoma CMCC No. 171 of 2018.
  - b. Permission to deposit the title deed for parcel No. E. Bukusu/S. Kanduyi/18894 as security.
7. The grounds for application are:
  - a. Judgment was entered against the Appellant on 20/5/2025 for Kshs. 2,648,050/=, costs, and interest.
  - b. The Appellant filed an appeal (E084 of 2025) as they were aggrieved by the judgment.
  - c. The Respondent has proclaimed the Appellant's properties.
  - d. The Appellant is willing to provide security and has offered the title deed of land parcel No. E. Bukusu/S. Kanduyi/18894, valued at over Kshs. 4,100,000/=, which exceeds the decretal amount.
  - e. The stay granted by the lower court will lapse on 21/11/2025.
  - f. The Appellant is facing financial challenges and is unable to deposit the decretal sum but can provide the title deed as security.
8. In support of his case the Applicant relied on:
  - a. Margaret Mwhiki Wanjau vs. Joseph Muiruri Mugo (2014) eKLR: where the Court found that the requirement of security should not impose hardship or punish the Appellant but should secure the Respondent's rights. The Court allowed the deposit of a title deed as security, considering it adequate to cover the Respondent's interests.
  - b. Alexis Khalumba vs. Harrison A. Anukutse (2018) eKLR: where the Court emphasized the need to balance justice for both parties and prevent abuse of the court process. The Court accepted the deposit of a title deed as security, as its value exceeded the decretal sum.
9. The Applicant highlighted financial constraints and the risk of losing the property if it is sold to a third party before the appeal is determined. Also, the Appellant argues that he is servicing another claim (Bungoma CMCC No. 264 of 2021) with monthly installments of Kshs. 30,000/=, thus further compounding his financial constraints.



10. In conclusion, the Applicant urged this Court to exercise discretion and grant the prayers as sought in the motion application.
11. Opposing the Motion application, the Respondent herein submitted on a sole issue namely: whether the Applicant should be allowed to deposit a title deed as security in place of depositing the decretal sum in Court, pending the hearing and determination of the appeal.
12. The Respondent argues that since the judgment by the trial Court is a money decree, the security for such a decree should be in monetary form. The Respondent cites two case laws to support this position:
  - a. *Onesmus Mburu Njuguna v Samson Kitire Kuna* [2007] KEHC 1159 (KLR): where the Court held that for a money decree, security should be in the form of money, either deposited in Court or in a joint account of both parties' counsel. It was deemed unjust for the Court to accept a title deed as security, as the purpose of security is to secure the interests of the Respondent pending the hearing of the appeal.
  - b. *Ngugi v Karanja (Civil Appeal E214 of 2024)* [2025] KEHC 11353 (KLR) (31 July 2025): where the Court found that depositing a title deed as security is inappropriate for a money decree. The Court emphasized the need to balance the rights of the Respondent, who has successfully obtained judgment, and the Applicant's financial position. Finally, the Court highlighted the inconvenience and potential risks for the Respondent in realizing the judgment if the appeal fails, including the effort required to transfer the land and the possibility of the Applicant reporting the title deed as lost and obtaining a new one.
13. The Respondent urges this Court to dismiss the application with costs, arguing that the Appellant's proposal to deposit a title deed as security lacks merit and is not appropriate for the circumstances of the case.

### **C. Analysis And Determination**

14. The Applicant is seeking for stay of execution pending appeal. The main issue for determination is whether the application has merit and whether it should be allowed.
15. An Applicant for stay of execution pending appeal is required to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. These are that:
  - a. The application was brought without unreasonable delay.
  - b. The Applicant will suffer substantial loss unless the orders sought are granted.
  - c. The Applicant has given security for due performance of the decree as may be binding on him.
16. On the first condition, the appeal was filed within the time required by the law. The appeal was thus filed without delay.
17. The second condition for grant of stay of execution is that an Applicant is required to demonstrate that he/she will suffer substantial loss if the orders sought are not granted. In *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani)* HCCC 795 of 1997, Warsame J. (as he then was) held as follows on the question of substantial loss:

“For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face



value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...”

18. The Applicant’s position is that he will suffer substantial loss if execution is allowed to proceed. He submitted that the subject vehicle that caused the accident was not insured and that he is already serving another claim vide Bungoma CMCC No. 264 of 2021 where a consent was recorded for liquidation of a total sum of Kshs. 904, 422/= in monthly installments of Kshs. 30,000/=. That if he deposits the decretal sum, he will be forced to sell the said land and if his appeal succeeds, he will be prejudiced as he would have already disposed off his property.

19. The third condition for grant of stay of execution pending an appeal is that the Applicant has to offer security for due performance of the decree. This is meant to give the Respondent something to fall back to in the event that the appeal is not successful. In *Arun C. Sharm v Ashana Raikundalia T/A/ Rairundalia & Co. Advocates & 2 Others* [2014] eKLR, the court stated:

“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...”

20. It is the discretion of the Court to determine what kind of security an Applicant should deposit in Court. The Applicant herein has offered to deposit the title deed of land parcel No. E. Bukusu/S. Kanduyi/18894, valued at over Kshs. 4,100,000/=:, which exceeds the decretal amount, as security. The Respondent has opposed the same on the ground that this is a money decree and this Court should only allow a security deposit of money.

21. This Court is required to balance the competing interests of the two parties; where one party is exercising its undeniable right of appeal and the other which has a judgment in its favour and who should not be deprived the fruits of the judgment without just cause. In the case of *Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 Others* [2012] eKLR it was held that:

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.”

22. The Applicant impugns both liability and quantum in his appeal. The security offered by the Appellant is adequate to cover the judgment sum and while I take cognizance of the fact that real property cannot be easily sold to realize the judgment sum, the same will still be available for purposes of execution should the appeal fail. The respondent will therefore not suffer any prejudice. I do note that the Appellant has duly filed the record of appeal and his submission wherefore he cannot be accused of harbouring any intentions of procrastinating the appeal. I am thus inclined to allow the application herein in the interest of justice so as to allow the appellant exercise his right of appeal without being punished due to his financial impecunity. I thus make the following orders :

- i. An order of stay of execution is hereby granted against the judgment and decree delivered and issued respectively in Bungoma CMCC NO 171 of 2018 until the appeal herein is heard and determined on the following condition;
  - a. That the Applicant shall deposits with this Court the original title deed of land parcel No. E. Bukusu/S. Kanduyi/18894 and a valuation within 14 days from the date hereof.



- b. In the event of default in compliance with the order i) (a) above the stay orders granted hereinabove will stand vacated and the respondent shall be at liberty to execute.
- ii. The respondent is awarded costs of this application assessed at ksh 15000.

It is hereby so ordered.

**DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 20<sup>TH</sup> DAY OF NOVEMBER 2025.**

**MWANAISHA.S. SHARIFF**

**JUDGE**

In the presence of:

Ms Natwati holding brief for Mr Wattanga for the Appellant

Mr Juma Waswa holding brief for Mr Bw'onchiri for the Respondent.

Peter Machoni – court assistant

