



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT KENYA AT KERUGOYA**  
**CIVIL APPEAL NO. E071 OF 2025**

**AVENUE CAR AND LEASING LIMITED.....APPELLANT**  
**VERSUS**  
**AGNES WANJIRA NTHIGA.....1<sup>ST</sup> RESPONDENT**  
**CHRISTOPHER GICOVI.....2<sup>ND</sup> RESPONDENT**

**RULING**

- [1] The applicant filed a Notice of Motion dated 17<sup>th</sup> January, 2025 seeking the following orders:
1. *Spent.*
  2. *Spent.*
  3. *There be a stay of execution of the decree emanating from the judgement delivered on Kerugoya MCCC No. E029 of 2024 pending the hearing and determination of the Appeal.*
  4. *Costs of this application be in the cause.*
- [2] The application is based on the grounds on the face of the application and the supporting affidavit of Javan Ombado.
- [3] The applicants case is that on 16<sup>th</sup> May, 2025, the Chief Magistrates Court delivered a Judgment in Kerugoya MCCC No. E029 of 2024, where the Court awarded the Plaintiff Kshs.3,150,000/=. The Applicant faces an imminent and real danger of execution by the Respondents to satisfy the decree emanating from the above judgement.
- [4] Further, the Applicant avers that he stands to suffer substantial loss if the application herein is not allowed as the Respondents will proceed with the process of execution. The Appellant has lodged an appeal in this Honourable Court as the Judgment of the Honourable Magistrate is not supported by evidence that was tendered in court by the parties.
- [5] Lastly, the appellant's appeal has a high probability of success and will be rendered nugatory if this application is not allowed. The application has been made in good faith and without any unreasonable delay.
- [6] The respondent on 30<sup>th</sup> June, 2025 deposed to a Replying Affidavit. The respondent avers that the Applicant has failed to demonstrate, with any degree of specificity or evidential backing, the substantial loss it stands to suffer if the stay is not granted. The mere fear of execution, or the usual consequences of lawful execution, does not amount

to substantial loss. As such, the Applicant's claim is vague, speculative, and unsupported by any documentation.

- [7] The Respondents, as the successful litigants, are entitled to the fruits of their judgment. However, vide the instant application, the Applicant now seeks to deny them this right.
- [8] The Applicant has not provided any credible evidence to demonstrate that the appeal has high chances of success. The bare allegation that the judgment of the lower Court was not supported by the evidence tendered by the parties is a mere assertion, unsupported by any legal or factual foundation.
- [9] Further, the Applicant has not proposed, offered, or deposited any form of security for due performance of the decree, yet the provision of security is a mandatory requirement under Order 42 Rule 6(2)(b) of the Civil Procedure Rules, 2010.

### **Applicant submissions**

- [10] On substantial loss, the applicant submits that he filed an application for stay of execution dated 20<sup>th</sup> June, 2025 and the court granted stay and issued a date for inter-partes hearing of the application on 30<sup>th</sup> June, 2025. Therefore, the execution will result in the Applicant undergoing substantial loss. Moreover, he contends that unless the stay is granted the Appeal herein will be rendered nugatory in so far as the Plaintiff/Respondent cannot repay back the decretal sum in case the same is released to him.
- [11] The applicant submits that it is upon the Plaintiff/respondent to demonstrate that he is engaged in an income generating activity and that he is able to raise the decretal sum together with costs at once and repay the Defendant in the event that the appeal succeeds. Unfortunately, the respondent has not mentioned anything on being able to refund the decretal sum should the appeal be successful. He only filed a replying affidavit.
- [12] In *G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Bishar & Another* {2018} eKLR, the court considered the respondent's ability to repay the decretal sum in case the appeal succeeded as there was no affidavit evidence by the respondent on record on the means.
- [13] On whether security has been furnished, the Applicant is ready and willing to abide by any reasonable condition set forth by the Honourable Court which includes depositing the entire decretal sum together with costs as security to court or in a joint interest earning account in the names of both advocates.

### **Respondents' submissions**

- [14] It is the Respondents' submission that the Applicant bears the legal and evidentiary burden of demonstrating, with specificity, that they stand to suffer substantial loss if stay is not granted. This requirement is not a matter of mere conjecture or apprehension; it must be grounded in tangible, credible evidence illustrating the nature and extent of the alleged loss.

[15] In *Tropical Commodities Suppliers Ltd v International Credit Bank Ltd* [2004] EA 331, the Court held that:

**“... Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”**

[16] In the present case, the Applicant merely asserts that it will suffer loss, but has not provided any cogent evidence or particulars of the alleged loss.

[17] On security, the respondents submit that the Applicant has not has not proposed, offered, or deposited any form of security for due performance of the decree as required under Order 42 Rule 6(2) of the Civil Procedure Rules.

[18] On whether the Respondents are entitled to the fruits of the judgment, the respondent submits that as the successful litigants in the lower court, obtained a regular Judgment, and are therefore entitled to execution in line with the decree issued therein.

[19] In *Kenya Shell Limited v Benjamin Karuga Kibiru & Another 1986 KLR 410*, the Court of Appeal underscored this position that:

*“As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.....”*

### **Issue**

[20] Whether stay of execution pending hearing and determination of the appeal should be granted.

### **Analysis**

[21] Whether the Applicant has satisfied the conditions for the grant of stay of execution pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.

[22] Order 42 Rule 6(2) of the Civil Procedure Rules provides that:

**“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.”**

[23] The guiding principles have been elaborated in *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* [1986] KLR 410, where the Court of Appeal held that substantial loss is the cornerstone of an application for stay and must be specifically demonstrated.

### **Substantial Loss**

[24] The Applicant asserts that unless stay is granted, it will suffer substantial loss as the Respondents are likely to execute and may not be in a position to refund the decretal sum should the appeal succeed. The Respondents did not file any affidavit demonstrating their financial capacity to refund the decretal amount if required.

[25] In *G.N. Muema t/a Mt. View Maternity & Nursing Home v Miriam Bishar & Another* [2018] eKLR, the court held that where the Respondent fails to show ability to refund, this becomes a valid ground for finding that substantial loss may occur.

[26] In the absence of evidence to the contrary, I find that the Applicant has demonstrated that substantial loss may result if stay is not granted.

### **Delay**

[27] The impugned judgment was delivered on 16<sup>th</sup> May 2025, and this application was filed on 22<sup>nd</sup> June, 2025. There is no unreasonable delay in moving the Court.

### **Security for Due Performance**

[28] The Applicant has expressed willingness to deposit the decretal sum in a joint interest-earning account in the names of both advocates. The Court finds this to be a reasonable offer that satisfies the requirement of security under Order 42 Rule 6(2)(b) of the Civil Procedure Rules.

### **ORDERS**

[29] Accordingly, for the reasons set out above, the Court finds merit in the application for stay of execution pending appeal and makes the following orders:

1. A stay of execution pending appeal is granted upon terms that the applicant shall deposit the entire decretal sum, having regard to contribution, in the sum of **Ksh.1,750,000** into an joint interest earning account in the names of the Counsel for the parties within 30days.
2. The Record of Appeal shall be filed in sixty (60) days.
3. In default execution to issue.
4. Costs in the Appeal.

[30] Directions for the hearing of the Appeal to be taken on **16/2/2026**.

*Order accordingly.*

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF NOVEMBER 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

Mr. Ontita for the Appellant.  
Mr. Mwangi Maina for the Respondent.