



REPUBLIC OF KENYA



KENYA LAW
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**Njenga & another v Embu Gaturi Housing Co-operative Society Limited & another
(Civil Appeal 22 of 2014) [2025] KEHC 17712 (KLR) (26 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17712 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 22 OF 2014
RM MWONGO, J
NOVEMBER 26, 2025**

BETWEEN

WAMAE NJENGA 1ST APPELLANT

SIMON NJOGU MUTURI 2ND APPELLANT

AND

**EMBU GATURI HOUSING CO-OPERATIVE SOCIETY LIMITED 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

RULING

The Application

1. The applicant filed a notice of motion dated 12th August 2025, being supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 1. Spent;
 2. That this Honourable Court be pleased to issue an order for stay of execution of the Judgement and Decree of the High Court delivered on 22nd February 2017 and all consequential orders pending the hearing and determination of this Application inter partes;
 3. That this Honourable Court be pleased to direct that the present Application for stay of execution of the Judgment and Decree dated 22nd February 2017 be heard and determined on a priority basis and/ or before the Appellants' Notice of Motion dated 28th June 2025 seeking execution of the said Judgment and Decree;
 4. That this Honourable Court be pleased to issue an order for stay of execution of the Judgement and Decree of the High Court delivered on 22nd February 2017 and all consequential orders



pending the hearing and determination of the Appeal serialized as Nyeri Civil Appeal No. E064 of 2025: Embu Gaturi Housing Co-operative Society vs Wamae Njenga & 2 Others; and

5. That the costs of and incidental to this Application abide by the outcome of the Appeal.
2. The applicant averred that through this court's judgment delivered on 22nd February 2017, the appellants were each awarded Kshs.400,000/= as damages for defamation, Kshs.50,000/= each as damages for unlawful detention and Kshs.600,000/= as general damages plus costs of the suit with interest. The applicant was aggrieved by this judgment and it lodged an appeal at the Court of Appeal sitting in Nyeri, which court also extended the time for appealing. The second appeal is dubbed Nyeri CoA Civil Appeal No. E064 of 2025 which is pending hearing.
3. The applicant stated that the second appeal has high chances of success and it raises substantial points of law including the fact that the first appeal was filed outside the statutory timelines. The applicant is apprehensive that the appellants are in the process of executing for the decretal amount. As such, they have already filed a notice of motion dated 28th June 2025 seeking reinstatement of warrants of arrest issued against one of the applicant's members, Joseph Munyi.
4. The applicant stated that the decretal amount is an all-inclusive sum of Kshs.5,100,059/= and it is the subject of the appeal. The applicant had been ordered to pay the decretal amount into an interest earning joint account. However, it was not able to raise the money hence warrants of arrest were issued against its member. Unless a stay order is made, the applicant says it will suffer irreparable prejudice which will render the appeal nugatory. It urged the court to allow the appeal since it has a constitutional right to be heard on the second appeal but execution will take away that right.
5. Munyi Njiru, a member of the applicant and against whom the warrants of arrest were issued, filed an affidavit stating that the applicant's second appeal has high chances of success. He supported the prayer for stay of execution pending hearing and determination of that appeal.

Replying Affidavit

6. The 1st appellant/respondent filed a replying affidavit stating that the applicant had filed a similar application before the Court of Appeal vide Nyeri CoA Civil Appeal No. 118 of 2018 but it was dismissed with costs. He produced an order of the Court of Appeal delivered on 11th March 2021. He stated that he challenged the second appeal filed by the applicant on the basis that it was filed out of time and without extension of time. Hence the appeal was struck out with costs. That the applicant then filed an application seeking extension of time but it was dismissed through ruling of a single - judge of the Court of Appeal.
7. The applicant was aggrieved and filed a reference before the CoA three-judge bench but the same has not yet been determined. He stated that there is no pending appeal nor is there a stay of execution order in place. He therefore moved to execute through a notice to show cause application which was heard and determined. The court ordered the applicant to deposit the decretal amount into an interest earning joint account within 60 days of the court's ruling, failing which warrants of arrest would issue.
8. The applicant failed to deposit the money as ordered, and consequently warrants of arrest issued. The applicant was aggrieved by this order by the Deputy Registrar and so it filed a stay application before the High Court. This application was dismissed by Lady Justice Njuguna J. through a ruling delivered on 27th November 2024. As it is now, there is no stay of execution order in place and even the Court of Appeal did not at any point stay the warrants of arrest as claimed by the applicant.
9. He was not sure that the applicant is keen on prosecuting the appeal but is keen to deny the appellants the fruits of their judgment through filing numerous unnecessary applications yet there is no stay of



execution order in place. Even though Lessit JA granted the applicant leave to file a second appeal out of time, the appellant stated that they challenged this decision through a reference before a three-judge bench and the same is pending determination.

Parties' Submissions on the application

10. The application was canvassed by way of written submissions.
11. In its submissions, the applicant relied on Order 42 Rule 6 of the Civil Procedure Rules and the case of *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR). It also relied on the case of *Century Oil Trading Company Ltd v Kenya Shell Ltd* [2008] KEHC 1875 (KLR) and argued that the applicant should not be forced to pay the decretal amount when there is a chance that an appeal against the decree might succeed. It urged the court to consider the unique circumstances of the case and its history in determining the application which was filed without unreasonable delay. It stated that it is willing to deposit security into a joint interest earning account. Further reliance was placed on *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] KEHC 8358 (KLR) and *Mathu v Gachimu* [2004] eKLR.
12. The appellants/respondents submitted that the applicant has not proved what substantial loss he would suffer if the orders are denied. They relied on *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR). They argued that the application does not meet the requirements of Order 42 Rule 6 of the Civil Procedure Rules. They also relied on the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Limited & 2 others* [2001] KECA 242 (KLR).
13. They stated that the applicant's second appeal was filed hurriedly after the Court of Appeal allowed his application for extension of time yet there was a delay of 8 years. The appellants challenged the one-judge decision to extend time to appeal. Further reliance was placed on the case of *Nguruman Limited v Jan Bonde Nielson* [2014] KEHC 1718 (KLR) and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KECA 782 (KLR). They argued that unreasonable delay is a major factor to consider for justice to be served in a case such as this one. They urged the court to dismiss the application with costs.

Issue for Determination

14. The issue for determination is whether the orders sought should be granted.

Analysis and Determination

15. It is noted that the matter appears to have a lengthy history, part of which has been brought out herein. The first appeal was determined through a judgment of this court delivered on 22nd February 2017 which judgment was entered in favour of the appellants. Being dissatisfied with this decision, the respondent/applicant filed a memorandum of appeal dated 09th April 2018 at the Court of Appeal Nyeri (Civil Appeal No.71 of 2018) and accompanied it with a certificate of delay dated 28th March 2018 disclosing a 384-day delay in appealing. It appears that the second appeal was filed without leave to appeal out of time, and so it was struck out.
16. Through an application dated 06th September 2024, the applicant sought extension of time from the Court of Appeal (COA) in Civil Application No. E089 of 2024 under Rules 4 and 49(4) of the Court of Appeal Rules. The application was determined by Lessit, JA through a ruling delivered on 07th March 2025. Shortly after this ruling, the appellants herein filed a letter dated 14th March 2025 to the CoA Registrar notifying the Court of their dissatisfaction with the ruling by Lessit, JA and their



intention to pursue a reference before a 3-judge bench in the same court. Regardless, the applicant filed a memorandum of appeal dated 25th March 2025 after being granted 30 days by Lessit, JA to appeal.

17. All this time, there was no stay order in place, hence the appellants would have been free to execute for the decretal sum. In fact, they did institute execution proceedings against the respondent/applicant. They obtained an order following a Notice to Show Cause compelling the applicant to deposit the decretal amount into a joint interest earning account failing which warrants of arrest would issue. The applicant defaulted in depositing the amount and so warrants issued as ordered.
18. The applicant then brought an application before this court to, inter alia, challenge the outcome of the NTSC and seek stay of execution of the warrants issued. This court dismissed the application through a ruling by Njuguna J. delivered on 27th November 2024. In that ruling, the Judge found that there was a long unexplained delay to lodge a second appeal. She also discussed Order 42 Rule 6 of the Civil Procedure Rules and the role of the Deputy Registrar in determining NTSC under Order 47 Rule 2 of the Civil Procedure Rules.
19. The Judge held that execution is a lawful process and it cannot be termed as amounting to a substantial loss to be suffered by a party seeking stay of execution. The Judge also noted that at the time, the second appeal before the Court of Appeal had been struck out hence there was no justifiable reason to extend time to appeal or to stay the warrants.
20. Between the time of this court's last ruling on 27th November 2024 and now, the applicant has made strides as described herein to file a second appeal at the Court of Appeal within the timelines prescribed, which appeal is ongoing. It is its prayer that execution be stayed pending determination of that second appeal. It is trite that stay of execution orders may be granted when the court is satisfied of the parameters set out in Order 42 Rule 6(2) of the Civil Procedure Rules 2010 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]

21. The first consideration is whether the application was filed timeously without delay. The execution is against a finding of the High Court reached on 22nd February 2017 through the first appeal. This application for stay has been filed more than 8 years and 5 months after the judgment. Within this period, the appellants/respondents have been making necessary efforts to execute for the decretal amount. Thus, the time frame of delay is over 8 years.
22. The second consideration is whether the applicant will suffer substantial loss. As stated in this court's ruling delivered on 27th November 2024, apprehension of execution does not amount to a fear of substantial loss since execution is a lawful process. See the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR). The applicant has also not provided evidence of any other substantial loss that could be suffered if the stay order is not granted.
23. The final issue is that of security. The applicant submitted that it is committed to any terms that the court will impose in terms of security; which terms include depositing the money into a joint interest



earning account. With this in mind, there is an appeal pending before the Court of Appeal as of 01st April 2025.

24. From the foregoing, there would be more reason to deny, than allow, the stay order. However, in the face of the second appeal that is yet to be determined, it is in the interest of justice that a conditional stay order be issued.

Disposition

25. In the result, I allow the application and issue orders as follows:
1. The applicant is granted stay of execution pending determination of Nyeri CoA E064 of 2025, on condition that the applicant deposits the full decretal amount into a joint interest earning account to be opened in the names of the advocates for the parties, within fourteen (14) days of this ruling;
 2. If the applicant fails to comply with order (1) hereinabove, the order for stay of execution shall automatically lapse and the appellants/respondents will be at liberty to execute for the decretal amount immediately, notwithstanding that the second appeal is pending;
 3. Costs shall abide the outcome of the appeal.
26. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 26TH DAY OF NOVEMBER, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

N. Magee for Appellant

Mutisya holding brief for Kanyama

Francis Munyao - Court Assistant

