

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. E266 OF 2025**

**MESHACK KARIUKI CHIRI.....APPELLANT/APPLICANT**

**VERSUS**

**ELIJAH KARIUKI MUMBI.....RESPONDENT**

**RULING**

1. In the Notice of motion application dated 9<sup>th</sup> October 2025 the appellant/applicant prays for the following orders;

***i. & -ii- Spent.***

***iii. That there be a stay of execution of the judgment delivered on 25<sup>th</sup> September 2025 by Hon. Edward Oboge (SRM) in Nakuru Small Claim Case No. E111 of 2025 pending the hearing and determination of the intended appeal***

***iv. That costs of this application be in the cause.***

2. The said application is premised on the grounds on its face and the affidavit by the appellant/applicant's director sworn on even date. He deponed that the appellant being dissatisfied with the aforementioned judgment and decree on various points of law had filed a Notice of Appeal dated 9<sup>th</sup> October 2025.

3. He stated that unless stay of execution is granted, the respondent is likely to proceed with execution and the appeal will be rendered nugatory, as he may not be in a financial position to refund the decretal sum should the appeal succeed, hence defeating the ends of justice. He

added that he was ready willing to furnish security for due performance of the decree as may be ordered by the court. The same was to demonstrate good faith and ensure that the respondent is not prejudiced in any way.

4. The application is opposed vide the respondent's replying affidavit dated 25<sup>th</sup> October 2025. He averred that the appellant/applicant's application is vexatious, incompetent, an abuse of the court process and an afterthought aimed at spinning the wheels of justice in unending circles. He stated that no sufficient reason had been adduced to necessitate the stay of execution of proceedings. He further stated that the application had not been filed on time and by allowing it he will be greatly prejudiced since has no business currently and his pursuit for justice had been frustrated. He urged the court to dismiss both the application and appeal with costs.
5. The application was canvassed by way of written submissions.

#### **Appellant/applicant's submissions**

6. These were filed by D.T Kipkorir & Company Advocates and are dated 28<sup>th</sup> October, 2025. Counsel gave brief facts of the case and identified four issues for determination.
7. The first issue is whether the applicant has satisfied the conditions for grant of stay pending appeal. Counsel cited Order 42 rule (2) (a) of the Civil Procedure Rules, 2010, which states that no stay of execution shall be granted unless the court is satisfied that the application has been made without unreasonable delay, substantial loss may result and that security had been provided for due performance. He placed reliance on the decision in **Prilscot**

**Company Limited v Monica Heho [2015] eKLR** where court while relying on the case of **Halai & Another v Thornton Turpin (1963) Ltd KLR 365** opined that Order 42 rule 6 (2) of the Civil Procedure Rules lay down the conditions which be satisfied by an application to grant the orders for stay of execution pending an appeal. See also; **RWW v EKW [2019] eKLR**.

8. The second issue is whether the intended appeal is arguable and raises triable issues. Counsel submitted that the appellant/applicant had filed a notice and memorandum of appeal raising serious questions of law. Further, that the existence of arguable points alone suffices it is not necessary that the appeal should succeed only that is not frivolous. He placed reliance the decision **Butt v Rent Restriction Tribunal [1982] KLR 417** where the court held as follows;

***“If there is no overwhelming hindrance, a stay should be granted so that an appeal may not be rendered nugatory should it succeed.”***

9. The third issue is whether it is in the interest of justice to grant stay, counsel cited sections 1A and 1B of the Civil Procedure Act which obligates the court to facilitate the just, expeditious, proportionate and affordable resolution of disputes. He placed reliance on the decision in **Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR** where Warsame J held as follows;

***“Every party aggrieved with a decision of the court is entitled to appeal. The Court should not prevent the appeal process by denying a stay, unless there are***

***cogent reasons. The yardstick is to balance the scales of justice.”***

10. Lastly, on costs counsel submitted that the general rule under section 27 of the Civil Procedure Act is that costs follow events. He placed reliance on the decisions in **Narok County Government v Livingstone Kunini Ntutu & 2 others [2018] Eklr** and **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others** and urged the court to award costs to the appellant/applicant.

### **Respondent’s submissions**

11. These were filed by Koome & Koome Advocates and are dated 25<sup>th</sup> October, 2025. Counsel gave brief introduction of the case and identified three issues for determination.

12. The first issue is whether the condition for grant of stay of execution have been met, counsel submitted that the applicant had failed to exhibit and or prove the necessary preconditions needed for grant of stay orders to be issued. He stated that it is mandatory for all the three conditions to be fulfilled before an order of stay pending appeal is granted.

13. He relied on Order 42 rule 6 of the Civil Procedure Rules and the decision in **Trust Bank Limited v Ajay Shah & 3 Others [2012] eKLR** where the court held as follows;

14. See also; **Vegpro Kenya Limited v Susan Wanja [2017] eKLR**, **Peter Ndung’u Ngae & 3 Others v John Mugane Karomo [2015] eKLR**, **Machira t/a Machira & Co. Advocates vs East African Standard (No.2) [2002] KLR 63** and **Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited [2014] eKLR**.

15. The second issue is whether the respondent should receive half of the decretal sum as the appeal continues. Counsel submitted in the affirmative and added that the same allowed a balance of the interests of the two sides in the dispute. He placed reliance on the decision in

***“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 pay 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 reputable financial institution specific to this 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”***

16. Lastly on costs, counsel submitted that the same normally and ordinarily follow the event. Thus, since the appellant /applicant’s application clearly lacked merit the same should therefore be dismissed with costs.

### **Analysis and Determination**

17. I have considered the application, affidavits and the submissions by the parties and I find the issue arising for determination to be whether the appellant/applicant has satisfied the grounds for issuance of the stay of execution orders.

18. The guiding principles regarding stay of execution pending appeal are well settled. The same are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

***No order for stay of execution shall be made under sub rule (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***

***“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.***

***9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the***

***interests of the appellant with those of the respondent.”***

19. In **RWW vs EKW [2019] eKLR**, the court addressed the purpose of a stay of execution order pending appeal as follows;

***“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.***

***Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the appellant with those of the respondent.”***

20. From the law and the above decision, it is clear that the purpose of stay of execution is to preserve the substratum of a case pending the hearing and determination of an appeal. Further, a successful litigant has a right and expectation to enjoy the fruits of the decision rendered in his or her favour by the court, and a respondent who has lost a case also has a right of appeal to ventilate his or her

displeasure with the said decision of the court. Furthermore, the grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of the case. This court has the duty to balance these rights to ensure that justice is served.

21. This position was affirmed in the case of **Regional Institute of Business Management v Lucas Ondong' Otieno [2020] eKLR** where the court observed as follows;

***“20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the Constitution of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2) (b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted”.***

22. The application herein is dated 9<sup>th</sup> October 2025 and was filed on 14<sup>th</sup> October 2025 after delivery of the impugned judgment on 25<sup>th</sup> September 2025. There is therefore no delay in the filing of the application herein.

23. On substantial loss, the appellant/applicant averred that in the event execution takes place the appeal would be rendered nugatory. On his part the respondent argued that

no sufficient reason had been adduced to necessitate the stay of execution of proceedings.

24. In the case of **Silverstein vs. Chesoni [2002]1 KLR 867**, the court observed that substantial loss was the cornerstone of both jurisdictions and the same had to be prevented by preserving the status quo because such loss would render the appeal nugatory.

25. On security the appellant/applicant stated that it was willing to offer reasonable security as the court may order. I note that the appellant/applicant deposited in court kshs.490,000/= pursuant to this court's directions of 27<sup>th</sup> May 2025.

26. As earlier noted, the grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of the case. This court has the duty to balance rights to ensure that justice is served.

27. The above being the position, I allow the prayer for stay of execution of the judgment delivered on 25<sup>th</sup> September, 2025 with the deposit in court as security. The appellant/applicant is directed to prosecute his appeal within twelve (12) months from the date of this ruling failure to which the stay orders shall lapse.

28. The upshot is that the application dated 9<sup>th</sup> October 2025 is merited and the same is allowed.

29. Costs shall be in the cause.

30. Orders accordingly.

**Delivered, dated and signed this 18<sup>th</sup> day of December, 2025 in open court.**

**H. I. ONG'UDI**  
**JUDGE**