



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL APPEAL NO. 353 OF 2021

KENYA COMMERCIAL BANK.....

.....APPLICANT

=VERSUS=

JOSEPH NGATIA NDUNG'U.....

RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion application dated 18th March 2025, brought under Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, in which the Applicant seeks the following orders:-

i) Spent.

ii) Spent.

iii) THAT pending the hearing and determination of the Intended Appeal, a stay of execution of the judgment/Decree entered herein on 13th March 2025 in Milimani ELCC E353 of 2021- John Ndungu Ngatia v Kenya Commercial Bank and all the consequential orders and proceedings thereto be granted.

iv) THAT the costs of the application abide with the outcome of the Appeal.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Lilian Sogo sworn on even date.

THE APPLICANT'S CASE

3. The deponent averred that, being aggrieved by the judgment delivered on 13th March 2025, the Applicant instructed their Advocate to appeal the judgment. She further averred that there is no order of stay of execution as the trial court declined to grant the same.
4. The deponent is apprehensive that the Respondent will execute the decree arising from the judgment, which would render the appeal nugatory. She asserted that the Applicant has an arguable appeal with overwhelming chances of success. She further asserted that the Applicant would suffer substantial loss as there is a likelihood that the Applicant

would be unable to recover the decretal sum from the Respondent. She stated that the Applicant is ready and willing to furnish security of costs as the court may direct.

THE RESPONDENT'S CASE

5. The Respondent filed a replying affidavit dated 8th May 2025 in opposition to the application.
6. He averred that the allegation that he owns the Applicant is without basis, as the Applicant did not plead or prove any claim against him in its pleadings. He maintained that he does not owe the Respondent any money. He asserted that the Kshs 300,000/= should be deposited in a joint account and that the Defendant release his titles to him. He further stated that the Applicant has denied him a statement of his account, which does not prejudice it in any way.
7. The application was canvassed by way of written submissions. The Applicant filed its submissions dated 16th May 2025, which I have duly considered. As of the time of writing this ruling, the Respondent had not filed his submissions as directed.

ANALYSIS AND DETERMINATION

8. Having considered the application, the respective affidavits and the Applicant's submissions, the issue that arises for determination is whether the Applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for the grant of a stay of execution pending Appeal.

Order 42 Rule 6(1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of a stay and provides that;

6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

6(2) 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 such security of costs for the performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

9. The grant of an order of stay of execution is a discretionary one. In the case of **Butt vs Rent Restriction Tribunal (1982) KLR 417**, the Court of Appeal set out the following guidelines on how a court should exercise its discretion;

***“The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal. The general principle in granting or refusing a stay is; if there is no overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s decision. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicants at the end of the proceedings.*”**

The court in exercise of its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.”

10. Similarly, in the case of **RWW vs EKW (2019) eKLR**, the Court held that;

“...the purpose of an application for stay of execution pending an appeal is to preserve the subject 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 the 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 damages.”

11. This Court is therefore called upon to balance the rights of the successful party so as not to hinder him from enjoying the fruits of his judgment and those of the Appellant whose Appeal may succeed and be rendered nugatory if a stay of execution is not granted.

12. The purpose of a stay of execution is to preserve the substratum of the case. In **Consolidated Marine vs**

Nampijja & Another Civil App No. 93 of 1989 (Nairobi),

the Court held that;

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal is safeguarded and the appeal, if successful, is not rendered nugatory.”

13. The Court will now determine whether the Applicant has satisfied the conditions for granting the orders.
14. Regarding the first condition that substantial loss may result unless stay orders are granted, the Applicant should not only state that it is likely to suffer substantial loss, but must prove that it will suffer substantial loss if stay orders are not granted.
15. In **Charles Wahome Gethi vs Angela Wairimu Gethi (2008) eKLR**, the Court of Appeal held that;

“...it is not enough for the Applicants to say that they live or reside on the suit land and they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent executes the decree in this suit against them.”

16. In **Mukuma vs Abuoga (1988) KLR**, the Court of Appeal held that;

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

17. Discussing substantial loss, Platt, JA, in the case of **Kenya Shell Ltd v Benjamin Keruga Kibiru and others 1982-85**

1 KAR 1018 observed as follows:-

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented.”

18. The Applicant is apprehensive that the Respondent will execute the judgment if a stay of execution is not granted. The Applicant maintains that the Respondent would be unable to repay the decretal sum if the appeal succeeds. The Respondent, on the other hand, contends that it does not owe the Applicant any money. He argued that the Applicant denied him access to his statement of account and failed to produce any statement showing that he owes the Applicant any money. He further argued that the Applicant did not plead any claim against him or prove the same.

19. Although the Applicant has satisfied the Court that the application was made without unreasonable delay, it has not shown that it would suffer substantial loss if it releases

the statement of account and the titles to the Respondent as directed.

20. In its judgment, the court awarded the Respondent general damages of Kshs 300,000/= with interest at court rates. The Applicant contends that the Respondent will be unable to repay the amount if the appeal succeeds. The Respondent proposed depositing the amount into a joint interest-earning account.
21. In light of the foregoing, I find that the stay of execution may be granted to the extent of Kshs. 300,000/= in respect of the general damages award.
22. Regarding the last condition on the provision of security for costs, Order 42 Rule 6 (2) (b) of the Civil Procedure Rules is couched in mandatory terms requiring the Applicant to furnish security for the performance of the order or decree. In the case of **Arun C Sharma vs Ashana Rakundalia T/A Raikundalia & Co. Advocates & 2 Others (2014) eKLR**, the court held that;

“The purpose of the security under Order 42 is to guarantee due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor....civil process is quite different because in civil process the judgment is like a debt hence the applicant become and are judgment debtors

in relation to the respondent. That is why any security given under order 42 rule 6 of the civil procedure rules acts as a security for the performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

23. The Applicant has expressed its willingness to provide security for the due performance of the decree.

24. The upshot of the foregoing is that the application dated 18th March 2025 2025 is allowed in the following terms:-

a) Stay of execution of the award for general damages of Kshs 300,000/= is granted pending the hearing and determination of the Appeal.

b) The Appellant shall deposit Kshs 300,000/= in a joint interest- earning account in the names of both Advocates within 30 days from the date of this ruling.

c) Costs to abide by the outcome of the appeal

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 11th DAY OF DECEMBER, 2025.

.....
**T. MURIGI
JUDGE**

IN THE PRESENCE OF

Wariara for the Applicant
Kimamo for the Respondent
Ahmed - Court assistant

ORIGINAL