

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E152 OF 2025

FLORENCE WANJIRU..... APPELLANT

-VERSUS-

RASHID KARIUKI KABEBE.....1ST
RESPONDENT

BENARD MWAURA NGENE.....2ND RESPONDENT

*(Being an appeal from ruling and orders in Small Claims Court at Thika (Hon. Sylvia
A. Wayodi Adjudicator/RM) claim number E1085 of 2024 dated 29th May 2025)*

RULING

The lower court on 5-02-2025 entered judgment against the 1st respondent for failure to respond despite being served with claim documents. The 2nd respondent learned of the judgement when motor vehicle registration number KZA 873 was attached in execution of the decree upon which he moved the court vide application dated 14-04-2025 which was praying among others, orders for setting aside of the default judgment. The application was allowed vide the ruling which is the subject of this appeal.

The appellant was dissatisfied by the above ruling and preferred this appeal. This ruling is in respect of the applicant's application dated 11-06-2025 which prays for the following orders;

1. **THAT** spent.

2. **THAT** this Honourable Court be pleased to issue an injunction preventing the interested party M/S Lizzma Auctioneers from releasing the attached motor vehicle KZA 873 currently in their custody pending the hearing and determination of this application.
3. **THAT** this Honourable Court be pleased to issue an injunction preventing the interested party M/S Lizzma Auctioneers from releasing the attached motor vehicle KZA 873 currently in their custody pending the hearing and determination of this appeal.
4. **THAT** this Honourable Court be pleased to stay the orders and consequences of such orders issued by Honourable Sylvia A. Wayodi (Adjudicator/Resident Magistrate) vide a ruling delivered on the 29th May, 2025 in Thika SCCC NO. E1085 of 2024 (Florence Wanjiru versus Rashid Kariuki Kabebe) pending the hearing and determination of this instant application inter-partes.
5. **THAT** this Honourable Court be pleased to stay the orders and consequences of such orders issued by Honourable Sylvia A. Wayodi (Adjudicator/ Resident Magistrate) vide a Ruling delivered on the 29th May, 2025 in Thika SCCC NO. E1085 of 2024 (Florence Wanjiru versus Rashid Kariuki Kabebe) pending hearing and determination of this appeal.
6. **THAT** this Honourable Court be pleased to stay the proceedings in Thika SCCC No. E1085 of 2024 (Florence Wanjiru versus Rashid Kariuki Kabebe) pending the hearing and determination of this application.

7. ***THAT*** this Honourable Court be pleased to stay the proceedings in Thika SCCC No. E1085 OF 2024 (Florence Wanjiru versus Rashid Kariuki Kabebe) pending the hearing and determination of this appeal.
8. ***THAT*** this Honourable Court be pleased to make any further orders as it may deem just and reasonable.
9. ***THAT*** costs of this application be provided for.

Being an application for stay of execution and proceedings, the appellant has to satisfy the established three conditions. These are that; the applicant must show that she will suffer substantial loss if the application is not granted, the application was filed without inordinate delay and that security for due performance of the decree must be given. These conditions have been set in many judicial precedences including ***Jaber Mohsen Ali & another v Priscillah Boit & another (2014) KEELC 132 (KLR)*** where the court held that;

‘The applicant needs to demonstrate three elements. There must be demonstration that substantial loss will result if stay is not granted; secondly, the application must be made without unreasonable delay; and finally, there needs to be security for the due performance of the decree.’

The court gave directions on the disposal of the application on 16-06-2025. One of the directions was that the parties should exchange submissions within twenty days. The appellant since then failed to file any submissions while the 2nd respondent filed his submissions dated 11th July 2025 which I have considered alongside his replying affidavit sworn on 25th June 2025 and the appellant’s notice of motion.

I will start with the condition for substantial loss. In her supporting affidavit, the appellant has narrated the history of the matter resulting to the ruling she is appealing. In addition to stating that she was dissatisfied with the ruling, she depones that the appeal has very high chances of success and proceeds to give her reasons for believing that.

The only averments which point to substantial loss are that; the 2nd respondent is pursuing release of the attached motor vehicle, the respondents do not have any other known assets, the respondents are likely to hide the vehicle once it is released in order to defeat justice and that the appeal will be rendered nugatory if the vehicle is released.

It must be noted that the chances or merits of the appeal is not one of the conditions set for an application for stay pending appeal. The court is not at this stage concerned with the strength or the weakness of the appeal. If the appellant wants to demonstrate the strength of the appeal, it must be co-joined with demonstration of substantial loss. The assumption at this stage is that, the decision being appealed is lawful, sound and deserving and the beneficiary of the decision should not be stopped from enjoying the fruits of its litigation for simple reason that an appeal has been filed. In ***James Wangalwa & Another v Agnes Naliaka Cheseto (2012) KEHC 1094 (KLR)***, Honourable Justice F. Gikonyo held that;

‘The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal.’

Again, in *Jaber Mohsen Ali & another v Priscillah Boit & another (2014) KEELC 132 (KLR (Supra))* the court held;

‘Much has been said about the respective strengths of the cases of the parties but that is not a consideration under Order 42 Rule 6. Apart from the three elements, the essence of an application for stay pending appeal is aimed at preserving the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment. That said, it must be appreciated that the respondent is a successful litigant who is entitled to benefit from the fruits of the judgment.’

Substantial loss cannot be based on assumptions or mere averments. In this matter, the appellant claims that the respondents are likely to hide the vehicle and since they have no other known assets, the appellant may not succeed in executing the decree if this appeal succeeds. In my view, that cannot translate to substantial loss as it is speculative and not based on facts. The appellant has not deponed into the assets or lack of them by the 1st respondent against who he would have judgement if he succeeds in the appeal. If the appeal is allowed it would mean that the judgement left standing would be against the 1st respondent and not against the 2nd respondent yet the vehicle is said to belong to the 2nd respondent.

Allowing the application would mean leaving the vehicle exposed to sale or disposal in execution of the decree which to me would be more loss to the 2nd respondent than it would be to the appellant if the application is denied. In these circumstances, I do not think that the appellant has satisfied the condition of substantial loss.

The condition for timely filing is no doubt satisfied as the application was filed within two weeks of the ruling. On security for due performance of the decree, it is notable that there is no decree capable of being executed at the moment. The orders being challenged in the appeal set aside the existing decree and as such there is no decree which needs to be secured. This is a condition which is at the discretion of the court and it does not mean that it must be ordered in every application irrespective of the nature of the orders being appealed. The circumstances of this application do not call for security for due performance of the orders.

Having found that the appellant has failed to satisfy the condition for substantial loss, the application must fail. The three conditions must be satisfied conjunctively and where one is found lacking or unsatisfied, the application fails. It was held in ***G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another (2018) KEHC 8780 (KLR)*** that;

‘Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.’

I note from the lower court file that on 15-08-2025, the trial court ordered that there shall be stay of proceedings pending determination of this appeal because this court had made an order staying her ruling. It is clear that, what has been on record is an order for temporary stay pending inter-parte hearing of the application which was issued by Honourable Justice F. Muchemi on 16-06-2025. The trial court did not therefore have jurisdiction to make an order of stay of the matter pending determination of the appeal. The much it could do was to stay the proceedings

pending hearing of the application in this appeal. In the circumstances, that order must be vacated and the case before the trial court proceed.

In conclusion, the final orders of this court are as follows;

- a. The appellant's application dated 11th June 2025 is hereby dismissed.
- b. The order of the trial court dated 15-08-2025 staying the proceedings is vacated.
- c. The costs of the application shall be in the cause.

Dated, signed and delivered at Nairobi this 11th day of December 2025.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Kamau holding brief for Mr. Kibiku for the appellant and Miss Kenyani for the 2nd respondent.