



REPUBLIC OF KENYA



KENYA LAW
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**Karuguchu v Mwangi (Civil Appeal E029 of 2024)
[2025] KEHC 19188 (KLR) (17 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 19188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL E029 OF 2024
CW GITHUA, J
DECEMBER 17, 2025**

BETWEEN

PETER KARIUKI KARUGUCHU APPLICANT

AND

STEPHEN WAITHAKA MWANGI RESPONDENT

RULING

1. By his Notice of Motion dated 17th December 2024, the appellant, Peter Kariuki Karuguchu (hereinafter the applicant) moved this court principally seeking three substantive orders namely;
 - (i) That this court be pleased to set aside or review the orders made by the trial court in a ruling delivered on 7th November 2024 in Muranga CM CC No.400 of 2009.
 - (ii) That the court be pleased to order stay of execution of the judgement and/or decree issued on 31st May 2024 in Murang'a CMCC No.400 of 2009 pending the hearing and determination of the applicant's appeal.
 - (iii) That costs of the application be in the cause.
2. In the grounds anchoring the Motion and in his supporting affidavit sworn on 17th December 2024, the applicant averred that judgement was delivered by the trial court on 31st May 2023 in which the respondent was awarded Kshs.1,001,500 plus costs and interests; that he was aggrieved by the entire judgement and he instructed his advocates to lodge the instant appeal; that his appeal has high chances of success and if stay was not granted, the respondent will proceed with execution which will render his appeal nugatory.
3. Further, the applicant contended that the decretal amount was substantial and he was apprehensive that if it was paid to the respondent and his appeal succeeded, he may not be able to recover the amount from the respondent and this would render his appeal nugatory.



4. The applicant also informed the court that he had been granted conditional stay of execution in the lower court in a ruling delivered on 6th November 2024. The stay was granted on condition that he deposited the entire decretal amount in a joint interest earning account held by counsel for both parties; that he was unable to comply with the terms of stay aforesaid due to financial constraints as he was struggling to pay medical bills and drugs for his son who had allegedly been ill for one year in addition to fending for his family. He urged the court to find that allowing the application would not occasion any prejudice on the respondent.
5. The application is contested by the respondent in a replying affidavit dated 14th January 2025. In the affidavit, the respondent deposed that the applicant had shifted goal posts by introducing in this court the issue of his alleged financial inability which he had not raised in the trial court; that the financial inability of a judgement debtor was not the concern of the court in an application for stay of execution since the judgement sum must be settled; that the applicant cannot have his cake and eat it by failing to deposit the decretal amount as ordered by the trial court and at the same time enjoy stay of execution.
6. In addition, the applicant argued that the applicant had not laid a basis for setting aside of the stay orders issued by the trial court as sought. In his view, the application lacked merit and ought to be dismissed with costs.
7. On 11th February 2025, by consent of the parties, I directed that the application be prosecuted by way of written submissions. The applicant's submissions are dated 17th March 2025 while those of the respondent are dated 18th March 2025.
8. Having carefully considered the application, the affidavits on record and the rival written submissions filed on behalf of the parties, I find that the key issue arising for my determination is whether the applicant had demonstrated that he was deserving of grant of the orders sought.
9. Starting with the prayer that this court should set aside the orders of stay issued by the trial court, it is not disputed that the orders sought to be set aside were issued in a ruling delivered on 6th November 2024. The orders were to the effect that the applicant was granted conditional stay of execution on terms that he deposited the decretal amount in an interest earning account held jointly by counsel for both parties within 30 days from 6th November 2024.
10. It is clear that the 30 day timeline set by the court expired on 7th December 2024 before the applicant had deposited the decretal amount. It is thus evident that the stay orders automatically lapsed on or about 7th December 2024. There is no evidence that the time limited by the court for the aforesaid deposit was extended for a further period. Consequently, there are no stay orders in force which can be set aside. The orders no longer exist and there is therefore nothing for this court to set aside.
11. Turning to the second prayer for stay of execution of the trial court's judgement and decree, I wish to state at the outset that the relief of stay of execution pending appeal is discretionary but like all other judicial discretions, the discretion must be exercised judiciously in accordance with the law. The court's discretion should not be exercised whimsically or capriciously.
12. The parameters within which courts exercise their discretion in applications such as the instant one are set out in Order 42 Rule 6(2) of the Civil Procedure Rules (CPR). A reading of this provision makes it clear that for an applicant to be deserving of orders of stay of execution, he must establish to the satisfaction of the court the following three conditions. These are;
 - (i) That unless the orders sought were granted, he was likely to suffer substantial loss.
 - (ii) That the application was filed timeously.



- (iii) That the applicant had provided adequate security for the due performance of the decree or order as may ultimately be binding on him.
13. Starting with the requirement that the application must be filed without unreasonable delay, I find that the decision challenged on appeal was made on 31st May 2023. The Memorandum of Appeal was filed on 7th May 2024 and the instant application was filed on 17th December 2024 about ten days after lapse of the stay orders issued by the trial court. A delay of ten days cannot be said to be prolonged or inordinate. I am therefore satisfied that the application was made without unreasonable delay.
14. Regarding the need to demonstrate substantial loss if the stay orders were not granted, the applicant urged this court to note that the decretal amount was substantial and if execution issued and the money was paid to the respondent, he was unlikely to recover it.
15. It is trite that when an applicant expressed apprehension that the judgement creditor was incapable of refunding the decretal amount if the appeal outcome was favourable, the evidential burden shifted to the respondent to demonstrate that he or she was capable of refunding the amount in question when called upon. See: *ABN Amro Bank N.K. V Lemande Foods Ltd Civil Application No.15/2002 (NRB)*; *Stephen M. Mwangi & 2 others V Albert Wesonga (2017) eKLR*.
16. In this case, the respondent did not contest the above claim by demonstrating that he was not impecunious and was capable of refunding the amounts involved if the appellant's appeal was successful.
- In the premises, given that the decretal amount was quite substantial, I am in agreement with the applicant that he was likely to suffer substantial loss if stay was not granted as the respondent has not disproved the applicant's claim that he may be unable to refund the decretal amount if called upon to do so.
17. The last condition that must be fulfilled before grant of stay orders is provision of security. The law is that the applicant must offer such security for the due performance of the decree as may ultimately be binding on him.
18. In his submissions, the applicant has reminded this court that it has discretion to set the terms of security to be offered for the due performance of the decree and urged me to order that he deposits Kshs.200,000 which is the amount he can currently afford. This proposal was vehemently opposed by the respondent who claimed that if the applicant's offer was accepted, it would leave him exposed without adequate security.
19. It must be remembered that the purpose of stay of execution pending appeal is to preserve the subject matter in dispute so that the applicant's constitutional and statutory right of appeal is safeguarded and the appeal if successful is not rendered nugatory. The court should however weigh this right against the respondent's right to have the fruits of his successful litigation adequately secured pending determination of the appeal.
20. The applicant claimed that his offer of Kshs.200,000 as security was informed by the fact that he was currently experiencing financial constraints as his resources had been depleted after paying for his sick son's medical bills and drugs. He however did not avail any evidence to prove that he had an ailing son or evidence to demonstrate his financial standing.

In the absence of such evidence, I am not persuaded that the applicant was unable to provide the entire decretal amount as security.



21. Considering that the purpose of security was to guarantee the due performance of the decree or order as may ultimately be binding on the applicant, I am of the view that the respondent may be prejudiced if the applicant was allowed to deposit only Kshs.200,000 as security against a decretal sum of Kshs.1,000,50.
22. Having weighed the compelling rights and interests of both parties and in order not to cause prejudice to any party, I will allow the application and grant the applicant stay of execution pending conclusion of his appeal on condition that he deposits the entire decretal amount in an interest earning account held jointly by counsel for both parties or in court within 60 days of today's date. In default of compliance, the stay granted shall automatically lapse.
32. On costs, I order that costs of the application shall abide outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 17TH DAY OF DECEMBER 2025.

HON. C. W. GITHUA

JUDGE

In the presence of;

Mr. Kimori holding brief for Ms. Waititu for the applicant

Mr. Mbuthia for the respondent

Ms. Susan Waiganjo, Court Assistant

