



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tomno v Jerobon & another (Civil Case E010 of 2024)  
[2025] KEHC 19096 (KLR) (19 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 19096 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE E010 OF 2024  
E OMINDE, J  
DECEMBER 19, 2025**

**BETWEEN**

**SAIDA JEPTOO TOMNO ..... APPLICANT**

**AND**

**ZAIDUN JEROBON ..... 1<sup>ST</sup> RESPONDENT**

**JEREMIAH K KIMOSOP T/A USHIRIKA DESIGNERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By way of Notice of motion dated 26<sup>th</sup> May 2025, the Applicant seeks the following orders;
  1. Spent.
  2. Spent.
  3. That this Honourable court be pleased to order stay of execution of the Judgment and decree in Eldoret CMCC No. 736 OF 2015 delivered on 14/12/2023 pending the hearing and determination of the appeal lodged herein,
  4. That costs of this application be provided for.
2. The application is expressed to be brought under Order 21 Rule 1, Order 42 rule 6, Order 51 rules 1 & 4 of the Civil Procedure Rules and Section 3,6 & 3A of the Civil Procedure Act CAP 21 Laws of Kenya.
3. The application is premised on the grounds on the face of it and the averments of the Applicant in the affidavit sworn in support of the application. She deponed that judgment was delivered in Eldoret Magistrates Court Civil Suit No. 736 of 2015 in favour of the 1<sup>st</sup> Respondent. That she was aggrieved and dissatisfied with the said judgment and decree and lodged an appeal. She annexed and marked as SJT-1 the decree. She deponed that she instructed her advocate to prefer an appeal to the High Court



- annexing and marking as a copy the Memorandum of Appeal dated 11<sup>th</sup> January 2024. She stated that there is already an Appeal herein filed and all the necessary documents prepared, filed and served.
4. Further, that the High Court has already issued a date for purposes of taking directions on the appeal which is 03/06/2025. She urged that the Respondents however went ahead and proceeded with the execution of the lower court judgement and Decree whereby the matter came up in the Lower Court for taxation and subsequently a Notice to Show Cause was issued against the Appellant/Applicant. She annexed and marked as SJT3 and 4 an application of Decree and certificate of assessed costs.
  5. The deponent averred that the foregoing happened after service to the Respondent of both the Notice of the intention to Appeal and the Memorandum of Appeal itself, which was utterly disregarded by the Respondents. Further, that the appeal raises severe and weighty legal issues for determination by the Court on Appeal and has very high chances of success and there is a need for the stay of execution. She stated that the Applicant will suffer substantial irreparable loss and damage if orders sought herein are not granted and the said appeal will be rendered nugatory.
  6. The deponent averred that the Applicant is willing and able to abide by the terms and conditions set by this Honourable Court for allowing this present application in the best interest of justice. She prayed the court allow the application as prayed.
  7. The 1<sup>st</sup> Respondent filed a Replying Affidavit dated 11<sup>th</sup> June 2025 in response to the application. She deponed that the application is incompetent, frivolous, vexatious and an abuse of the court process. She further deposed that judgement was delivered in the original suit on 14<sup>th</sup> December 2023 annexing and marking a copy of the said the judgement as ZJ 1. Further, that the applicant filed a memorandum of appeal dated 11<sup>th</sup> January 2024 within time. He annexed and marked the memorandum marked as ZJ 2. He stated that the advocates proceeded and assessed costs of the suit the of which certificate was served on the applicants Advocates and duly received on the 29<sup>th</sup> November 2024. He annexed and marked the certificate of costs marked as ZJ 3.
  8. The deponent averred that their advocates on record applied for a decree which was issued and dated 2<sup>nd</sup> February 2025 which again was served on the Advocates of the applicant. That the said advocates then proceeded to apply for and obtained a notice to show cause dated 8<sup>th</sup> May 2025 which again was served on the applicants' advocates. He annexed the notice to show cause marked as ZJ4. Further, that the applicant was informed of every step that he was taking in executing the decree and never took any action about it from 14<sup>th</sup> December 2023, being the date of Judgement in the original file to 26<sup>th</sup> May 2025 when the application herein was filed which is a period of one year and five months which is clearly an inordinate delay.
  9. The deponent averred that under Order 42 Rule 6, the fact of filing an appeal in itself does not confer an automatic stay of execution, the application for stay thereof has to be filed and prosecuted without delay. That the applicant has not even made an attempt to explain the reason for delay of one year and 5 months. Further, that for an applicant to merit stay pending appeal orders, she has to demonstrate substantial irreparable loss. The execution is for costs amounting to Kshs.81, 690/-, it is not demonstrated how this can result to irreparable substantial loss which is unrecoverable.
  10. The deponent averred that the applicant has not provided any security as condition precedent for the grant of orders of stay herein. He maintained that the application lacks merit and should be dismissed with costs.



## **Applicants' submissions**

11. Learned counsel for the applicant submitted the principles guiding the grant of stay of execution pending appeal are well settled and outlined under the Civil Procedure Rules, Order 42 Rule 6 (2) which establishes factors to be considered before granting stay of execution of judgment pending appeal.
12. Further, that the court is no longer limited to the foregoing provisions as they are enjoined to give effect to the overriding objective stipulated under Section 1A and IB in exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions. An application for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned, failure to which such orders should be refused.
13. Counsel cited the case of James Wangalwa & another v Agnes Naliaka Chesoli (2012) eKLR and urged that proof of substantial loss is a mandatory requirement in an application for stay of execution pending appeal. That the applicant must prove the same for the court to grant the said orders. Rather than merely alleging that she will suffer substantial loss, the Applicant has provided proof that she will suffer greatly as warrants of arrest have already been issued against her and she stands not only to lose her motor vehicle which she uses but also to be locked behind bars to her detriment and that of her family members. Counsel cited the case of Andrew Kuria Njuguna vs. Rose Kuria (Nairobi Civil Case 224 of 2001, (unreported) and urged that the Applicant has discharged that onus. That moreover, the court in RWW VEKW (2019) EKLK stated that the purpose of stay of execution pending 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 if the appeal is successful. She also called upon the court to ensure that no party suffers prejudice that an award of costs cannot compensate.
14. Counsel urged that there was also no inordinate delay as the applicant was able to bring appeal against the Judgment of the trial court before lapse of the stay period. He cited the case of Nicholas Stephen Okaka v Alfred Wanga Wesonga (2022) eKLR and urged the court to allow the application and grant orders of stay as prayed by the applicant as all factors have been proved by the applicant.
15. Counsel submitted that the appeal will be rendered nugatory if the court declines to grant the orders sought. He invited the court to take note and cognizance of the fact that the appeal filed by the applicants challenges the entire decision by the trial court.
16. That the same issues raised are tenable since the applicant did not breach any contract and is the one who was defrauded. She further adduced evidence to this effect which she would like the appellate court to look at in determination of her appeal. Counsel urged that the appeal is merited and has arguable triable grounds as against the Respondent. Counsel cited the case of Gitahi & another vs. Waruogongo [1981] KLR 621 and Absalom Dova vs. Turbo Transporters [2013] eKLR and reiterated that the court should allow the application as prayed.

## **Respondents' submissions**

17. Learned counsel for the respondent submitted the application for stay of execution is governed by Order 42 Rule 6 of the Civil Procedure Rules 2010. Further, that none of these conditions have been met by the applicant. That the applicant has not demonstrated substantial irreparable loss. The execution is for costs amounting to Kshs.81, 690/- and there is no indication as to how this can result to substantial loss or cannot be recovered should the appeal succeed. Counsel placed reliance on the decision of the Court of appeal in Kenya Shell Ltd v Benjamin Karuga Kibim & Another (1986) eKLR.



18. Counsel urged that since no proof or evidence has been presented on the alleged risk of substantial loss, we urge this honourable court to find that this threshold has not been met.
19. He stated that the judgement was delivered on 14<sup>th</sup> December 2023, the application for stay was filed on 26<sup>th</sup> May 2025 more than 1 year and 5 months later, without sufficient explanation for delay or at all. Counsel cited the case of Machira t/a Machira & Co. Advocates v East African Standard Civil Case No. 612 of 1996, in regards to delay.
20. Additionally, he stated that the applicant has not provided security for due performance of decree herein as required under Order 42 Rule 6 (2) (b) of the Civil Procedure Rules 2010. Counsel cited the case of Arun C. Shamia v Ashana Raikundalia Ha Raikundalia & Co. Advocates & 2 others (2014) eKLR and urged that in the absence of security provided, the court should find that this threshold has not been met. He prayed that the Application be dismissed with costs to the respondent.

### **Analysis & Determination**

21. The issues for determination is;  
Whether the orders for stay of execution should issue
22. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:  

“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.
23. In light of the above statutory provision, I have considered the Application, the facts deposed in support and against the same as well as the submissions made on behalf of the parties. In carefully addressing my mind to the same, I find that the Applicant has failed to sufficiently demonstrate the substantial loss that he stands to suffer and has also not offered any security for the due performance of the decree in the event that the Appeal is not successful.
24. Further and more importantly, in considering the fact that the Application was filed way out of time, to be precise approximately one year and five months’ after the delivery of the judgement and without any explanation on the reason for the delay having been given by the Applicant coupled with the fact that the deposition by the Respondent that the process of the assessment of costs and the application for and the obtaining of a Notice to Show Cause was well within the knowledge and information of the Applicant’s Advocate for reasons that the said Advocate was diligently served with all the requisite papers has not been controverted and/or rebutted by the Applicant,
25. In this regard, it is my finding that the applicant has failed to meet the conditions set out in Order 46 Rule 6(2) to warrant the orders of stay sought. Accordingly, the court finds that the Application is devoid of merit and the same is now hereby dismissed in its entirety with costs to the Respondent.

**READ DATED AND SIGNED AT ELDORET ON 19<sup>TH</sup> DECEMBER 2025**

**E. OMINDE**



**JUDGE**

