

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MILIMANI LAW COURTS
HCCC NO. E204 OF 2021

**FEISAL SHERIFF IBRAHIM & MOHAMUD SHEIKH
MUHUMED T/A SHEIKH AND SHERIFF
ADVOCATES.....DECREE HOLDER**
VERSUS
**DANIEL KAMAU CHEGE T/A CHEGE KAMAU & CO.
ADVOCATES.....JUDGEMENT DEBTOR**

RULING

Professional undertaking

1. This ruling determines two applications.
2. The first application is dated 22.4.2024, and is by the judgment debtor, seeking, *inter alia*, stay of execution of the judgment delivered on 30.11.2022 pending an intended appeal and the striking out of the decree holder's application for execution dated 23.11.2023. It is brought primarily under **Order 42 Rule 6 of the Civil Procedure Rules**, and it is supported by an affidavit sworn by **Daniel Chege Kamau** on 22.4.2024.
3. The application is opposed by the decree holder through the replying affidavit sworn by **Feisal Shariff Ibrahim**.
4. The court granted the judgment-debtor an interim stay of execution on 7.5.2024 which was extended on several occasions.

Second application

5. The second application is dated 2.8.2024, and is by the decree-holder, seeking that the interim orders of stay be vacated. It is brought under **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 51 Rule 15 of the Civil Procedure Rules**. It is supported by affidavits sworn by **Feisal Shariff Ibrahim** on 2.8.2024 and 10.6.2025.
6. The application is opposed by the judgment-debtor's replying affidavit sworn by **Daniel Chege Kamau** on 23.5.2025.

Submissions

7. In the written submissions dated 11.1.2025, the judgment-debtor has argued that the decree holder has not substantiated allegations of the applicant obtaining stay of execution through misrepresentation. It urged the court to allow its application and dismiss the decree holder's.
8. The judgment debtor submitted that the High Court lacks jurisdiction to determine the competency of an appeal filed in the Court of Appeal. It highlighted that it filed a notice of appeal and served it together with the letter bespeaking of proceedings on 6.12.2022.
9. The judgment debtor submitted that it stands to suffer substantial loss if a stay is not granted as the subject matter dispute arose in the course

of his duty as an advocate and its practice is dependent upon the outcome of the appeal. It further submitted that it is willing to offer a bank guarantee for the due performance of part of the decree.

10. The judgment debtor relied on the following cases: ~

(1) **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**

(2) **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR**

11. The decree holder filed written submissions dated 10.6.2025 in support of its application and in opposition to the judgment debtor's application.

12. The decree holder argued that the judgment debtor has not met the threshold for grant of orders of stay.

13. The decree holder faulted the judgment debtor for not taking any step to regularize the record after filing the notice of appeal on 30.11.2022. It faulted the judgment debtor for not given any explanation as to why there is an inordinate delay in filing and serving the memorandum and record of appeal which is prejudicial to it. It pointed out that the application for copy of proceedings provided

under **Rule 84(2)** were never served upon it and service has not been proven.

14. The decree holder further faulted the judgment debtor for failing to file an application for leave to file its appeal out of time three years after the judgment was delivered, a supplementary record or letters consistently requesting for proceedings.
15. The decree holder submitted that the judgment debtor has not demonstrated that he is able to satisfy the decree should the appeal fail. He highlighted that the judgment debtor has stated that the survival of his practice depends entirely on the non-existent appeal.
16. The decree holder argued that the judgment debtor has not demonstrated ability to comply with any order as to full security as they can only be able to provide a bank guarantee for part of the decree.
17. The decree holder relied on the following cases: -
 - (1) **Kombe & 11 others v Mwebi & 10 others (Civil Appeal (Application) E65 of 2021) [2023] KECA 980 (KLR)**
 - (2) **Patrick Kiruja Kithinji v Victor Mugira Marete [2015] eKLR**
 - (3) **Daniel Nkirimpa Monirei v Sayialel ole Koilel & 4 others [2016] eKLR**

(4) **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**

(5) **RWW v EKW [2019] eKLR**

18. The judgment debtor asserted that there is a pending appeal in the matter. He asserted that his advocates are pursuing the proceedings and certificate of delay and are in the process of lodging the appeal.

ANALYSIS AND DETERMINATION

Issue, onus and threshold of proof

19. Is there a sufficient cause to order a stay of execution pending an appeal?

20. The onus lies on the applicant to show, among other things, that substantial loss would occur if the stay is not granted, has applied for relief without unreasonable delay and is willing to provide security for the due performance of the decree.

Preliminary issue: legal representation

21. Be that as it may, a preliminary issue was raised; whether the firm of **Wilberforce Akello & Co. Advocates** is properly on record.

22. The judgment debtor argued that the applicant's advocates are improperly on record for failure to comply with **Order 9 Rule 9 of the Civil Procedure Rules**.

23. The decree holder insisted that the firm of advocates representing them was properly on record as it complied with **Order 9 Rule 9 of**

the Civil Procedure Rules by filing a consent dated 2.11.2023 with its previous advocates, **Wanyanga & Company Advocates**.

24. Under **Order 9 Rule 9 of the Civil Procedure Rules**; after judgment has been passed, change of advocate or to act in person is to be effected by order of court or consent of outgoing and incoming advocate or the parties.

25. The decree holder exhibited a copy of the consent dated 2.11.2023 between its current and previous advocates. It is executed and was filed by the current advocates on the Judiciary's Case Tracking System on 20.11.2023. Therefore, the court finds that **Wilberforce Akello & Co. Advocates** is properly on record for the decree holder.

26. Accordingly, the court rejects the judgment debtor's contention that the application for execution and the notice to show cause filed by the advocate on record are for striking out for non-compliance with the law.

27. The court will next consider the issue of stay.

Stay of execution

28. This relief is governed by **Order 42 Rule 6 of the Civil Procedure Rules**.

29. It bears repeating that, the court may for sufficient cause order stay of execution pending appeal. The applicant, however, bears the onus of proving sufficient cause. Proof

thereof include that substantial loss would occur if stay is not granted, the application has been made without unreasonable delay and that the applicant is ready to provide security for the due performance of the decree. **Order**

42 Rule 6 of the Civil Procedure Rules

30. For proper grounding, this court enjoys concurrent jurisdiction with the Court of Appeal in respect of stay of execution pending appeal before the Court of Appeal. The functional and operational foundation of this jurisdiction is that: 'For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.' **Rule (4) of the Civil Procedure Rules.**

31. Arguments were made by the judgment debtor that the High Court lacks jurisdiction to determine the competency of an appeal filed in the Court of Appeal. It highlighted that it filed a notice of appeal and served it together with the letter bespeaking of proceedings on 6.12.2022.

32. I need only state that a notice of appeal for purposes of order 42 rule 6(4) must be filed as prescribed in law.

33. The discretion of the court in granting stay of execution pending appeal is exercised in accordance with the principles of law under

the Constitution and Order 42 rule 6 of the Civil Procedure Rules.

34. The judgment debtor exhibited a notice of appeal dated 30.11.2022. It also exhibited a letter bespeaking proceedings of the same date. It further exhibited a draft memorandum of appeal dated 22.4.2024 although it does not have any legal vitality until duly filed.
35. The judgment debtor however claimed that its advocates are pursuing the proceedings and certificate of delay and are in the process of lodging the appeal. No further updates on the current state of things was provided by the judgment debtor.
36. The impugned judgment was delivered on 30.11.2022. This application was filed on 22.4.2024, which was **509** days after the judgment was delivered. This is about **1 year and 4 months**.
37. The judgment debtor did not satisfactorily explain the delay or exhibit other letters bespeaking proceedings to show that he has followed up the certified copies of proceedings with the registry. Lamentably, once again I reiterate that no further updates were provided by the applicant on the status of the appeal.
- Mae Properties Limited v Joseph Kibe & another [2017] eKLR**

38. A satisfactory explanation for the delay is the key that unlocks the court's flow of discretionary favour. **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR.**

39. In any event, I do note that the judgment debtor argued that it stands to suffer substantial loss if a stay is not granted as the subject matter dispute arose in the course of his duty as an advocate and its practice is dependent upon the outcome of the appeal. But, given the nature of the claim against the judgment-debtor, the applicant did not show how the survival of its practice is dependent upon the outcome of the appeal or how they will suffer substantial loss in the sense of **order 42 rule 6 of the Civil Procedure Rules.**

40. The weight tilts towards declining stay of execution request.

Disposal

41. From the foregoing, albeit with much trepidation, the upshot is that the judgment debtor's application dated 22.4.2024 is dismissed with no order as to costs.

42. As a consequence, thereof, and on the merits of the decree holder's application dated 2.8.2024, the said application is allowed in the following terms: -

(1) Interim orders of stay issued on 7.5.2024 and extended on 12.6.2024, 4.3.2025 and on 29.7.2025 are hereby vacated.

(2) No order as to costs.

Dated, signed and delivered at Nairobi this 22nd day of January, 2026 through Microsoft Teams online application

F. Gikonyo M

Judge

In the presence of:

Akelo for Decree Holder

Ms. Wangari for Mr Kihara for the Respondent

CA - Godfrey