

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**(CIVIL DIVISION)**  
**HCCA NO E190 OF 2025**

**MOHAMED WANYAMA .....APPELLANT**

**VERSUS**

**JAFFER MOHAMED .....RESPONDENT**

**RULING**

1. The notice of motion before me is dated 3<sup>rd</sup> July 2025. Vide the said motion, the appellant seeks to stay execution of the judgment pending the hearing and determination of the appeal. The application is opposed by the respondent. The respondent contends that the application is calculated to deny it the fruits of a judgment in his favour.
2. This is a run-of-the-mill stay of execution application. An applicant for such orders must, under Order 42 Rule 6(2) of the Civil Procedure Rules, establish that the following conditions have been met, for the application to succeed: -
  - a. He would suffer substantial loss unless the stay is granted;
  - b. The application was filed without undue delay; and
  - c. Provide security for the due performance of the decree or order that may ultimately be binding.

The above provision has been the subject of a plethora of decisions of the High Court, which I need not set out herein as they are, in a manner of speaking, trite. For illustration I will highlight one such decision. In the case

of **Halai & another v Thornton & Turpin (1963) Ltd [1990] eKLR**, it was held by the Court of Appeal that: -

**“In *Rasiklal Somabhai Patel v Parklands Properties Ltd*, the court said that before it could decide the application (for stay of execution) it must have regard to the requirements of Order XLI rule 4(2) of the Civil Procedure Rules under which the applicant had to satisfy the court of two matters.**

**Firstly, that substantial loss may result to the applicant unless the application is granted, which *prima facie* means that if the appeal succeeds, the respondent would not be in a position to make full restitution. Secondly, the applicant had to give such security as the court may order. Those are the requirements under Order XLI rule 4(2) of the Civil Procedure Rules, but that order mainly governs applications before the superior court and not those to this court, although in sub-rule (1) of the same rule reference is made to the court to which the appeal is preferred.”**

3. It looks to me as though it would be highly unlikely that the respondent would be unable to repay **Kes 400,000** if a stay of execution is not granted, the respondent executes, and the appellant ultimately succeeds on appeal. Having said so, and in keeping with the salutary words of Madan JA, as he then was, in **Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR)**, I should, as much as possible, grant a stay of execution, unless it would be manifestly unjust to do so, so that an appeal is not rendered nugatory.

4. Madan, JA, in the decision I have referred to stated as follows: -

**“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:**

**“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”**

- 5.** In my view, the application was filed without undue delay. The appellant has offered to abide by any conditions this court may give when granting the orders sought. In the circumstances, I allow the application dated 3<sup>rd</sup> July 2025, on the condition that the sum of **Kes 400,000** is deposited in an interest-earning account in the joint names of both parties' counsel within 30 days of the date hereof. In default execution to issue.
- 6.** The costs of the application shall abide the outcome of the appeal
- 7.** It is so ordered.

**Dated and signed at Mombasa, this 19<sup>th</sup> day of January 2026. Delivered virtually through Microsoft TEAMS.**

**Gregory Mutai**

## **JUDGE**

In the presence of: -

Ms Ayuma, holding brief for Mr Gikandi, for the Respondent

No appearance for the Appellant; and

Bancy – Court Assistant.

Original