



REPUBLIC OF KENYA



**KENYA LAW**  
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**Githaiga v Muraya (Commercial Case E006 of 2025)  
[2026] KEHC 760 (KLR) (21 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 760 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
COMMERCIAL CASE E006 OF 2025  
JM NANG'EA, J  
JANUARY 21, 2026**

**BETWEEN**

**MICHAEL KINYUA GITHAIGA ..... APPELLANT**

**AND**

**PAULINE NYAKINYWA MURAYA ..... RESPONDENT**

**RULING**

1. Vide Notice of Motion dated 2<sup>nd</sup> July 2025 the Appellant craves the following reliefs;-
  - 1) Spent
  - 2) Spent.
  - 3) That pending hearing and determination of the Appeal, this Honourable Court be and is hereby pleased to grant a temporary order stay of execution of the judgement and decree of the Small Claims Court issued in SCCCOMM/E033/2025, Pauline Nyakinywa Muraya vs Michael Kinywa Githaiga.
  - 4) That costs of this Application to abide in the outcome of the Appeal. (sic)
2. The background to this Application is that Judgement was on 9<sup>th</sup> June 2025 entered in the lower court in the principal amount of Kshs. 908,567.35 together with the costs of the Claim and interest. The Appellant was aggrieved by the decision and brought this Appeal and the interlocutory Application before the court.
3. The Appellant avers by affidavit in support of the Application that he is dissatisfied with the Small Claim's Court judgement and lodged this Appeal pleading grounds contained in the Memorandum of Appeal dated 17<sup>th</sup> June 2025. He contends that he would suffer substantial loss if stay of execution of the impugned judgment is not granted. It is alleged that the Respondent resides outside Kenya and her income is unknown. Recovery of the decretal sum if paid out would be difficult in the circumstances,



- the Appellant claims. Reference is also made to bank statements the Respondent tendered before the lower court which are said to show her financial inability to refund the decretal sum.
4. The Appellant expresses readiness and willingness to offer security for the due performance of any decree that may ultimately be binding upon him. Inter alia, he further states that the Application has been brought without unreasonable delay.
  5. The Respondent opposes the Application vide her affidavit evidence in reply. She deposes inter alia that the Application is malicious and intended to delay her enjoyment of the fruits of litigation. It is contended that the matter is even wrongly before this court and ought to have been canvassed before the lower court in the first instance. According to the Respondent the Appellant has not demonstrated that he would suffer substantial loss if the Application is not allowed. She testified to having had a sum of Kshs. 1 million in her bank account which the Appellant unlawfully withdrew and which withdrawal was the subject of the lower court case. The Respondent therefore states that she has the capacity to make good the decretal sum were it to be released to her.
  6. Were the court to grant the Application, the Respondent urges that the entire decretal sum be released to her. Alternatively, half of the sum proposed to be paid out and the other half deposited in a joint account in the names of the parties.
  7. It would appear that the Appellant offered no further evidence in consent to the depositions in the Respondent's affidavit in reply.
  8. Learned Counsel for the parties filed written submissions which I have perused against the rival affidavit evidence and the record. In the case *RWW vs EKW* [2019]eKLR and *Francis K. Chabari vs Mwarania Gaichura Kirubi* (2022) eKLR it was observed that the remedy of stay of execution is discretionary and the court's discretion is exercised in favour of a deserving party.
  9. Order 42 Rule 6 of the Civil Procedure Rules 2010 governs disposal of an application for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-
    - a. unless 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.”
  10. In *Mohsen Ali & Another vs Priscillah Boit & Another*, E& LC Case No. 2000 of 2012 (2014) eKLR the court explained “unreasonable delay” as dependent on the surrounding circumstances of each case.
  11. Provision of security for costs is a crucial condition precedent to grant of an order of stay of execution pending hearing and determination of an appeal. This is a mandatory legal requirement that has to be complied with. The court has power to determine the appropriate security for costs but an Applicant must first express willingness and readiness to offer security.
  12. In *John Odungo vs Joyce Irungu Muhatia* [2014] eKLR the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows “preparedness as well as readiness to provide security should one be called upon to do so”.
  13. On the question of substantial loss, if any, the Respondent might suffer if stay of execution is not ordered, the case of *Nyatera vs Nyakundi* (Civil Appeal E033 of 2022) [2023]KEHC 3086 KLR) (16 March 2023) (Ruling) is relevant for the proposition that the Applicant ought to show the manner



in which his appeal would be rendered nugatory if stay of execution is not ordered. The court opined in the case that it is not enough to say that because there is intention to proceed with execution, it should be stopped because of the appeal. The court is therefore required to tread a delicate balance of the parties' interests. As it is now trite, this is the cornerstone of the court's discretion to grant or refuse stay of execution pending appeal. The onus is on the party appealing to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds.

14. In Re Global Tours & Travel Ltd HCWC No. 43 of 2000 and Milimani HCMCA No. 1561 of 2007, Century Oil Trading Company Ltd vs Kenya Shell Ltd, this court explained thus:-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes when, it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

15. In Shell Ltd vs Kibiru & Another (1986) KLR 410 it was famously postulated that:-

“substantial loss in its various forms is the cornerstone of the court's jurisdiction to grant stay pending appeal. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”

16. Regarding the burden of proof, the Court of Appeal held in National Industry Credit Limited vs Aquinas Francis Wasike & Another [2006] eKLR that:-

“once an applicant expresses a reasonable fact that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

17. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including Matata & Another vs Rono & Another (Civil Appeal No. E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling) and Muinde Mulatya & Another ( 2021) eKLR and Kenya Commercial Bank Limited vs Sun City Properties Limited 7 & 5 Others (2012) eKLR.

18. Based on the affidavit evidence of the parties neither of them has clearly stated their financial position. The Appellant who shoulders the burden of proof has in particular not made out a prima facie case of inability by the Respondent herein to pay back any decretal sum to warrant the latter to debunk the claim. No substantial loss is therefore likely to be occasioned to the Appellant.

19. The impugned Judgement was delivered on 9<sup>th</sup> July 2025 whilst this Application was brought on 9<sup>th</sup> July 2025, a month later. This long delay is unexplained. A certificate of delay was filed but it appears to relate to filing of the Appeal itself, not this interlocutory Application. The court is, however, satisfied as to offer of security for costs. The Appellant expresses willingness and readiness to deposit appropriate security as may be required by the court.



20. In the particular circumstances of this case, therefore, the Respondent has not satisfied all the legal requirements to be entitled to stay of execution as prayed. The onus was on him to meet all the conditions stipulated hereinabove.
21. In order to balance the parties' interests and not jeopardize the Appeal, however, I shall allow the Application of the following conditions;
  - a. The Appellant is ordered to pay out half of the decretal sum to the Respondent within 30 days of the date hereof, and deposit the other half into court within the same period.
  - b. In the event of non-compliance with order a), the Application for stay of execution shall automatically stand dismissed with costs and the Respondent shall be at liberty to lay execution to realize the entire decretal sum.
  - c. The costs of the Application shall abide the Appeal.

**J. M. NANG'EA, JUDGE.**

Ruling delivered virtually this 21<sup>st</sup> day of January, 2026 in the presence of:

The Advocate for the Appellant, Mr Koigi.

The Advocate for the Respondent, Ms Mwashu for Mr Githiru.

Court Assistant, Jeniffer.

