

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMABAY
MISC CIVIL APP NO. E027 OF 2025

DANCAN
.....APPLICANT

OMONDI
JUMA

VERSUS

SAMUEL OCHIENG ORWA AND
QUINTER ACHIENG DIANGA
(Legal representative of estate of CHARLES OCHIENG)
RESPONDENT

RULING

Before Me is an application by Dancan Omondi Juma, the applicant herein seeking the court to give direction where the decretal sum should be deposited.

The only issue for determination is whether the judgement debtor should deposit the decretal sum to a joint account, to the court or to the judgement creditors account pending appeal.

Analysis:

The Civil Procedure Act and Rules govern the payment and execution of decrees in Kenya.

Order 21, Rule 1 of the Civil Procedure Rules outlines the methods by which a judgment-debtor can satisfy a decree. It provides for the decretal sum to be paid directly to the decree-holder or deposited into the court that passed the decree.

Order 40, Rule 11 of the Civil Procedure Rules applies when the subject matter is money or other items capable of delivery, and one party admits to holding it for another. The court can order the amount to be deposited in court or delivered to the other party, with or without security.

Order 42, Rule 6 of the Civil Procedure Rules addresses the deposit of security during an appeal. To obtain a stay of execution, an appellant is often required to provide security for the due performance of the decree, which can involve depositing the decretal amount.

Protecting the fruits of a judgment:

The case of **Michael v. Odunga (2021) eKLR** affirmed that a party who wins litigation should not be denied the opportunity to enjoy the fruits of the judgment. Requiring the

deposit of the decretal sum during an appeal is a mechanism to prevent delays from frivolous appeals and ensure that the funds are available if the appeal fails.

Burden of proof for financial capacity:

In **Kamanga v. Venus Inn & another [2024] eKLR**, the court noted that when an applicant expresses a reasonable fear that the respondent cannot refund the decretal sum if the appeal succeeds, the burden shifts to the respondent to prove their financial capability.

The said Order 21 Rule 12(1)(2) of the Civil Procedure Rules, states as follows;

“ (1) Where and so far as the decree is for payment of money, the court may for any sufficient reason at the time of passing the decree order payment of the amount decreed shall be postponed or shall be made in instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After passing of any decree, the court may on the application of the judgment-debtor and with the consent of the decree-holder for sufficient cause shown order that the payment of the amount decreed be postponed or be made by instalments on such terms as to the payment of interests, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise, as it thinks fit.”

In the case of Bernadette Namajanja (supra), the court also held as follows;

*“The principles for exercise of discretion on whether to order payment in instalments or not were set out in **Keshavji Jethabhai & Bros Limited vs. Saleh Abdullah [1959] EA 260**, as follows: (a) each case to be considered on its own merits, (b) mere inability to pay in full at once is not sufficient reason for exercising the discretion, (c) the debtor should show bona fides by arranging prompt payment and (d) though hardship may be a factor, the court should consider whether the indulgence should be given to the debtor without prejudice to the decree holder. Similar principles were stated in **A. Rajabali Alidina vs. Rehimtulla Alidina and another [1961] EA 565**, where the court stated the conditions to be considered to be (a) the circumstances under which the debt was incurred, (b) the conduct of the debtor, (c) the debtor’s financial position, and (d) his bona fides in offering to pay a fair proportion of the debt at once”.*

The issue of adequacy of security was dealt with by the Court of Appeal in **Nduhiu Gitahi vs. Warugongo[1988]KLR 621; 1KAR 100;[1988-92] 2KAR 100** where the Court of Appeal expressed itself as follows:

“The process of giving security is one, which arises constantly. So long as the opposite party Can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank Guarantee and payment into court are but two of them.

So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given, it is subject to appeal. It may be armed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the Appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash.

There is absolutely no reason in principle why they should not do so. The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

The applicants did state with regard to the issue of security that, they were ready to pay the sum in a joint account. The respondent on the other hand did request court to have the appellant pay 3/4 of the money to the decree holder immediately to allow the holder enjoy the fruits of her judgement and the remaining to court to provide proof of deposit.

Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful party to the appeal, I do order that the appellants will pay the respondent half of the decretal sum awarded and deposit the other half in a joint interest earning account held in the joint names of both counsels.

The appellant is granted 30 days within which to comply with the above order from the date of delivery.

It is so ordered.

DATED AND SIGNED THIS 19TH DAY OF JANUARY, 2026

T. A. ODERA, JUDGE

ORIGINAL