

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E299 OF 2022

DAVID M. MEREKA.....
PETITIONER

VERSUS

SAMORA M. SIKALIEH -CHAIRMAN
KAREN LANGATA DISTRICT
ASSOCIATION.....RESPONDENT

RULING

Introduction

1. By a Notice of Motion Application dated 19th September 2025, the Respondent/Applicant herein seeks Orders that:
 - i. Spent.***
 - ii. Pending the inter partes hearing and determination of this Application, this Court be pleased to stay the execution of the judgment delivered on 20/3/2025 by the Honourable Justice Mugambi and any further consequential orders and decree.***
 - iii. Pending the hearing and determination of the Respondent's appeal being Nairobi Civil Appeal No. E510/2025, this Court be pleased to stay the execution of the judgment delivered on 20/3/2025 by the Honourable Justice Mugambi and any further consequential orders and decree.***

iv. Costs of the application be in cause.

Respondent/Applicant's Case

2. The Application is supported by the grounds on the face of the Application and the Respondent's Supporting Affidavit of even date.
3. The Respondent states that on 20th March 2025, this Court in its Judgment, found in favour of the Petitioner and awarded him Ksh.250,000. He contends that dissatisfied with the decision, he filed **Civil Appeal No.E510 of 2025.**
4. He asserts that he is apprehensive that the Petitioner may at any time commence execution to recover the Ksh.250,000/- awarded in the judgment thereby rendering his Appeal nugatory. He asserts that his appeal is arguable with high chances of success.
5. The Respondent avers that he is willing and ready to deposit in Court, within 30 days, the entire decretal sum of Ksh.250,000/- as security and to comply with any other conditions that the Court may impose in granting stay of execution.

Petitioner's Case

6. The Petitioner in opposition to the Respondent's Application filed his Replying Affidavit sworn on 24th September 2025.

7. The Petitioner asserts that the Respondent has not adduced any evidence to show that he is incapable of refunding the decretal sum of Ksh.370,150 (*as was taxed in view of the Bill of Costs in the Ruling dated 24th September 2025*). He states that as a successful Advocate and a long-time resident of Karen, he is more than able to refund this sum if at all the Respondent's Appeal were to succeed.
8. The Petitioner asserts that the Respondent is guilty of laches as the impugned Judgment was delivered on 20th March 2025. As such, he terms the Application an afterthought with the sole intention of denying him the fruits of the judgment.
9. Further to this, the Petitioner asserts that the Respondent does not have an arguable appeal since the Memorandum of Appeal dated 7th July 2025 does not meet the threshold set in **Giella vs Cassman Brown & Co. Ltd (1973) EA 358.**
10. The Petitioner states that the Respondent's term in office will expire early next year and thus he prays that he be ordered to pay the decretal sum of Ksh.370,150.
11. Nonetheless, the Petitioner avers that if at all this Court finds in his favour, he prays that the decretal sum plus estimated costs of the Appeal totaling Ksh.500000 be deposited in an

interest-earning joint account between the advocates for the parties with Equity Bank Kenya Limited within 14 days.

Respondent's Submissions

12. The Respondent through Ndegwa and Sitonik LLP Advocates filed submissions dated 21st November 2025. Counsel, relying in Order 42 Rule 6(2) of the Civil Procedure Rules submitted that the key issues for discussion are: *whether the Respondent had proved that substantial loss may result if the order of stay is not granted, whether the application was made without unreasonable delay and whether the Respondent has provided security.*
13. On the first issue, Counsel submitted that the Respondent will suffer substantial loss if the Petitioner is paid the decretal amount and costs. In Counsel's view, the Petitioner has not demonstrated his ability to refund the decretal sum and costs in the event the Respondent's appeal is successful. Counsel relied in **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and another(2006)eKLR** where the Court of Appeal held that once the appellant expresses a reasonable fact that, a respondent would be unable to pay back the decretals 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.

14. Comparable dependence was placed in **Matata and another v. Rono & another [2024] KEHC 2799(KLR)**.
15. On the second issue, Counsel submitted that the instant Application had been made without unreasonable delay. Counsel submitted that the Respondent had without delay filed a Notice of Appeal on 21st March 2025 and filed the Application only 183 days after the Judgment. Counsel stressed thus that the Application was made without delay and that would not be prejudicial to the Petitioner.
16. On the third issue, Counsel submitted that the Respondent is willing to deposit Ksh.250,000 as security in Court. Counsel contended that this sum is fair, just and reasonable. Reliance was placed in **Samvir Trustee Limited v Guardian Bank Ltd [2007]eKLR** where it was held that the role of security is not to punish the appellant but to equitably balance the appellant's right of appeal against the Respondent's right to enjoy the fruits of a judgment.
17. Comparable reliance was placed in **Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR)** and **Gitahi & another v Warugongo [1988]eKLR**.

Petitioner's Submissions

18. Mereka and Company Advocates for the Petitioner, filed submissions dated 28th November 2025. On the onset, Counsel submitted that the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014)eKLR** outline the principles for grant of an order of stay of execution as follows:

“Before a Court grants an order for stay, the Appellant or intending Appellant must satisfy the Court that the appeal is arguable and not frivolous, that the appeal would be rendered nugatory if the stay orders are not granted and that it would be in public interest to do so.”

19. According to Counsel, the Respondent has failed to satisfy this threshold. First, Counsel pointed out that the Respondent has not demonstrated the substantial loss that will be suffered if the order sought is not issued. Relying in the case of **James Wagalwa and another v Agnes Naliaka Cheseto(2012)eKLR**, Counsel submitted that the Court guided that mere inconvenience, delay or hypothetical loss is an insufficient basis for grant of this order.
20. In this case, Counsel stated that the Respondent's claim that he will suffer substantial loss if he pays the decretal sum is unfounded as he can be compensated by an award of damages. Consequently, Counsel stressed that the Respondent had failed to show the substantial loss he claims by adducing the requisite evidence.

21. Furthermore, Counsel emphasized that the Respondent's position as Chairman is time bound as lapses annually. Counsel pointed out that the Respondent has not demonstrated that he has a stable or permanent income to pay the decretal sum. On the flipside, Counsel submitted that the Petitioner in his affidavit had demonstrated his financial capability. Counsel noted that the Court in **Kenya Shell Limited v Benjamin Karuga Kibiru & another (1986) KECA 94 KLR** stated that this is a sufficient demonstration of the ability to meet any refund obligation.
22. Moving on, Counsel submitted that the Respondent's Application had not been filed in a timely manner having been filed on 19th September 2025. Counsel added that this was not the first time the Respondent had been indolent, as is evident from the Respondent's consistent failure to comply with Court directions.
23. Reliance was placed in **Namukana v Barasa and 4 others [2025] KEELC 337 (KLR)** where it was held that:
- "In view the delay was not sufficiently explained, even though the period of less than six months may appear to be short. Even when there is a delay of a day which is not sufficiently explained, the Court may not exercise discretion to extend time just because the duration is short. There must be a reasonable explanation given to the Court's satisfaction after which it will consider*

whether the period of delay is short or unreasonably long.”

24. Further reliance was placed in **Machira t/a Machira & Company Advocates v East African Standard [2002] KEHC 1167(KLR)**.
25. On the issue of security, Counsel submitted as deponed that the Respondent’s offer of Ksh.250,000/- is insufficient as the decretal sum stands at Ksh.370,150/- which is exclusive of accruing interest and further costs arising from the appeal process. Counsel submitted that Courts have consistently held that security must be sufficient to safeguard the decree holder from prejudice during the pendency of the appeal.
26. Counsel also submitted that contrary to the Respondent’s claim his appeal would not be rendered nugatory as this condition only applies where the subject matter is likely to be destroyed, wasted or lost irreversibly, which is not the case herein. Counsel noted that the nature of the appeal is monetary in nature and thus can be refunded if at all the Respondent’s appeal succeeds.
27. Reliance was placed in **Haki na Sheria Initiative v Inspector of Police and 2 others; Kenya National Human Rights and Equality Commission (Interested**

Party) Petition (Application)No.5 (E007 of 2021) where it was held that:

“On the nugatory aspect, the concern is whether what is sought to be stayed if allowed to happen is reversible; or if it is not reversible, whether the damages will reasonably compensate the party aggrieved.”

28. Counsel equally argued that the Respondent’s appeal is not arguable as the issues raised were conclusively determined by this Court in its Judgment. Reliance was placed in **East African Development Bank v Hyundai Motors Kenya Limited 2006 KECA 369(KLR)** where it was held that:

“First an applicant must show a prima face case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

Analysis and Determination

29. There is only one singular issue for determination, namely:

Whether this Court should allow the Respondent’s Application

30. The legal foundation for making an application for stay pending appeal in **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and**

Procedure Rules, 2013 is under **Rule 32** which provides as follows:

Stay pending appeal.

32. (1) *An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.*
 - (2) *An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.*
 - (3) *A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.*
31. The principles for grant of an order of stay of execution pending appeal are also well settled by the Courts. In **RWW vs EKW [2019] KEHC 6523 (KLR)** the Court stated thus:

“8. The purpose of an application for stay of execution pending an 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 and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of

the Appellant with those of the Respondent...”

32. The Court went on to observe as follows:

“10. I have proceeded to determine whether the conditions stipulated for grant of stay have been met. On whether the appellant will suffer substantial loss, I am reminded of the sentiments of Gikonyo J in James Wangalwa & another v Agnes Naliaka Cheseto Misc Application No 42 of 2011 [2012] eKLR.

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein Vs Chesoni [2002] 1KLR 867, and also in the case of Mukuma Vs. Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of

Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

33. Equally, in **Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu [2022] KEHC 1845 (KLR)** the Court observed as follows:

“The principles upon which the court may stay the execution of orders... were enunciated in *Butt vs Rent Restriction Tribunal [1979]* the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements..."

34. Furthermore, the discretionary nature of this order was expounded on by the Court of Appeal in **Absalom Dova v Tarbo Transporters [2013] eKLR** as cited in **Al-Riaz International Ltd & another vs Munini (2023) KEHC 22221 (KLR)**:

"...Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory... This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in Absalom Dova v Tarbo Transporters [2013] eKLR while enunciating this principle stated as follows: -"... The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of

the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

35. The Respondent/Applicant in the instant Application argues that issuance of an order of stay of execution is necessary as his appeal maybe rendered nugatory if not granted. On the flipside, the Petitioner asserts that this is not a plausible reason, as he is more than capable to refund the decretal sum if at all the Respondent’s appeal is successful.
36. For the order to issue, three elements must be proved, as is discernible from the above authorities, that is, the *Application must have been filed without unreasonable delay; substantial loss must be demonstrated and, security must be provided.*
37. The Respondent/Applicant filed the instant Application on *19th September 2025*. The Judgment was delivered on 20th March 2025. That was thus a six months delay. The period provided by the rules for filing the application is within 14 days of delivery of the judgment. The Respondent/Applicant does not explain the reason for the six-month delay. In the

absence of any explanation, a six months delay is unreasonable.

38. As regards substantial loss, it has been held to be the cornerstone of the Application for stay. In this matter, the Respondent argued that possibly execution proceedings may commence rendering his appeal nugatory. No demonstration of the substantial loss likely to be suffered was shown other than a general statement that the Petitioner's would likely not repay the decretal sum if the appeal succeeds.
39. The apprehension alone cannot be evidence of substantial loss. The petitioner has in fact refuted the claim he is an indigent judgment creditor. He instead argued that that he is a respected advocate who would be more than able to refund the decretal sum should the appeal succeed. The evidential burden shifted to the Respondent to demonstrate otherwise and this was not done.
40. Finally, the Respondent indicated his willingness to deposit Ksh.250,000. This is less than the amount now due and owing from the judgment debtor. The full amount due to the Petitioner in view of costs awarded is Ksh.370,150 in light of the Ruling dated 24th September 2025. This excludes further costs that could arise in the appeal.

41. An appeal is a Party's right but it does not automatically entitle the Party to an order of stay of execution. After a careful consideration, I find that the Respondent has not explained the reasons for the delay or proved the likely substantial loss he might suffer since the Petitioner is not an indigent judgment creditor.

42. He has thus not satisfied the threshold for grant of an order of stay. The Application lacks merit and is hereby dismissed with costs.

Dated, signed and delivered virtually at Nairobi this 27th day of January, 2026.

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L N MUGAMBI
JUDGE