



Sieley & 3 others (Suing as the Administrators of the Estate of the Late Nathaniel Kibitok Sieley) v Kenya Commercial Bank Limited & another; Kimutai & another (Third party) (Civil Suit 23 of 2019) [2026] KEHC 849 (KLR) (30 January 2026) (Ruling)

Neutral citation: [2026] KEHC 849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 23 OF 2019
JRA WANANDA, J
JANUARY 30, 2026**

BETWEEN

**ELIZBETH CHELIMO SIELEY 1ST PLAINTIFF
ANDREW KIPROP BITOK SIELEY 2ND PLAINTIFF
JONATHAN KIBIWOT'T BITOK SIELEY 3RD PLAINTIFF
PETER KIPKORIR BITOK 4TH PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE
NATHANIEL KIBITOK SIELEY**

AND

**KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT
THE BRANCH MANAGER KENYA COMMERCIAL BANK, NANDI HILLS
BRANCH 2ND DEFENDANT**

AND

**LUKE KIMUTAI THIRD PARTY
THE ATTORNEY GENERAL THIRD PARTY**

RULING

1. I delivered a Judgment in this matter on 19/09/2025, in which I made final orders as follows:

“77. The upshot of the foregoing is that this Court finds and holds that the Plaintiffs have proved their claims against the 1st and 2nd Defendants to the



required standard. As a consequence, I enter Judgment, against the 1st and 2nd Defendants, jointly and severally, as follows:

- i) An order hereby issues that the Defendants do reinstate the bank Account No. 0XXXXXXXXXX81/1XXXXXXXXXX99, whether under the same account number or a new one, but on the same terms and conditions as before, and to restore the sum of Kshs 24,069,373.60/- illegally and fraudulently withdrawn therefrom on 14/02/2019.
- ii) The above sum shall also attract interest from the said 14/02/2019 at the same rate at which the funds were attracting interest before the same was fraudulently paid out to the 1st Third Party.
- iii) The Plaintiffs are also awarded costs of this suit to be borne by the Defendants.”

2. Now before Court is the Defendants’ post-Judgment Notice of Motion dated 7/10/2025 filed through Messrs Manani, Lilan, Mwetich & Co. Advocates. It seeks an order staying execution of the Judgment pending the Defendants’ Appeal intended to be filed at the Court of Appeal.
3. The Application is supported by the Affidavit sworn by one Bonnie Okumu said to be the 1st Defendant’s Group General Counsel. He deponed that the Defendants have filed a Notice of Appeal against the Judgment, which intended Appeal is solid and arguable, that the Defendants are ready and willing to abide by any directions that the Court may give in respect thereto. He also urged that the Application has been brought without undue delay.
4. The Application is opposed by the Plaintiffs by way of the Replying Affidavit sworn by the 2nd Plaintiff, Andrew Kipkorir Bitok Stanley on 24/10/2025, and filed through Messrs Z.K. Yego & Co. Advocates. The 2nd Plaintiff deponed that the Defendants have not demonstrated, as required under Order 45 Rule 6 of the Civil Procedure Rules, the substantial loss they might suffer should execution proceed, and that stay of execution cannot be granted on mere apprehension. He urged further that the Defendants have also failed to deposit security, and that the Plaintiffs, being the successful litigants, shall suffer prejudice should the Application be allowed. He also asserted that the estate has been deprived of funds in the Plaintiffs’ deceased’s father’s account for the last 6 years due to the Defendants’ fraudulent action in breaching bank-customer fiduciary relationship, and a stay order would only further exacerbate the prejudice. He deponed further that the Plaintiffs are engaged in meaningful economic activities, and are capable of refunding the decretal dues in the unlikely event that the Appeal succeeds.
5. The parties then filed written Submissions. The Defendant’s Submissions is dated 4/11/2025, while the Plaintiffs’ is dated 18/11/2025. I do not deem it necessary to reproduce the Submissions as the same basically reiterate the factual matters already captured in the respective Affidavits referred to above, and restate, supported with cited case law, the known principles applicable in considering Applications of the nature herein.

Determination

6. The issue for determination is “whether an order of stay of execution of the decree herein pending Appeal should be issued”.



7. The Court’s power to grant orders of stay of execution pending Appeal is provided under Order 42 Rule 6(2) of the Civil Procedure Rules as follows:

“No order for stay of execution shall be made under sub rule (1) unless—

- a. the Court is satisfied that substantial loss may result to the Defendant 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 Defendant.”

8. Therefore, an Applicant for stay of execution of a decree or order pending Appeal is required to satisfy the conditions set out above. The first is to demonstrate that the Application has been made “without unreasonable delay”, the second is to demonstrate the “substantial loss” that may be suffered by the Applicant unless the order is granted, and the third is the Applicant’s willingness or its readiness to “deposit security” for due performance of the decree or order.

9. The first condition that I need to consider is therefore whether the Application has been made “without unreasonable delay”. In this case, the Judgment was delivered on 19/09/2025, and the instant Application was filed on 7/10/2025, less than 3 weeks later. There is therefore no doubt that the Application was brought timeously, and without delay.

10. The second condition is whether the Defendants would suffer “substantial loss” should the order not be granted. As to what constitutes “substantial loss”, F. Gikonyo J in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated as follows:

“ 11. 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 N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V 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.”

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.”



11. Further, Platt, Ag. JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR, expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. 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”.

12. On his part, Gachuhi, Ag. JA (as he then was) in the same case, stated as follows:

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

13. The Judgment sum herein is for the sum of Kshs 24,069,373.60 plus costs and interest computed from 14/02/2019. Although the 1st Defendant is a large, if not the largest, bank in Kenya, and the amount in question might sound like loose-change to it if one is to consider the bank’s annual turnover, to the ordinary “mwananchi”, it cannot be disputed that the amount is colossal and enormous by any standards. According to the Defendants, there is doubt over the Plaintiffs’ ability to refund the money should it be paid to them and subsequently, the Judgment is overturned on Appeal. On the issue a decree-holder’s ability to refund the decretal sum, the Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another*, Nairobi Civil Application No. 238 of 2005 guided as follows:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge - see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.

The 1st respondent swore the replying affidavit in this matter and in Paragraph 1 thereof, he swore that he is the Chief Executive Officer of and the principal shareholder in the second respondent. He did not disclose the value of his share-holding in the 2nd respondent; nor did he say if he earns a salary and if so how much. In Paragraph 11 of the replying affidavit, the 1st respondent set out the contracts in which the 2nd respondent was engaged in but the values of those contracts were not disclosed. On the material before us, the means or resources of the 1st respondent remain wholly unknown and in those circumstances, we agree with Mr. Laibuta that if the decretal sum was paid over to the 1st or even to the 2nd respondents, the two might not be able to repay it back and in that case, if the applicant’s intended appeal were to succeed, that success would be rendered nugatory.”



14. Applying the above principles to this case, I find that the Plaintiffs have not provided any evidence to demonstrate their ability to refund the decretal sum should they be paid and the Appeal eventually succeeds. The fact that the 1st Defendant may be a large bank does not in any way deny it protection from this Court from exposure to possible financial loss. I also take judicial notice of the fact that the 1st Defendant is a publicly listed institution with significant private shareholding, but also with the Kenyan government holding a substantial shareholding. In the circumstances, I am satisfied that execution before the Appeal is determined may result into a significant loss to investors and also the taxpayer should the Appeal eventually succeed. The description I have given no doubt amounts to “substantial loss” as contemplated under Order 42(6)(2)(a) of the Civil Procedure Rules. In view thereof, I am satisfied that the Defendants have satisfied and/or met the threshold required for grant of Applications of the nature herein. Consequently, I grant stay of execution pending Appeal as prayed.
15. On the third condition, deposit of “security”, the Defendants have alluded that they are ready and willing to comply with the conditions that the Court may impose, and have proposed to deposit a Bank Guarantee. Taking into account all relevant factors and in striving to maintain a balance between the interests of the respective parties, I will impose upon the 1st Defendant the condition that for the order of stay of execution to remain in force, it shall execute a bank guarantee as security for performance of the decree. Considering that costs and interest are yet to be computed, appreciating that the principal Judgment sum is Kshs 24,069,373.60, and being cognisant of the reality that the 1st Defendant, being a large bank that has been in existence for many years, is believably well secured, and is unlikely to suddenly just vanish or disappear from the face of earth, I will round off the amount to be secured by the bank guarantee to a sum of Kshs 30,000,000/-.
16. However, although recognizing that the Defendants may not be in full control of the speed within which the Court will supply them with transcripts of the typed proceedings for purposes of filing the Record of Appeal, to ensure that the Defendants do not abuse the order of stay of execution granted herein by falling into a deliberate slumber of inaction, or lessen their efforts to expedite filing of the Record of Appeal, I will limit the duration of the stay order to a period of eight (8) months in the first instance, should they fail to lodge the Record of Appeal within such period. The Defendants will therefore have to return for extension of the order if they will have good grounds for failing to file the Record of Appeal by then.

Final Orders

17. The upshot of the above is that the Application succeeds. Consequently, I order as follows:
 - i. The Applicants’ Notice of Motion dated 7/10/2025 is hereby allowed in terms of prayer 3 thereof. Accordingly, pending the hearing and determination of the Defendant’s intended Appeal, an order is hereby issued staying execution of the decree arising the Judgment entered herein on 19/09/202, but on the following conditions :
 - a. that the 1st Defendant shall, within a period of thirty (30) days from the date hereof , execute and file in Court a bank guarantee in the Judgment sum of Kshs 30,000,000/- from a reputable commercial bank, as security for performance of the Decree herein, and
 - b. The Record of Appeal is filed or lodged at the Court of Appeal within a period of eight (8) months .



- ii. In the event of default in complying with any of the conditions given hereinabove within the timelines stipulated, the orders of stay of execution shall lapse and the Plaintiffs shall be at liberty to execute the Decree.
- iii. However, should the Defendants fail to file or lodge the Record of Appeal at the Court of Appeal within the said period of eight (8) months from the date hereof, they shall, upon expiry of that period, be at liberty to return and move this Court for extension of that period should they have good reasons for failing to meet that set timeline.
- iv. Costs of the Application shall be borne by the 1st Defendant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 30TH DAY OF JANUARY 2026

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WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Ms. Nasongo h/b for Mr. Yego for the Plaintiff

N/A for other parties

Court Assistant: Brian Kimathi

