

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPELLATE DIVISION
HCCA NO. E1306 OF 2024

BERNARD TONNY ATANCHA
APPLICANT/APPELLANT
VERSUS
EZEKIEL LETEPES LEKARAM
RESPONDENT

RULING

Background

1. The Respondent sued the Appellant before the trial court seeking payment of the balance of the purchase price arising from a motor vehicle sale transaction that they entered into on 14th December 2014. The trial court entered judgment in favour of the Respondent, finding that the agreed purchase price was Kshs. 4,000,000 out of which only Kshs. 800,000 had been paid.
2. The Applicant's appeal to this Court was heard and dismissed with costs in its entirety on 18th September 2025 thereby setting the stage for the present application wherein the Applicant seeks to halt execution of that judgment pending a second appeal.

The Application

3. This ruling is in respect to the application dated 7th October 2025, seeking stay of execution of the judgment of this Court delivered on 18th September 2025, pending the hearing and

determination of an intended second appeal to the Court of Appeal.

4. The Applicant has already lodged a Notice of Appeal and contends that unless stay is granted, execution will proceed, thereby rendering the intended appeal nugatory. The Respondent opposed the application.

Applicant's Submissions

5. The Applicant submits that the intended second appeal raises bona fide and arguable questions of law. He isolated the said issues to include misapplication of evidentiary burdens in oral contracts, improper reliance on uncorroborated testimony of a non-contracting party and the failure by both courts to consider the doctrine of restitution and unjust enrichment following rescission.
6. It was submitted that unless stay is granted, execution for Kshs. 3,200,000 plus costs and interest will proceed thereby irreversibly altering the status quo and rendering the appeal nugatory.
7. The Applicant argued that the Respondent's financial ability to refund the decretal sum, if the appeal succeeds, is unknown and that he is willing, in good faith, to deposit Kshs. 1,097,000, being the undisputed balance, as security for due performance. He added that the application was filed timeously and satisfies all the requirements of Order 42 Rule 6 of the Civil Procedure Rules (CPR).

Respondent's Submissions

8. The Respondent opposes the application on the grounds that this Court is functus officio, having finally determined the appeal on 18th September 2025, and therefore lacks jurisdiction to entertain the present application.
9. The Respondent states that the Applicant has no arguable appeal, having consistently denied indebtedness throughout the proceedings and only admitting liability after dismissal of the appeal.
10. It was submitted that the intended second appeal is a delaying tactic intended to deny the Respondent the fruits of a judgment obtained after more than twelve years of litigation.
11. The Respondent noted that no evidence has been tendered to show that the Respondent is unable to refund the decretal sum.
12. The Respondent proposed that if stay were to be considered at all, then the Applicant should first pay the admitted sum with interest, and deposit the balance as security.

Issues for Determination

13. I have carefully considered the pleadings filed herein and the parties' rival submissions. I find that the following issues fall for my determination: -

- a) Whether this Court is functus officio and lacks jurisdiction to hear the application.***
- b) Whether the Applicant has demonstrated an arguable intended appeal.***

- c) Whether the Applicant has shown that the intended appeal will be rendered nugatory if stay is not granted.**
- d) Whether the Applicant has satisfied the conditions for stay of execution under Order 42 Rule 6 CPR.**

Analysis and Determination

Functus Officio

14. The doctrine of functus officio is a principle of finality which holds that once a court has fully exercised its jurisdiction and rendered a final decision on the merits, it lacks the authority to reopen, revisit, or alter that decision. The rationale of the doctrine is to promote certainty, prevent endless litigation, and safeguard the integrity of judicial decisions.
15. In ***Raila Odinga & 2 Others vs. Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR**, the Supreme Court held that a court becomes functus officio once it has performed all its duties in a matter and cannot re-engage with it except as provided by law.
16. It is however settled that the doctrine does not bar a court from addressing ancillary, incidental, or collateral matters, such as correction of clerical errors, taxation of costs, enforcement mechanisms, or applications for stay of execution pending appeal, which do not amount to a re-determination of the merits. This means that the court retains residual jurisdiction to entertain ancillary matters such as stay of execution pending appeal.

17. In ***Telkom Kenya Ltd vs. John Ochanda [2014] eKLR***, the Court of Appeal held that the doctrine does not prevent a court from dealing with collateral issues such as stay of execution pending appeal.
18. Accordingly, this Court finds that it retains jurisdiction to determine the present application.

Whether the Intended Appeal is Arguable

19. An arguable appeal is not one that must succeed, but one that raises at least a single bona fide point of law. (See ***Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR***).
20. I note that the Applicant's proposed grounds of appeal touch on the legal treatment of oral contracts, burden of proof, and restitutionary remedies. I find that these are questions of law which, prima facie, fall within the province of a second appeal under section 72 of the Civil Procedure Act.
21. I am therefore satisfied that the intended appeal is arguable but I hasten to add that I make no finding on the ultimate merit of the appeal.

Whether the Appeal Will Be Rendered Nugatory

22. The cornerstone of stay is substantial loss. In ***Kenya Shell Ltd vs. Kibiru [1986] KLR 410***, the Court of Appeal held that: -

“Substantial loss is the cornerstone of both jurisdictions for granting a stay. Without it, there is no basis for granting stay.”

23. The Applicant asserts that execution will expose him to attachment, sale of assets, and irreversible loss. I however note that the decree herein is purely monetary. In ***National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike [2006] eKLR***, the Court held that : -

“Once an applicant expresses reasonable fear that a respondent may not refund the decretal sum, the evidential burden shifts to the respondent to show ability to repay.”

24. In the present case, the Respondent asserts that he is a man of means, but no documentary proof of financial capacity has been placed before the Court. In the circumstances, the Court is persuaded that the nugatory aspect of the appeal has been sufficiently demonstrated.

Security for Due Performance

25. Order 42 Rule 6(2)(b) of the CPR makes provision of security mandatory. In ***Focin Motorcycle Co. Ltd vs. Ann Wambui Wangui [2018] eKLR***, it was held that the purpose of security is to guarantee the due performance of the decree and not to punish the judgment debtor.

26. In the instant case, the Applicant has offered to deposit Kshs. 1,097,000, being the undisputed sum. My finding is that considering the long history of this matter and the competing interests, a conditional stay would best serve the interests of justice.

27. Consequently and in balancing the Applicant’s right of appeal against the Respondent’s right to enjoy the fruits of judgment, and guided by Order 42 Rule 6 CPR, I find that the Applicant has partially satisfied the threshold for stay.

28. Accordingly, the Court makes the following orders:

a) Stay of execution of the judgment delivered on 18th September 2025 is hereby granted but on condition that the Applicant shall, within 30 days of this ruling:

- i) Pay to the Respondent the admitted sum of Kshs. 1,097,000; and***
- ii) Deposit the balance of the decretal sum in an interest-earning joint account in the names of the parties' advocates, or in court, as security.***

b) In default of compliance, the stay shall automatically lapse.

c) Costs of the application shall abide the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2026.

HON W. A. OKWANY
JUDGE

In the presence of
No appearance for Appellant
Miss Njoroge for Respondent
Abdirzak - Court Assistant