

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: GATEMBU, MUMBI NGUGI & NYAMWEYA, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E424 OF 2021

BETWEEN

KIMANI WALTER

alias

WALTER NGUGI KIMANI.....APPELLANT/APPLICANT

AND

FRED ONYONI NYABUTO.....RESPONDENT

(Being an appeal from the Judgment and Order of the High Court of Kenya at Nairobi (B. Thuranira Jaden, J.) dated 26th June 2019

in

HCCC No. 358 of 2014)

RULING OF THE COURT

1. The respondent, Fred Onyoni Nyabuto (Nyabuto) was on 26th October 2012 knocked down by a motor vehicle owned by the appellant/applicant Kimani Walter alias Walter Ngugi Kimani (Kimani), and sustained injuries. Thereafter, Nyabuto filed suit against Kimani before the High Court at Nairobi, and in a judgment delivered on 26th June 2019, the High Court (***B. Thuranira Jaden, J.***) awarded Nyabuto general damages of Kshs.5,000,000.00 and special damages of

Kshs.13,548,715.00 subject to 30% contribution hence a total award of Kshs.12,983,101.00.

2. Dissatisfied with the judgment, Kimani lodged **Civil Appeal No. E424 of 2021** against Nyabuto in which the present applications are made. Nyabuto cross appealed. To forestall execution of the High Court judgment pending the hearing and determination of the appeal to this Court, Kimani moved this Court vide **Civil Application No. E119 of 2021**. Based on that application, the Court made an order on 6th November 2023 staying execution of the High Court judgment conditional upon Kimani depositing Kshs.3,000,000.00 in court within 45 days. That order was complied with and the amount of of Kshs.3,000,000.00 was deposited with the Court.
3. The appeal, being **Civil Appeal No. E424 of 2021**, was eventually heard and determined by this Court in a judgment delivered on 28th March 2025. In that judgment this Court set aside the High Court award of Kshs.12,983,101.00 and substituted therefor an award in favour of Nyabuto for a total sum of Kshs.5,195,800.00.

4. In so far as this Court is concerned, the matter did not, as one might have expected, end there. There are now two applications before us that are the subject of this ruling. The first application is dated 19th May 2025 and is filed by Nyabuto and is supported by his affidavit. He seeks an order for the release of Kshs.3,000,000.00 that was deposited in Court by Kimani's advocates. Kimani resists that application through his replying affidavit sworn on 18th June 2025.
5. The second application, dated 12th June 2025 is filed by Kimani and is supported by his affidavit. He seeks an order of stay of execution of the decree emanating from the judgment of this Court pending the hearing and determination of a declaratory suit he has filed against Xplico Insurance Company Limited before the High Court. In that suit, Kimani is seeking a declaration that the insurer of his vehicle which was involved in the accident is liable to settle the decretal amount. The second application is resisted by Nyabuto who filed a replying affidavit in opposition sworn on 20th August 2025.
6. We heard the two applications on 27th August 2025. Learned counsel, **Miss. Munyua**, held brief for **Mr. Nyasae** for

Nyabuto

while learned counsel, **Mr. Khavagali**, appeared for Kimani. Counsel relied on their respective written submissions in respect of the two applications. We have duly considered the applications, the affidavits and the submissions.

7. In relation to the first application dated 19th May 2025, Nyabuto's case as borne out by his affidavit and submissions by counsel is that upon delivery of the judgment by this Court on 28th March 2025, the advocates for Kimani refused to sign a consent for the release of the money deposited in court; that Nyabuto ought not to be delayed from enjoying the fruits of the judgment; that in the circumstances, it is in the interest of justice that an order for the release of the deposit of Kshs.3,000,000.00 which secured the decretal amount be released; that the said amount was deposited by Kimani to demonstrate his capability to satisfy the decretal amount; that Nyabuto is not privy to the contract between Kimani and his insurer and Kimani's pursuit of his insurer to satisfy the decretal amount should not be a bar for the release of the deposit.
8. Kimani's case on the other hand as borne out by his replying affidavit and submissions by counsel, while acknowledging

that he deposited Kshs.3,000,000.00 in court pursuant to an order of the Court in order to secure a stay of execution of the High Court judgment pending appeal, asserts that his motor vehicle involved in the accident with Nyabuto that gave rise to the claim was insured by Xplico Insurance Company Limited; that he has sued the insurer seeking declaratory orders for the insurer to settle the decretal amount; and that an order for the release of the amount deposited in court will be tantamount to execution against Kimani and will go against the essence of the insurance indemnity intended under the Insurance (Third Party Motor-Vehicle Risk) Act.

9. The only issue for determination with respect to the first application dated 19th May 2025 is whether an order for the release of Kshs.3,000,000.00 should be granted. In that regard, the order made by the Court on 6th November 2023 based on Civil Application No. E119 of 2021 filed by Kimani was as follows:

“We hereby grant stay of execution of the trial court's judgment on the condition that the sum of Kshs. 3,000,000.00 be deposited in court within 45 days from the date hereof, failing which the notice of Motion dated 21st April 2021 shall stand dismissed.”

10. The order for stay of execution was undoubtedly an interim measure to protect Kimani from execution of the High Court judgment pending the hearing and determination of the appeal. The appeal has since been heard and determined. In our view, there can be no justification for the continued retention or holding by the Court of the deposit of Kshs. 3,000,000.00 that was made as security for the due performance of the decree.
11. The argument by Kimani in answer to the first application that the deposit should not be released to await the outcome of his suit against his insurer is also the subject of the second application dated 12th June 2025 in which he seeks an order to stay execution of the decree emanating from the judgment of this Court.
12. The question that arises regarding that second application and which was urged during the hearing, is whether this Court has jurisdiction to grant the prayers sought. The answer is that the Court, having already heard, and rendered judgment in the appeal, has no mandate to grant the orders sought pending determination of Kimani's declaratory suit pending

before the High Court.

13. It is a notice of appeal or an appeal that clothes this Court with the mandate to entertain an application for stay of execution under rule 5(2) of the Court of Appeal Rules. As stated by the Court in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others [2010] KECA 346**

(KLR):

“It is clear from the provision of Rule 5 that the basic aim is to provide an interim relief where the superior court has determined a matter and the party against whom determination is made has either appealed or intends to appeal. If there is no appeal or no intention to appeal, this court would have no jurisdiction to meddle in a decision made by the superior court.”

14. The declaratory suit by Kimani before the High Court against his insurer is yet to be determined, as far as we can tell, and there is in any event no appeal or intended appeal before this Court based on which the Court can assume jurisdiction. Without jurisdiction, we have no power “to make one more step”. See **Owners of Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Ltd, Civil Appeal No. 50 of 1989 [1989] KECA 48 (KLR).**

15. In the result, the first application dated 19th May 2025 succeeds. We order that the security deposit of Kshs.3,000,000.00 deposited by Khavagali & Kadima Law

Advocates in Court of Appeal **Civil Application No. E119**
of

2021 be released forthwith to the advocates for Fred Onyoni Nyabuto, namely, Ms. Nyasae & Associates Advocates.

16. The second application dated 12th June 2025 is incompetent, it fails and is hereby struck out.

17. Costs of both applications are awarded to Fred Onyoni Nyabuto, the respondent in the appeal.

18. Orders accordingly.

Dated and delivered at Nairobi this 13th day of February 2026.

S. GATEMBU KAIRU, FCIArb, C.Arb.

.....

JUDGE OF

APPEAL MUMBI

NGUGI

REPUBLIC OF KENYA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR