



**Kariuki v Mwangi (Civil Appeal E106 of 2025)
[2026] KEHC 1231 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E106 OF 2025
FN MUCHEMI, J
FEBRUARY 5, 2026**

BETWEEN

JACINTA MUTHONI KARIUKI APPLICANT

AND

LIVINGSTONE W MWANGI RESPONDENT

RULING

Brief Facts

1. The application for determination dated 30th April 2025 seeks for orders of stay of execution in respect of the judgment in Thika SCCCOMM No. E442 of 2024 delivered on 15th July 2024 pending the hearing and determination of the intended appeal.
2. The application is unopposed.

Applicant's Case

3. The applicant states that she is aggrieved by the default judgment delivered on 15th July 2024 in Thika SCCCOMM No. E042 of 2024. He intends to lodge an appeal against the entire judgment. He further states that a decree and certificate of costs was issued in favour of the respondent on 30th July 2024 and the warrants of sale of property in execution of decree for money and warrants of attachment of moveable property in execution of decree for money were issued on 10th December 2024. The applicant avers that she was never served with the pleadings leading to the default judgment. As such, she never had the opportunity to enter appearance or to be heard in the suit.
4. The applicant avers that once she knew of the suit she appointed her advocates who swiftly entered appearance and filed an application seeking orders of stay of any impending process of execution as well as an opportunity to defend the claim. The trial court dismissed the said application.



5. The applicant states that unless stay of execution is granted, she will suffer substantial loss and render the appeal nugatory. the applicant further states that the appeal has high chances of success and will be rendered nugatory if the orders sought are not granted.
6. Directions were issued that parties put in written submissions and the record shows that the applicant complied by filing her submissions however the respondent had not filed his submissions by the time of writing this ruling.

The Applicant's Submissions

7. The applicant submits that the learned adjudicator erred in law and in fact by dismissing her application for stay of execution and for leave to defend without addressing the triable issues disclosed in the annexed draft Response to the Statement of Claim. This omission amounts to a clear misdirection of principle and fact warranting interference by this court.
8. The applicant relies on the case of Mavji Devji & Co. Ltd vs Ruaha Concrete Co. Ltd (2009) KEHC 3666 (KLR) and submits that the Learned Adjudicator failed to establish the test for an order of stay of execution. The applicant further submits that the Learned Adjudicator erred in failing to find that she satisfied the conditions for stay of execution. To support her contentions, the applicant relies on the case of Butt vs Rent Restriction Tribunal [1979] eKLR.
9. The applicant relies on the cases of Patel vs E.A. Cargo Handling Services Ltd [1974] EA 75; Tree Shade Motors Ltd vs D.T Dobie & Another [1995-1998] 1 EA 324 and Sebei District Administration vs Gasyali [1968] EA 300 and submits that her draft defence disclosed triable issues deserving judicial interrogation and thus she was condemned unheard. The applicant further argues that the Learned Adjudicator failed to exercise her discretion judiciously in declining to set aside the default judgment thereby arriving at a decision that is plainly unjust and oppressive.
10. The applicant submits that the Learned Adjudicator erred in failing to consider her submissions which had been duly filed and served on 18th March 2025 which denied her right to be heard under Article 50 of *the Constitution*.

The Law

Whether the application has merit

11. On perusal of the instant application, the application seeks to stay the execution of the judgment entered on 15th July 2024 whereas the memorandum of appeal seeks to appeal the decision dated 17th April 2025. The submissions address stay in regard to the decision dated 17th April 2025. There is currently no appeal lodged in respect of the judgment dated 15th July 2024. As such, there is no appeal and the instant application is premature and cannot stand.
12. That notwithstanding the impugned ruling which is the subject of appeal dismissed the applicant's application for stay of execution, which is in effective a negative order. Notably, the court cannot grant stay of the impugned ruling as it dismissed the applicant's application dated 20th February 2025 which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay –



called a positive order – either an order that has not been complied with or has partly been complied with.

13. Similarly in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga* (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

14. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot grant orders of stay of execution in respect of the said order.
15. Accordingly, the application dated 30th April 2025 lacks merit and is hereby dismissed with no orders as to costs.
16. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5TH DAY OF FEBRUARY 2026.

F. MUCHEMI

JUDGE

