

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E423 OF 2025

-between-

- 1. ALFRED MWANGI**
 - 2. PEGRACE ENTERPRISES LIMITED**
-
- APPLICANTS/RESPONDENTS**

-versus-

MATHEW NDAI MBALUKA
RESPONDENT/APPLICANT

RULING

Background:

- 1. This dispute before this Court arose from the judgment of the Subordinate Court in *Nairobi [Milimani] Commercial Courts Case No. E3282 of 2023* (hereinafter referred to as '**the suit**'). The suit arose from a road traffic accident. In the judgment, damages were in the sum of Kshs. 1,244,294/-, and liability was apportioned between *Alfred Mwangi* and *Pegrace Enterprise Limited*, the Applicants herein, and *Mathew Ndai Mbaluka*, the Respondent herein, in the ration of 80%: 20% respectively.
- 2. The Applicants filed an application dated 14th February 2025 seeking a review of the judgment on the grounds of a mathematical error apparent on the face of the record. Specifically, they contended that while liability was apportioned at 80%: 20%, the deduction made did not reflect the ratio accurately. The trial Court allowed the application for review *via* a Ruling delivered on 19th March 2025. The Learned Magistrate corrected the error and entered a varied judgment in the sum of Kshs. 1,106,039.20.
- 3. Subsequently, the Applicants filed a Memorandum of Appeal on 2nd April 2025, challenging the quantum of damages. Contemporaneously, they filed a Notice of Motion dated 2nd April 2025 seeking a stay of execution pending the hearing and determination of the appeal.

4. In response, the Respondent filed a Notice of Motion dated 23rd April 2025 seeking to strike out the appeal on the grounds that it was filed out of time and is incompetent.
5. This Court is now called upon to determine the foregoing two cross-applications, hence, this ruling.

The Applicants' case:

6. The Applicants, through written submissions dated 25th August 2025, argued that the appeal is competent and filed within the requisite statutory timeline. They submitted that their appeal challenged the judgment of 5th February 2025 as reviewed on 19th March 2025. They submitted that that the filing of the appeal on 2nd April 2025 fell squarely within the 14-day window granted by the trial Court in the Ruling. They contended that the review was limited to an arithmetic error and that the corrected judgment constituted the appealable decree.
7. Regarding the application for stay of execution, the Applicants relied on Order 42 Rule 6(2) of the Civil Procedure Rules and the decision in *Garden Estate Company Limited v Mohamed & 5 others* [2025] KEELC 4880 (KLR) to outline the conditions for granting a stay. It was their case that they will suffer substantial loss if execution proceeded as the appeal would be rendered nugatory.
8. Further to the foregoing, the Applicants submitted that the application was made without unreasonable delay, having been filed barely 14 days after the review ruling.
9. In their Replying Affidavit to the Respondent's motion to strike out the appeal, the Applicants reiterated that the review varied the judgment sum, and logically, an appeal could not be filed against the erroneous figure that was subject to correction.

The Respondent's case:

10. The Respondent opposed the appeal and sought its striking out primarily on a preliminary on the basis of limitation of time. The Respondent submitted that the judgment appealed against was delivered on 5th February 2025. Relying on Section 79G of the Civil Procedure Act, he argued that the appeal ought to have been filed within 30 days of that date.

11. It was his submission that a calculation between 5th February 2025 and 2nd April 2025 is approximately 56 days, rendering the appeal hopelessly out of time. The Respondent relied heavily on the decision of *Martha Wambui -vs- Irene Wanjiru Mwangi & Registered Trustee Mater Hospital* (HCCA No. 286 of 2014) to argue that this a review application is independent of the appeal requirements for the original decision.
12. The Respondent advanced the foregoing argument based on the doctrine of election and submitted that under Section 80 of the Civil Procedure Act, a party must choose between review or appeal. He contended that once the Applicants sought review, they were estopped from appealing the original decree. It was his case that the Notice of Motion dated 2nd April 2025 could not survive an incompetent appeal and must be struck out.
13. Without prejudice to the application for striking out the appeal, the Respondent submitted that if a stay is granted, the decretal sum of Kshs. 1,106,039.20/- should be deposited in a joint interest-earning account.

Analysis:

14. Upon consideration of the objection, the application, the affidavits and rival submissions, the following issues emerge for determination: -
 - i. *Whether the appeal is incompetent for being time-barred.*
 - ii. *Depending on (i) above, the merits of the Applicants' quest for stay of execution pending appeal.*
15. I will now look at the issues.

[a] Whether the appeal is incompetent for being time-barred:

16. Good order dictates that this Court first addresses the Respondent's Motion dated 23rd April 2025 since if the appeal is found to be invalid, then the Applicants' prayer for a stay of execution becomes moot.
17. The gravamen of the Respondent's argument is that time for filing the appeal began running on 5th February 2025, irrespective of the subsequent review application. The

Respondent relied on the *Martha Wambui -vs- Irene Wanjiru Mwangi & Registered Trustee Mater Hospital (supra)* decision to argue that the review process does not arrest the time for appeal. However, the facts in the instant case are distinguishable. In the above case, the Appellant sought to appeal the original order *after* a review application was dismissed. In the present case, the Applicants' application for review was allowed. The Trial Magistrate explicitly varied the terms of the judgment and entered a new judgment sum of Kshs. 1,106,039.20.

18. When a court reviews its own judgment and varies it, even to correct a mathematical error, the operative decree becomes the reviewed judgment. It would be an absurdity for the Applicants to be required to appeal the judgment of 5th February 2025, which contained an error of approximately Kshs 138,000, while simultaneously asking the trial Court to correct it. The Memorandum of Appeal explicitly states that it is an appeal from the judgment delivered on 5th February 2025 and *Reviewed on 19th March 2025*.
19. In addition to the foregoing, it is notable that the trial Magistrate, in the Ruling of 19th March 2025, expressly granted a right of appeal of 14 days. The appeal was lodged on 2nd April 2025, which is exactly 14 days from the date of the reviewed judgment. Therefore, the operative date for the computation of time for the purposes of this appeal is 19th March 2025. Consequently, the appeal was filed within time. The Respondent's reliance on the doctrine of election is misplaced in this context. The Appellant elected to review the error first, succeeded, and is now appealing the substantive quantum of the *corrected* judgment.
20. Accordingly, the Respondent's Notice of Motion dated 23rd April 2025 seeking to strike out the appeal lacks merit and must fail.

[b] The merits of Application for stay of execution pending appeal:

21. Having found the appeal to be competent, I now turn to the Applicants' Motion dated 2nd April 2025, seeking a stay of execution. *Order 42 Rule 6(2), (3), (4), (5) and (6)* of the *Civil Procedure Rules* provides as follows: -

- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant 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 applicant.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with

22. While speaking to the discretionary nature of the power to grant stay, the Court of Appeal in Civil Application Nai 6 of 1979, **Butt -vs- Rent Restriction Tribunal** [1979] eKLR, referred to the decision of Brett, LJ in *Wilson -vs- Church* (No 2) 12 Ch D (1879) 454 at p 459 where it was observed;

*.... It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:"*

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

23. The Learned Judges then crystallized conditions as hereunder;

- a. *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.*
- b. *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.*
- c. *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.*
- d. *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. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.*

24. With the foregoing, this Court now address each of the requirements.

a. Substantial Loss:

25. Substantial loss is the foundational test for the grant of stay. In **Kenya Shell Limited -vs- Kibiru & Another** [1986] KLR 410, the Court of Appeal held as follows: -

... Substantial loss, in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented... It is not enough for the applicant to say that his appeal will be rendered nugatory if he is not granted a stay. He must show what substantial loss he will suffer.

26. Under Order 42 Rule 6(2) of the Civil Procedure Rules the burden of proof lies with an Applicant to demonstrate that he

will suffer substantial loss if stay is not granted. In discharging the foregoing burden, the Applicants relied on the deposition of *Edinah Masanya*, the Legal Claims Officer at Britam General Insurance Kenya Limited, sworn on 2nd April 2025. She explicitly averred that the Respondent is a person of unknown means and expressed a well-founded apprehension that if the decretal sum is paid out, the Respondent would be unable to refund the same should the appeal succeed.

27. The concept of substantial loss in this context is inextricably linked to the nugatory principle. It is not merely about the loss of the money itself, since money can ostensibly be repaid, but rather the irreversibility of that loss. If the decretal sum of over Kshs. 1.1 million is released to the Respondent, and the Applicants subsequently succeed in their appeal to reduce the quantum, they would face the arduous task of recovering the excess funds from a litigant whose financial capacity has been called into question. When such an averment is raised, which it ought to be reasonable, then the burden of proof shifts to the Respondent to prove that the loss is not eminent.
28. This Court has perused the Respondent's replying documents and submissions. He did not proffer any evidence of means to counter the Applicants' contention. Such evidence may take the form of bank statements, asset valuations or any other admissible evidence to that end to rebut the Applicants' apprehension regarding his inability to refund the decretal sum. The assertion by the Appellants that the Respondent is of unknown means, therefore, remained uncontroverted.
29. Drawing from the foregoing, this Court is entitled to make the finding that the threat of the appeal being rendered academic is real and imminent. As cited by the Applicants in ***Garden Estate Company Limited -vs- Mohamed & 5 others***, the Court must ensure that the constitutional right of appeal is not rendered nugatory by the premature execution of a decree against a party with no demonstrated capacity to refund.
30. Consequently, balancing the hardship between the parties, this Court is satisfied that the Applicants have discharged the burden of proving that they stand to suffer substantial loss if the stay is denied and execution proceeds forthwith.

b. Delay:

31. The application was filed on 2nd April 2025, immediately upon the filing of the appeal and within 14 days of the Review Ruling. I find there was no delay.

c. Security:

32. The Applicants expressed willingness to provide security. The Respondent proposed a deposit in a joint interest-earning account. Pursuant to a temporary order issued on 11th April 2025, the Appellant deposited Kshs. 765,297/= in Court, representing 50% of the decretal sum.

33. To balance the interests of both parties, namely; ensuring the successful litigant is not kept out of their money indefinitely while preserving the Applicants' right to appeal, this Court finds that the deposit already made serves as sufficient security at this stage.

Disposition:

34. As I come to the end of this decision, I wish to sincerely apologize for the late delivery of this decision. The delay was largely caused by my engagement at the Judicial Service Commission where I sit as a Commissioner.

35. For the reasons expounded above, this Court makes the following final orders: -

[a] The Notice of Motion dated 23rd April 2025 is hereby dismissed with costs.

[b] The Notice of Motion dated 2nd April 2025 is allowed to the extent that an order hereby issues staying the execution of the Judgment and Decree in *Milimani Commercial Court Case No. E3282 of 2023* pending the hearing and determination of this appeal.

[c] The deposit of Kshs. 765,297/= already made by the Appellant in Court shall stand as security pending the determination of the appeal.

[d] Costs on the Notice of Motion dated 2nd April 2025 shall be in cause.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 13th day of February, 2026.

**A. C. MRIMA
JUDGE**

Ruling virtually delivered in the presence of:

No appearance for the Applicant.

Mr. Kaburu, Learned Counsel for the Respondent.

Michael/Amina - Court Assistants.