



**Nguku v Jamjos Enterprises Ltd (Civil Appeal E126 of 2023)
[2026] KEHC 1222 (KLR) (Civ) (10 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E126 OF 2023**

AC MRIMA, J

FEBRUARY 10, 2026

BETWEEN

ERIC MBIU NGUKU APPLICANT

AND

JAMJOS ENTERPRISES LTD RESPONDENT

RULING

1. On 9th October 2023, this Court delivered its judgment and upheld the trial Court’s findings which awarded, Jamjos Enterprises Ltd, the Respondent herein, Kshs. 2,081,490/-, being debt owing from Eric Mbiu Nguku, the Appellant herein. The Applicant, dissatisfied with this Court’s rendition preferred an appeal to the Court of Appeal in Civil Appeal No. E866 of 2024.
2. Subsequent upon lodging the appeal, the Applicant instituted the instant application by way of Notice of Motion dated 16th May 2025, supported by his affidavit deposed to on a similar date. He anchored it on Order 51 Rule 1, Order 42 Rule 6 of the Civil Procedure Rules and Section 1A,1B, 3A and 63E of the *Civil Procedure Act* and sought the following reliefs:
 1. Spent
 2. Spent.
 3. That pending the hearing and determination of this Application this honourable court be pleased to grant an injunction restraining the Respondent by itself, agents, legal representatives or whomsoever from offering for sale, selling and or transferring the appellant’s properties to any third parties and to throwing him to civil jail.
 4. That pending the hearing and determination of the Appeal before the Court of appeal being Nairobi Civil Appeal No. E866 of 2024, this honourable Court be pleased to grant an



injunction restraining the Respondent by itself, agents, representatives or whomsoever from offering for sale, selling and or transferring the appellant's properties to any third parties and to throwing him to civil jail.

5. That the cost of this application be provided for.
3. In the grounds and Affidavit in support of the application, the Applicant stated that he had already filed an appeal against this Court's decision in the Court of Appeal Nairobi Civil Appeal No. E866 of 2024. He further claimed that the Court of Appeal has already issued directions for the determination of the said appeal on 13th March 2025. He asserted that his appeal has overwhelming chances of success and this Court erred because its judgment failed to consider his defence and the evidence he presented.
4. He argued the matter is urgent because the Respondent has, in the meantime, obtained Warrants of Attachment and instructed Vintage Auctioneers to execute the judgment and unless this Court intervenes, his property will be sold and transferred illegally to third parties. He also claimed that his liberty is at risk due to an impending civil jail. In conclusion, he asserted that his appeal will be rendered nugatory if the execution proceeds, a fact that will expose him to irreparable loss and damage if the stay is not granted.
5. The Applicant argued that it is in the interest of justice that stay be granted to allow him to exhaust his inalienable right of appeal. It was his position that the Respondent will suffer no prejudice if the application is allowed.
6. In his written submissions dated 11th July 2025, the Applicant primarily based his plea on Order 42 Rule 6 of the Civil Procedure Rules. He identified the issues for determination as; whether he had met the legal threshold for a stay, whether his appeal was arguable and at risk of being rendered nugatory, and where the interests of justice lay. The Applicant argued that he had satisfied all three conditions required by Order 42 Rule 6(2). He described substantial loss as the cornerstone of the application. He asserted this loss was not speculative but imminent, as warrants had already been issued. He submitted that if his property was sold at auction, recovery would be practically impossible even if his appeal later succeeded. Furthermore, he argued that being incarcerated in civil jail would be a direct violation of his liberty and would, by itself, constitute substantial loss. To support his position, the Applicant cited the case of *Ena Investment Limited -vs- Benard Ochau Mose & 2 Others*.
7. It was his contention that the application was filed timeously. He portrayed himself as having been vigilant and diligent in pursuing his appeal, stating that there had been no indolence or delay on his part. As regards security, he was willing and able to provide such security as the Court might direct, positioning this as a demonstration of good faith rather than an admission of liability.
8. Further to the foregoing, the Applicant contended that his appeal before the Court of Appeal was not frivolous. He claimed it raised weighty and substantial legal and factual issues that merited judicial review, including an alleged failure by the previous courts to properly evaluate evidence. He reiterated that if the stay was denied, the subsequent execution would extinguish the substratum of the appeal, leaving the appellate court to decide on a purely abstract or academic question. He argued, such state of affairs would effectively render his constitutional right to a fair hearing and access to justice meaningless. He urged this Court to conduct a balancing act, weighing his right to appeal against the Respondent's right to the judgment. He submitted that the balance of convenience clearly tilted in his favour.
9. He further argued that denying the stay would cause him irreparable harm by enforcing a judgment that might be overturned. Conversely, he submitted that the Respondent would suffer no prejudice if the stay was granted. The Applicant's reasoning was that the decree would remain preserved and the Respondent would be fully protected by the security he had offered to furnish.



10. Eric Mbiu Nguku, opposed the application through concise Grounds of Opposition dated 28th May 2025. He claimed that this Court is functus officio having completed its duties regarding this matter when it dismissed a similar application from the Applicant on 20th March 2025. The Respondent contended that the matter is now before the Court of Appeal and the Applicant should have filed any application for a stay of execution in the Court of Appeal, not the High Court. He urged the court to dismiss the Application with costs.
11. In his written submissions dated 22nd July 2025, the Respondent reiterated that the High Court has already performed its function regarding a stay of execution because it previously dismissed a similar Notice of Motion from the Applicant dated 14th November 2024, on 20th March 2025. The Respondent submitted that the Applicant was improperly asking the High Court to sit in on its own appeal. He asserted that the correct and properly seized forum is the Court of Appeal, where the Applicant has already lodged an appeal.
12. The Respondent referred to Order 42 Rule 6 (1) of the Civil Procedure Rules, to advance the argument that once the court appealed from has refused a stay, the only recourse for the aggrieved party is to file a similar application in the court to which the appeal is preferred. While referencing the longstanding case in Owners of Motor Vessel “Lilian S” -vs- Caltex Oil (Kenya) Ltd (1989), he emphasized that Jurisdiction is everything and this court lacked the power to proceed.
13. Having considered the application and the rival submissions, the following issues crystallize for determination:
 - i. Whether this Court has jurisdiction to entertain the application.
 - ai. Depending on (i) above whether the Applicant has satisfied the conditions for the grant of a stay of execution under Order 42 Rule 6 of the Civil Procedure Rules.
14. I will now deal with the above issues. On the first issue as to whether this Court has jurisdiction to entertain the application, an issue of jurisdiction is a preliminary and threshold matter. The Respondent argued that an application dated 14th November 2024 was dismissed on 20th March 2025.
15. Due to the centrality of the issue, it is important to reproduce the prayers in the Notice of Motion dated 14th November 2024. The Applicant prayed for orders as hereunder;
 1. That the application herein be certified urgent and service thereof be dispensed with.
 2. That this Honourable Court be pleased to enlarge time and extend the orders of stay issued on 9th October 2022 by Hon. Justice Alexander Muasya Muteti and/or maintain status quo pending the hearing and determination of this application and appeal.
 3. That there be a stay of execution of the ex-parte judgment and decree entered on 24th November 2022 by Hon. E.M. Kagoni (PM) in CMCC No. E10650 of 2016 and further extension of the stay orders issued on 9th October 2024 by Hon. Justice Alexander Muasya Muteti against the Applicant herein together with all the consequential orders pending the inter-partes hearing and determination of the appeal.
 4. The costs of the application be in the cause.
16. This Court appreciates its Ruling of 20th March 2025 where it noted that the Applicant herein was seeking time within which to satisfy the decree in instalments. Thus, the application for stay was misconceived and it suffered a false start. Accordingly, the application was dismissed. It is, therefore, immediately discernible that the Applicant’s application for stay was not considered on merit. The



dismissal was informed by the fact that the orders sought were at variance with the applicant's depositions. Whereas the doctrine of *functus officio* holds an important judicial function of ensuring finality of matters, in this case, it is not applicable. The Applicant has the right under Order 42 rule 6 to seek stay of execution from the Court appealed from, as he pursues an appeal.

17. In the end, this issue is answered in the affirmative.
18. The second issue is whether the Applicant has satisfied the conditions for the grant of a stay of execution. An application for stay of execution is governed by Order 42 Rule 6(2) of the Civil Procedure Rules. It provides a three-pronged test that an Applicant must satisfy being proof of substantial loss, the issue of delay and the aspect of security.
19. In considering the requirements above, this Court's duty, as was observed by the Court of Appeal in *Butt -vs- Rent Restriction Tribunal* [1982] KLR 417, is to conduct a balancing act, by weighing the Applicant's right to appeal against the Respondent's right to the fruits of their judgment. I will, hence, consider them in turn. The issue of substantial loss is the cornerstone of an application for stay. The Applicant bears the burden of demonstrating a specific, tangible loss that goes beyond the mere fact that he has to pay the decretal sum.
20. The Applicant claimed that warrants of attachment have been issued and auctioneers instructed. In this Court's view, such action moves the threat of loss from speculative to imminent. Courts have consistently held that where execution by sale is imminent, substantial loss is easier to demonstrate. 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.
21. This Court has perused the annexures in support to the Applicant's case. Indeed, the Respondent was actively pursuing the issuance of warrants of attachment. There is the letter to the Executive Officer dated 2nd April 2025 where the Respondent sought a re-issuance of Warrants of attachment and sale to Vintage Auctioneers. In this Court's view, the Applicant has met this burden by specifying the loss which is the likely sale of his property. If it happens, his appeal, even if successful, would be a mere academic victory. Further, the Applicant raised the threat of committal to civil jail. The deprivation of a citizen's liberty is, by its very nature, one of the most substantial losses the law can recognize. In *M. M. -vs- R. M.* [2018] eKLR, the Court remarked thus: -

Deprivation of a person's liberty, even for a single day, is a matter that the court must guard against. Committal to civil jail is one of the consequences of failure to satisfy decree. It results in loss of liberty which itself constitutes substantial loss.
22. This court, therefore, finds that substantial loss is demonstrated.
23. On delay, an Applicant is to lodge the application without unreasonable delay. The motion herein was filed on 16th May 2025. It was instigated upon the issue of warrants of attachment. There is a 19-month period between the judgment of 9th October 2023 and the filing of the instant application. On its face, it is a significant lapse of time. However, the legal standard in Order 42 Rule 6(2) is not delay, but unreasonable delay. The determination of what constitutes unreasonable delay is not a simple mathematical calculation. It is a question of fact that depends entirely on the circumstances of each case. For purposes of this application, the most critical factor in this case is the trigger for the application. The Applicant did not file his motion in a vacuum. He filed it in direct response to a



specific, new event namely; the Respondent's decision to commence execution. The Applicant argued that the urgency was because the Respondent had obtained Warrants of Attachment and instructed Vintage Auctioneers to execute. There is evidence to that end. The Applicant portrays himself as vigilant and diligent in pursuing his appeal, noting that directions have already been issued by the Court of Appeal. Such context is crucial.

24. Having perused the annexures comprising the Notice of Appeal, the Memorandum of Appeal and the directions of the Court of Appeal, it is undeniable that there is in progress hearing of the appeal before the Court. In this Court's assessment, the Applicant's contention that he was diligently pursuing his right of appeal, and there was no need to seek a stay until the Respondent threatened to make that appeal nugatory is meritorious. The delay is, therefore, measured not from the date of judgment, but from the date the threat of execution became imminent. The 19-month period that elapsed was satisfactorily explained by the fact that the Applicant was busy prosecuting his appeal and the Respondent was, not executing the decree. For that entire period, the status quo existed. The Respondent broke the status quo by obtaining the warrants. The Applicant's application is, therefore, a reaction to this new event, not the result of indolence or delay.
25. In the circumstances, this Court exercises discretion favourably towards the Applicant.
26. Security is also a requirement. It is the consideration that balances the scales of justice by protecting the Respondent's interests while the Applicant prosecutes his appeal. The purpose of security was well-articulated by the Court of Appeal in *Halai & Another -vs- Thornton & Turpin (1963) Ltd [1990] KLR 365*:

.... The posting of security is a condition precedent to the grant of a stay of execution... The purpose of the security is to guarantee the due performance of the decree or order as may ultimately be binding... it is not to 'punish' the applicant, but rather to secure the respondent.
27. The Applicant has explicitly stated his willingness to provide such security as the Court might direct; a move that allows the Court to balance the rights of the two parties as required. The Applicant gets to pursue his appeal, and the Respondent is assured that their judgment, if upheld, is not merely good on paper but is fully secured.
28. Flowing from the above conclusions, this Court find merit in the Notice of Motion dated 16th May 2025 and hereby issues the following final orders: -
 - i. A stay of execution of the judgment delivered on 9th October 2023, and any consequential orders, is hereby granted pending the hearing and determination of Nairobi Civil Appeal No. E866 of 2024.
 - ii. The stay granted in (i) above is conditional upon the Applicant providing a Bank Guarantee from a reputable financial institution for the said sum of Kshs. 2,081,490/- within twenty-one (21) days of this order.
 - iii. In default of compliance with either order (ii) above, the stay of execution shall automatically lapse, and the Notice of Motion dated 16th May 2025 shall stand dismissed with costs and the Respondent shall be at liberty to execute the decree.
 - iv. The costs of this application shall be in the appeal.Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2026.



A. C. MRIMA

JUDGE

Ruling No. 2 virtually delivered in the presence of:

Mr. Ng'ang'a, Learned Counsel for the Respondent.

Miss Ogola, Learned Counsel for the Applicant/Appellant.

Michael/Amina – Court Assistants.

