

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
HCCA NO. E204 OF 2025

OUKO OKUSA 1ST APPELLANT
NATION MEDIA GROUP PLC 2ND APPELLANT
- VERSUS -
CALEB OMBIRO OMBATIRESPONDENT

R U L I N G

1. Before me is a Motion on Notice dated **24/9/2025** by the appellants. The same was brought under *sections 1A, 1B, 3A & 75 of the Civil Procedure Act & Order 42 rule 6 of the Civil Procedure Rules 2010*. It sought stay of execution of the decree in **Kisumu CMCC No. 599 of 2017** pending the hearing and determination of the instant appeal.
2. The grounds upon which the application was brought were set out in the body thereof and in the supporting affidavit of **Sekou Owino** sworn on **24/9/2025**. These were that the appellants were aggrieved by the ruling delivered by the trial court on the **17/9/2025** and preferred an appeal vide a Memorandum of Appeal dated **23/9/2025**.
3. That they stand to suffer substantial loss if stay is not granted as the respondent may move to execute the ex-parte judgment having already

extracted warrants of attachment over their property and this will render the appeal nugatory. That they are willing to furnish a bank guarantee as security in due performance of the decree.

4. The application was disposed off by way of submissions that were highlighted in court on the **8/12/2025**. It was submitted for the appellants that no appeal had been lodged against the Judgment Debtor but that the instant appeal was against the refusal by the trial court to set aside the judgment. That **sections 1A, 3 & 3A of the Civil Procedure Act** gives the court inherent jurisdiction to preserve the subject matter pending appeal so that the appeal is not rendered nugatory. That the property attached is used to run the appellants' business.
5. That the respondent's means are unknown as he has not filed anything in court to demonstrate that he can refund the sums whereas they have offered up security by way of guarantee for the judgment debt amount.
6. For the respondent, it was submitted that an application for stay of execution under **Order 42 Rule 6 of the Civil Procedure Rules** was against a decree or order appealed from. That the stay sought by the appellants was of a judgment not subject of an appeal. That the appellants main ground of appeal is that they were not served with summons which is purely an academic exercise as there is a copy of summons on record.

7. That the execution should not be unlawfully stopped and further that the respondent is a Medical Doctor of 7 years and therefore can repay the decretal amount. That in any case, means cannot be a basis to deny one the fruits of his judgment and the money ought to be deposited in court. That the application for stay should therefore be dismissed.
8. In rejoinder, it was submitted for the appellants that the issue of service of summons raised by the respondent is an issue for determination at the appeal level.
9. I have considered the record. The only issue for determination is whether the appellants merit grant of orders of stay of execution.
10. Stay of Execution pending appeal is governed by **Order 42, Rule 6 of the Civil Procedure Rules, 2010** which provides as follows: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the Court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to

make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

(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.”

11. The power of a court to grant stay of execution is discretionary as correctly submitted by the respondents. This discretionary power must not be exercised capriciously or whimsically but judiciously. It must be exercised to ensure that it does not prevent a party from pursuing its appeal so that the

same is not rendered nugatory should the appeal overturn the trial court's decision or that the successful party is not defeated from enjoying the fruits of his judgment. (see **Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR)**).

12. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in **RWW v EKW (2019) eKLR** addressed itself on this as hereunder: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

13. In Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, the Court of Appeal outlined the requirements for granting stay of execution pending appeal. It held that: -

“Whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 (as it then was) of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security”.

14. The first requirement is that the intended appeal must be arguable. A cursory look at the Memorandum of Appeal reveals that the appeal revolves around the issue of Service of Summons. This court opines that this is an arguable issue.
15. The second aspect is to consider whether the application was filed without undue delay. From the record, vide an application dated **9/5/2025**, the appellant sought to set aside the impugned judgment and decree entered on the **6/6/2018**. The said application was dismissed. The Order sought to be stayed was issued on **6/6/2018** and while the present application is dated **24/9/2025**, 7 years and 3 months later. Clearly, there was an inordinate delay.

16. Thirdly, this Court must determine whether or not granting the order will occasion substantial loss to the applicant. Substantial loss was explained in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, that: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

17. The appellants have filed an appeal which is waiting a determination and has submitted that they stand to suffer substantial loss if the stay is not granted as the respondent has already attached their tools of trade in satisfaction of the decree.

18. On the other hand, the respondent states that he has the right to enjoy the fruits of the judgment since the case was determined on merit and in his favor. However, he did not provide the means of refund if the appeal is successful. Accordingly, the Court is persuaded that the aspect of substantial loss was proved by the applicant.

19. The last consideration is security. In **Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another (2018) eKLR**, the court stated that: -

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground.”

20. Security is discretionary and it is upon the court to determine the same. In this case, the appellants have offered up to provide a guarantee covering the decretal sum of **Kshs. 13,016,925/-** as security. On the other hand, the respondent states he is a medical doctor of 7 years standing and is therefore a man of means.

21. Considering all relevant factors and in order not to render the intended appeal illusory, and since, based on the grounds of appeal, the same raises

triable issues, I do grant a stay of execution of the decree herein on condition that;

- a) **The appellant does deposit the entire decretal sum as security for the performance of the decree in a joint interest earning account in the names of the Advocates of the parties in this matter within 30days of this ruling.**
- b) **In default, the application shall be deemed to have been dismissed with costs and the respondent and execution to issue forthwith.**
- c) **The costs of this application will be in the appeal.**
- d) **Mention on 09/03/2026 for directions on the hearing of the appeal.**

It is so ordered.

DATED and DELIVERED at Kisumu this 12th day of February, 2026.

A. MABEYA, FCI Arb
JUDGE