THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CIVIL APPLICATION NO. 389 OF 2009

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CONTEMPT AGAINST THE ATTORNEY GENERAL AND THE SOLICITOR GENERAL, DEPUTY REGISTRAR, HIGH COURT OF KENYA, ELDORET, DISTRICT ACCOUNTANT UASIN GISHU DISTRICT, DISTRICT COMMISSIONER'S OFFICE, ELDORET ARISING FROM THE ORDERS OF THIS HONOURABLE COURT DATED 23RD MARCH 2010, 10TH OCTOBER 2013 AND 14TH OF FEBRUARY 2020

BETWEEN

SPARES & SERVICES LIMITED……APPLICANT-DECREE HOLDER

VERSUS

THE ATTORNEY GENERAL……...1ST RESPONDENT-JUDGMENT DEBTOR
THE SOLICITOR GENERAL……..2ND RESPONDENT-JUDGMENT DEBTOR

THE DEPUTY REGISTRAR,
HIGH COURT OF KENYA, ELDORET……3RD RESPONDENT

THE DISTRICT ACCOUNTANT, UASIN GISHU DISTRICT……...4TH RESPONDENT

DISTRICT COMMISSIONER'S OFFICE, ELDORET……5TH RESPONDENT

RULING

1. The tussle in this matter is about payment of a sum of Kshs 596,326.88 computed as accrued interest, an order made in this matter on 23/03/2010 by **Mwilu J (as she then was)**.

2. I delivered a subsequent Ruling herein on 24/12/2024, 14 years later, in which I declined to review or set aside the above order, and it is that Ruling that now forms the subject of the instant Application, and by extension, this latest Ruling. In the instant Application, what is sought is basically leave to challenge my said Ruling by filing an appeal out of time, and for stay of execution pending filing of that Appeal.

3. The background of the case is captured in my said Ruling delivered on 20/12/2024, in which I stated the following:

> ***"1. The genesis of this matter is the order made by the Court in Eldoret High Court Civil Case No. 11 of 1993 - Budhia Builders & Erectors vs Spares & Services Limited, which directed the Applicant to deposit a sum of Kshs1,419,825.90 as security in that suit. In compliance with the said order, the Applicant deposited the said sum in Court on 11/04/2003. Thereafter, upon the parties' consent order dated 3/08/2009, the Court directed that the said sum be released back to the Applicant. The said sum was however not released or paid as ordered thus prompting the***

Applicant to file these Judicial Review proceedings against the Deputy Registrar, High Court of Kenya, Eldoret and the District Accountant-Uasin Gishu District, District Commissioner's Office, Eldoret seeking an order of Mandamus. The matter was then heard and determined in favour of the Applicant whereof by the orders made on 23/03/2010 by Hon. Mwilu J (as she then was), it was directed as follows:

i) THAT an order of judicial review by way of mandamus be and is hereby issued in favour of the Applicant compelling the Respondents:

a) To release to applicant a sum of KShs.1,419,825.90 in accordance with the order of the court dated 03.08.2004 vide Eldoret HCC No. 11 of 1993 Bhudia Builders Erectors -Vs- Spares & Services Limited.

b) <u>To account for all the interests that may have accrued thereon for the period that they held the same</u>. [Emphasis mine]

ii) THAT costs of these proceedings be borne by the Respondents.

4. It is evident that the parties could not however agree on interpretation of the phrase "***to account for all the interests that may have accrued thereon***" as indicated in the above order. While the Decree-holder's interpretation was that it was entitled to receive accrued interest on the principal sum, the 3rd and 4th Respondents, on their part, contended that there was no interest to be released or paid to the Decree-holder as none had accrued. This difference in interpretation was however laid to rest in the subsequent Ruling rendered by **Ngenye-Macharia (as she then was)** on 10/10/2013 in which she ruled that "***the Court decree was in express terms, that the said money should be paid together with the accrued interest from the date of the consent order dated 3rd August, 2004"***.

5. When the interest was still not paid as ordered, the Decree-holder applied that the **Attorney General** and the **Solicitor General** be held in contempt of Court and be punished for continuing to disobey the orders made 23/03/2010, among others. On their part, the **Attorney General** and **the Solicitor General** filed their own separate Application seeking the setting aside, variation and/or review of the Orders made on 23/03/2010. In my said Ruling of 20/12/2024, I basically declined both Applications, but made orders as follows:

"48. In light of the above, I order as follows;

"i) ……..

"ii) In respect to the ex parte Applicant's Amended Notice of Motion dated 25/05/2023, I rule, direct and order as follows:

a) I hereby declare that the 1st and 2nd Respondents, namely, the Attorney General and the Solicitor General, respectively, are jointly and severally, obligated to pay to the Applicant the amount of Kshs 596,326.88, being interest on the principal sum of Kshs 1,419,825.90 and which interest was determined to be at the rate 6% per annum, accrued between 3/8/2004 when the order for release was made, to 11/03/2011 when the same was released, and as computed in the "Certificate of Order Against the Government", dated 23/03/2010 and issued on 19/02/2020, .

b) In respect to the issue of payment of costs taxed at the sum of Kshs 137,769.70, the Respondents having failed to prove onward transmission thereof to the Applicants, after receipt of the same from the Judiciary, the 1st and 2nd Respondents, namely, the Attorney General and the Solicitor General, respectively, are jointly and severally, similarly are found to be liable to pay the said amount to the Applicants.

c) As the matters in issue herein were contentious to a substantial extent, and thus susceptible to conflicting interpretations, the 1st and 2nd Respondents, namely, the Attorney General and the Solicitor General, respectively, will not outrightly be held to be in contempt of Court but since the matters in contention have now been conclusively clarified vide this Ruling, they shall be given a reasonable opportunity to make the said payment and remedy the omission and by so doing, avoid a finding of being in contempt of Court.

d) Accordingly, the 1st and 2nd Respondents, namely, the Attorney General and the Solicitor General, respectively, are given a period of ninety (90) days to make the said payments to the Applicant.

e) In default, the Court shall be at liberty to make a finding of contempt of Court against the 1st and 2nd Respondents and thereby mete out appropriate penalties and/or punishment.

iii) As the interpretation of the previous orders herein were contentious to some extent, each party shall bear its own costs of the two Applications herein."

6. The **Hon. Attorney General** and the **Solicitor General**, 3rd and 4th Respondents, respectively, have now returned to this Court with the instant Notice of Motion dated 16/05/2025, seeking leave to appeal out of time against the orders made in my Ruling delivered on 20/12/2024, and also for stay of execution of the orders pending Appeal.

7. The Application is supported by the Affidavit sworn by **State Counsel Mercyline Odeyo**, who deponed that upon delivery of the Ruling on 20/12/2024, the Office of the Attorney General initiated communication with relevant departments/offices responsible for settling the amounts ordered, by the time the Attorney General received instructions on 25/02/2025 about filing an appeal, the time allowed for filing an appeal had already lapsed, that the delay in filing the appeal was occasioned by the delay in obtaining instructions to appeal, and that further delay has also been occasioned by the fact that this file was being handled by their Nairobi Office and was only recently transferred to be handled by their Eldoret Office, and that being a new State Counsel on record, she needed sufficient time to peruse through the file as the suit commenced in 2009. She deponed further that the **Attorney General** and **Solicitor General** are at risk of being punished for contempt of the said orders, despite not being the responsible accounting officers, that they thus intend to appeal the Ruling, and that a stay is therefore necessary to preserve the ***status quo***. She deponed that execution of the Ruling prior to determination of the appeal would render the appeal infructuous and cause a miscarriage of justice, that the Applicants have an arguable appeal and if this Court does not issue the orders sought, they stand to suffer tremendously, and cause irreparable damage and embarrassment to the Office of the Attorney General. She also contended that the appeal and the instant Application have been filed without any inordinate delay.

8. In opposition to the Application, the Decree-holder relied on the Grounds of Opposition dated 17/06/2025, and filed through **Messrs Owiti, Otieno & Ragot Advocates**. In the Grounds, the Decree-holder urged that the Application is misconceived as this Court has no jurisdiction to grant the principal relief sought, namely, leave to appeal out of time, and that the Application is an abuse of the Court process in the absence of justification as to why it has taken such an inordinately long period of over 5 months, to bring it. It was further urged that the Application for stay pending appeal, in the absence of any appeal filed, would not lie. In conclusion, it was contended that the **Attorney General** and the **Solicitor General** have failed to demonstrate justification for the Court's exercise of discretion in favour.

9. The Application was then canvassed by way of way of written Submissions. The **Attorney General** and **Solicitor General's** Submissions is dated 30/07/2025, while the Decree-holder's is dated 29/10/2025.

Hon. Attorney General and the Solicitor General's Submissions

10. Ms. Odeyo reiterated that the delay to file the Application was occasioned by administrative delays in communication from the client Ministry, transfer of the matter from Nairobi to Eldoret Office, and change of Counsel handling the file. In respect to the prayer for stay pending Appeal, she also reiterated that there is imminent risk of execution and substantial loss shall be occasioned were execution to proceed, that the **Attorney General** and the **Solicitor General** are public institutions funded by the taxpayer, and the Appeal shall be rendered nugatory since the money paid out may not be recoverable as the Decree-holder has not sworn any Affidavit of means. She also reiterated that the **Attorney General** and the **Solicitor General** face constitutional embarrassment and risk of contempt enforcement despite not being accounting officers, that execution will undermine the institutional dignity of the Office of the Attorney General, and create a precedent of punishing State Officers for actions beyond their administrative control, and that the two are not accounting officers within the meaning of the **Public Finance Management Act**. In conclusion, Counsel submitted that the **Civil Procedure Act**, under **Sections 1A** and **1B,** and the **Constitution,** in **Articles 159(2)(d)** and **50(1),** require Courts to administer justice without undue regard to technicalities, and to uphold the right to fair hearing. She contended that the Court is therefore enjoined to evaluate not only procedural compliance, but also whether denying or granting the Application will best serve substantive justice. She submitted that the two have acted promptly upon receipt of instructions with full disclosure of the circumstances surrounding the delay, and have an arguable appeal that raises serious legal and constitutional issues, without any attempt to frustrate the judgment or evade accountability.

Decree-Holder's Submissions

11. Mr. Ragot, in his lengthy Submissions, urged that the period of delay is above 5 months from the date when the Ruling sought to be appealed against was delivered on 20/12/2024, as the Application was filed on 16/05/2025. He observed that the office of the Attorney General's has not denied being aware of the delivery of the Ruling, whose date was given in the presence of all parties on 18/07/2024. He contended that the explanation given for the delay does not constitute a plausible or reasonable explanation since there is no explanation for the delay of 5 months from when the Ruling was delivered on 20/12/2024, to the date when instructions to appeal was given, as per the letter dated 21/02/2025, received on

25/02/2025. He questioned why these instructions were not given earlier, or within the time prescribed under **Rule 77(1), (2)** and **(3)** of the **Court of Appeal Rules**. He also observed that the Hon. Registrar of the High Court who is said to have issued the instructions to appeal, and identified as **Hon. Winfrida B. Mokaya**, has not sworn any Affidavit to that effect.

12. Counsel also cited the State Counsel's Affidavit, and observed that the State Counsel, even after receiving the instructions to appeal around 25/02/2025, and even after receiving their Nairobi office file in Eldoret around 14/04/2025, she still took more than one month to file the Application on 16/05/2025. He also wondered why it took such a long time of about 2 months to forward the file from the Nairobi to the Eldoret office in today's era of technology, where documents filed in Court are required to be scanned and filed on the online Court portal. He urged that the entire file was already on a scanned copy having been relied upon in litigating the matter this far. According to him, it would have been so easy, within a minute, to transmit the entire record of the scanned documents constituting the file from the Nairobi office to the Eldoret office within a second by email. He also questioned why the State Counsel, **Ms. Chilaka Lumiti**, who had been handling the matter before, and to whom the letter dated 21/02/2025 was addressed, did not file a simple Notice of Appeal whose contents is hardly one page, before waiting to forward the entire file to their Eldoret office, considering that the letter of instructions had identified the portion of the Ruling complained of. Counsel contended that this obvious laxity in failing to take appropriate immediate action towards pursuing the appeal as instructed, is a demonstration of a lack of diligence. Counsel also submitted that the Application has not identified the aspect of the Ruling sought to be appealed against.

13. He further observed that the basis for the intended appeal is revealed in the letter of instructions dated 21/02/2025, which has identified the sole grievance with the Ruling to be as relates to its direction requiring the payment of interest. He submitted that this impugned order on payment of interest which is the real contention of the intended appeal, was an order issued by the **Mwilu J (as she then was)**, on 23/03/2010, which order was never appealed against and thus remains a valid order, and which fact was also reiterated by **G.W. Ngenye-Macharia J (as she then was)** in her Ruling delivered on 10/10/2013, in which she determined the very grievance now raised herein. He then submitted that in the Ruling delivered on 20/12/2024, which is the subject of the intended appeal, this Court on an Application seeking to have the **Solicitor General** held in contempt of Court for failing to comply with the said order issued by **Mwilu J (as she then was)** on 23/03/2010, simply

declined to hold the **Solicitor General** in contempt, and instead directed compliance with that payment within a period of 90 days. According to him, this implies that the real practical delay in filing the Application, is not about the Ruling delivered on 20/12/2024 since even if it is set aside, it would not in any way resolve the **Solicitor General's** grievance, which would still remain standing.

14. He further argued that the **Solicitor-General's** earlier Application which sought review of that very order of 23/03/2010 having been dismissed by the Ruling of this Court of 20/12/2024 on account of the inordinate delay of more than 14 years in seeking review, this issue of more than 14 years delay cannot be separated from the instant Application, and that it would not make any logical sense to allow such a delay of over 14 years to be ignored. In respect to stay of execution, Counsel reiterated that this Court does not have jurisdiction to entertain the prayer without any appeal having been filed. According to him, a reading of **Order 42 Rule 6(1)** and **(4)** of the **Civil Procedure Rules**, implies strongly that before a Court entertains an Application for stay of execution, there must be an appeal in existence, initiated by the filing of a Notice of Appeal, which in this case, has not been done, and thus the matter should end there, with dismissal of the Application. He asserted that this is a jurisdictional issue, without which the Court lacks any further mandate to hear the Application. He also submitted that there is no proof of any substantial loss to be incurred should the order for stay of execution not issue as there is no single mention that the Decree-holder would not be in a position to refund the amount of **Ksh 596,326.88** should the intended appeal succeed, and that there is no reason for the Court to doubt the Decree-holder's ability to make the refund, having already managed to raise the security of the principal sum which had been deposited with the Court in the sum of **Ksh 1,419,826.90**. Counsel also submitted that the amount of **Ksh 596,326.88** is so negligible in comparison to the colossal amounts of monies allocated to the offices of **Attorney General** and the **Solicitor General**, and it would thus not in any way affect their operations. He thus termed the claim that payment thereof would constitute an unfair burden on public funds as an illogical argument since the interest ordered to be paid is not an ordinary interest on any deposit made in Court, but interest computed as penalty for the unreasonable refusal to release the principal sum of **Kshs 1,419,826.90**.

Determination

15. The issues arising herein for determination are evidently the following:

i) Whether the Judgment-Debtors should be granted leave to appeal out of time.

ii) Whether the orders of stay of execution should issue.

16. There has been a debate on whether the High Court possesses the jurisdiction to extend time within which to lodge an Appeal to the Court of Appeal challenging orders of the High Court by allowing an intended Appellant to file and serve a Notice of Appeal out of time. I can however safely state that it is now more or less generally accepted that indeed, the High Court is clothed with such jurisdiction under **Section 7** of the **Appellate Jurisdiction Act (Cap 9)** which provides as follows:

> **"The High Court may extend the time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.**
>
> **Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence."**

17. Chepkwony J , while considering the above provision in the case of **Diamond Trust Bank of Kenya Limited –vs- Invesco Assurance Company Limited and Another [2021]eKLR,** held that:

> **"10. In view of the above provisions, it is explicitly clear that the High Court may extend time for giving Notice of Intention to Appeal from a judgment of the High Court and in my view the said Section 7 does not need any more than a literal interpretation. Therefore, Section 7 of the *Appellate Jurisdiction Act* clearly confers to the High Court jurisdiction to extend time for the filing of a Notice of Appeal and to decide otherwise is akin to completely disregarding a clear provision in the law."**

18. Similarly, **L.N. Mbugua J,** in the case of **Wanjau v Migwi (Environment and Land Appeal E012 of 2022) [2025] KEELC 1027 (KLR) (5 March 2025) (Ruling)**, held as follows:

> **"It follows that this Court does have a mandate to extend time to lodge a Notice of Appeal. However, the validity of such a notice, as well as any substantive appeal filed are in the domain of the Court of Appeal. *See -Samwel Kimutai Korir (Suing as Personal and Legal Representative of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School & Nyanchwa Adventist College [2017] KEHC 2780 (KLR)*"**

19. I share the above views. With the issue of this Court's jurisdiction now therefore laid to rest, I will now deal with the merits of the prayer for leave to appeal out of time.

20. In respect to the length of delay, the Supreme Court, in the case of **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR**, guided as follows:

> **"the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."**

21. In the case of **Edith Gichungu Koine Vs Stephen Njagi Thoithi [2014] eKLR**, the Court of Appeal guided that in an Application for extension of time, the Court ought to take into account several factors as observed by **Odek JJA** as follows:

> **"Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the Application is granted, and whether the matter raises issues of public importance, amongst others."**

22. The **Supreme Court**, while handling an Application for extension of time in **Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others**, also advanced similar guidelines.

23. It is therefore the position that where delay by a litigant is well explained and the matter sought to be heard out of time raises triable issues or arguable points, the Court will be reluctant to punish such litigant by declining to grant him enlargement of time. On this point, I am guided by the Court of Appeal holding in the case of **Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others [2015] eKLR**, in which, in declining to strike out a Notice of Appeal filed one day out of time, stated as follows:

> **"40. It must be realized that Courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that "*judicial authority is derived from the people and vests in, and shall be exercised by the Courts and tribunals established by or under this Constitution*." Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the Constitution to adhere to national values and**

> **principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, *inter alia*, that the rule of law, human dignity and human rights and equity, are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties *inter se* (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice."**

24. Similarly, in the case of **Charles Karanja Kiiru – versus- Charles Githinji Muigwa [2017] eKLR**, the Court of Appeal upheld the following statements made by the trial Judge (**P.J. Otieno J**) in the primary suit which gave rise to the appeal:

> **"It suffices to comment that a Court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint ….."**

25. The question now is basically, whether the delay to file a Notice of Appeal has been well explained.

26. Extension of time being a creature of equity, an Applicant can only benefit it if he acts equitably: "***he who seeks equity must do equity***". Hence, one has to lay a basis that he was not at fault in finding himself out of time. Extension of time is therefore not a right of a litigant, but a discretionary power of the Courts whose exercise, an Applicant has to lay a basis for.

27. In this case, it is not in dispute that the impugned Ruling having been delivered on 20/12/2024, and the instant Application filed on 16/05/2025, the delay was for about 5 months. The Court is now being asked to extend time within which to file the intended appeal on the basis that the delay was occasioned by administrative delays in communication from the client Ministry, transfer of the matter from Nairobi to Eldoret Office, and change of Counsel handling the file, circumstances alleged to have been beyond control. **State Counsel Ms. Odeyo** deponed that upon the Ruling rendered on 20/12/2024, she only received instructions to appeal on 25/02/2025 and filed this instant Application on 16/05/2025. She also alluded that the subject file was previously being handled by their Nairobi file, and only came to her possession on 14/04/2025, and she thus needed time to familiarize herself with the file.

28. I must say that I am not at all convinced with the grounds alleged for the delay, particularly considering the chronology of previous events herein. First, it is important to recall that in declining to review or set aside the orders of 23/03/2010, I also made the following observations in my Ruling of 20/12/2024:

> ***"44. Even more damning for the Respondents is that Order 45(1) expressly requires that an Application seeking review of an Order must be made without unreasonable delay. In this case, the order sought to be set aside, varied or reviewed was made on 23/03/2010, 14 years ago. The instant Application seeking review of that order was filed on 2/11/2023, 13 years later. This, by any means is a serious delay yet no proper or valid explanation has been offered for the same. The purported reasons advanced are so unconvincing and lame. It is also not lost on me that in her said Ruling of 10/10/2013, 10 years before the instant Application, Ngenye-Macharia J (as she then was) had indeed "advised" the Respondents that their recourse was to either apply for Review or to Appeal against the order. This, the Respondents never took cue of. In the circumstances, I find that by now purporting to suddenly remember to so act, the Respondents have moved after a woefully unexplained, inordinate and unreasonable delay. For a Court to set aside or review an order issued 14 years ago, it would require the existence of exceptional circumstances, none of which has been demonstrated herein. The Application is clearly an afterthought and I decline it."***

29. The above observation on the Attorney General's office's 14 years delay to apply for review ought to have served as a strong signal of the Court's displeasure with the lethargy and inaction displayed in this matter. It is therefore surprising that with such observation, the office still, again, fell behind a whole 5 months in filing such a simple document as a Notice of Appeal. In practice, Advocates normally, as an act of abundant action, proceed to file Notices of Appeal immediately a Judgment is rendered, even before seeking instructions, just in case the client fails to give instructions to appeal within the 14 days window. Considering the Court's earlier expression of displeasure with the earlier delays as captured above, this is what, perhaps, the Attorney General's office ought to have done, rather than go to sleep and choose to wait indefinitely. **Mr. Ragot** has also correctly observed that the Attorney General's office, even after receiving instructions to appeal around 25/02/2025, and even after receiving its Nairobi office file in Eldoret around 14/04/2025, it still took about 2 months to file the Application on 16/05/2025. Just like Mr. **Ragot**, I, too, wonder why it even took a whole 3-4 months to forward the file from the Nairobi to the Eldoret office in today's era of advanced technology. As these delays have not been well explained, I am

strongly persuaded that the sudden intention to appeal is all an afterthought calculated to delay conclusion of this litigation, and not borne out of a genuine intention to pursue justice. With this background, I do not find this to be a deserving case for exercise, judicially, of this Court's discretion to enlarge the time to appeal.

30. It is also important to note that this dispute has been in Court since 1993, first, by way of **Eldoret High Court Civil Case No. 11 of 1993 - Budhia Builders & Erectors vs Spares & Services Limited**, and subsequently, by way of the instant action. Cumulatively therefore, this litigation has been in Court for a whooping 32 years. With this background, it will, in my view, be an unforgivable case of judicial injustice to the Decree-holder for this Court to again indulge or excuse the Attorney General's office's by granting it leave to appeal out of time after the inordinate 5 months delay to apply for extension of time. I accordingly decline to enlarge the time for filing an Appeal.

31. Having ruled as above, there is no longer any necessity for interrogating the prayer for stay of execution pending Appeal. I will nevertheless, still do so for purposes of completeness of the record.

32. The principles guiding grant of stay of execution pending Appeal are well settled. These are stipulated at **Order 42 rule 6(2)** of the **Civil Procedure Rules**, which provides as follows:

> **33. 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**

34. Therefore, an Applicant for stay of execution of an order pending Appeal is required to satisfy the 3 conditions set out above. The first is that the Application has been made "***without unreasonable delay***", the second is to demonstrate that "***substantial loss***" may result unless the order is granted, and the third is the Applicant's willingness or readiness to "***deposit security***" for due performance of the order.

35. On the requirement of bringing the Application without "***without unreasonable delay***", I have already found that there was inordinate delay which was not well explained.

36. Regarding the condition whether "***substantial loss***" may be suffered should stay not be granted, on what constitutes "***substantial loss***", **F. Gikonyo J** in the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, stated as follows:

> **"11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:**
>
> > ***"… 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."***
>
> **With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above."**

37. Further, **Platt, Ag. JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR**, held as follows:

> **"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions**

for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money".

38. On his part, **Gachuhi, Ag. JA (as he then was)** in the same case, stated as follows:

"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

39. In this case, the amount in contention is Kshs 596,326.88/-. It is contended that the **Attorney General's** and the **Solicitor General's offices** stand to suffer irreparable harm were they to pay the said amount to the Decree-holder because the Decree-holder may not be in a position to refund the amount should the intended Appeal succeed. I am not satisfied that the amount of Kshs 596,326.88/-. is so high an amount such that its payment to the Decree-holder will financially paralyze the operations of the two offices as alleged. That cannot be true. Although the Decree-holder has also not made any disclosure on its financial strength, I have no reason to believe that the amount is so high an amount that the Decree-holder may not be capable of refunding it, or the two Government offices may not have any other way of recovering it.

40. Under the above circumstances, even if I had granted leave to appeal, I would still not have also granted the prayer for stay of execution.

Final Orders

41. In the end, the Notice of Motion dated 16/05/2025 fails, and it is accordingly dismissed with costs to the Decree-holder.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 13TH DAY OF FEBRUARY 2026

……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Ragot for the Applicant

N/A for the Respondents

Court Assistant: Brian Kimathi