



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. E142 OF 2025

DELICAN MAGAMBO KIOGORA

APPELLANT

-VERSUS-

DAVID NG'ANG'A

RESPONDENT

RULING

1. By Notice of Motion dated 5/6/2025, the Appellant seeks these orders;-

1. Spent.

2. Spent.

3. Spent.

4. THAT pending the hearing and determination of the Appellant's appeal in Nakuru HCCA No. E142 of 2025 DELICAN KIOGORA MAGAMBO

vs DAVID NG'ANG'A the honourable court be pleased to issue an order of stay of execution of the ruling delivered in Nakuru CMCC No. E1012 of 2021 by Hon. Peter Aloyce Ndege (SPM) on 3/6/2025 and any other consequential orders or warrants of arrest arising from the said ruling.

5. THAT the cost of this application be provided for.

2. The Respondent opposes the Application through an Affidavit in reply purportedly sworn on 7th January 2025.
3. The Appellant laments in his affidavit in support of the Application that he would suffer substantial loss since he could be jailed as his Appeal is pending, thus rendering the Appeal nugatory.
4. The Appellant also complains of ill health and that the condition could deteriorate if he is imprisoned. He asserts that the Application is brought without undue delay. *Inter alia* the Appellant also expresses willingness and readiness to offer requisite security for costs.

5. The Respondent retorts that there is no evidence as to the Appellant's current health status. According to the Respondent, the Appellant had failed to appear before the lower court in answer to the Notice to Show Cause without justification. The Respondent *inter alia* maintains that the Appellant has the capacity to settle the decretal sum but is merely unwilling.
6. Learned Counsel for the parties filed written submissions which I have perused against the rival affidavit evidence and the record. It was observed in **RWW vs EKW [2019]eKLR** and **Francis K. Chabari vs Mwarania Gaichura Kirubi (2022) eKLR** that the remedy of stay of execution pending Appeal is discretionary but the court's discretion is required to be exercised judiciously and not capriciously.
7. An application for stay of execution pending appeal must meet the threshold set under **Order 42 Rule 6 of the Civil Procedure Rules 2010**. The legal provisions stipulate that such order may not be granted;-

- “a. Unless 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.”**

8. In **Mohsen Ali & Another vs Priscillah Boit & Another,**

E& LC Case No. 2000 of 2012 (2014) eKLR the court explained “unreasonable delay” as dependent on the surrounding circumstances of each case.

9. The Application is brought promptly, two days after delivery of the impugned ruling and therefore this legal condition for grant of stay of execution pending appeal has been satisfied.
10. Provision of security for costs is another crucial condition precedent to grant of an order of stay of execution in the circumstances. The court has power to determine the appropriate security for costs but an Applicant must first

express willingness and readiness to offer the requisite security.

11. In **John Odungo vs Joyce Irungu Muhatia [2014] eKLR** the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows “preparedness as well as readiness to provide security should one be called upon to do so”.
12. The Respondent has satisfied the requirement for offer security for costs having expressed willingness and readiness to comply.
13. On the question of substantial loss, if any, the Respondent might suffer if stay of execution is not ordered, the case of **Nyatera vs Nyakundi (Civil Appeal E033 of 2022) [2023]KEHC 3086 KLR) (16 March 2023) (Ruling)** is relevant for the proposition that the Applicant ought to show the manner in which his appeal would be rendered nugatory if stay of execution is not ordered. The court opined in the case that it is not enough to say that because there is intention to proceed with execution, it should be

stopped because of the appeal. The court is therefore required to tread a delicate balance of the parties' interests. As it is now trite, this is the cornerstone of the court's discretion to grant or refuse stay of execution pending appeal. The onus is on the party appealing to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds.

14. In **Re Global Tours & Travel Ltd HCWC No. 43 of 2000** in **Milimani HCMCA No. 1561 of 2007, Century Oil Trading Company Ltd vs Kenya Shell Ltd**, this court again explained that;-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes when, it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who

is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

15. In **Shell Ltd vs Kibiru & Another (1986) KLR 410** it was famously postulated that;

“Substantial loss in its various forms is the cornerstone of the court’s jurisdiction to grant stay pending appeal. 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.”

16. Regarding the burden of proof, the Court of Appeal held in **National Industry Credit Limited vs Aquinas Francis Wasike & Another [2006] eKLR** that:-

“once an applicant expresses a reasonable fact that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

17. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including **Matata**

& Another vs Rono & Another (Civil Appeal No. E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling) and **Muinde Mulatya & Another (2021) eKLR and Kenya Commercial Bank Limited vs Sun City Properties Limited 7 & 5 Others (2012) eKLR.**

18. The Application has been brought timeously as already found. The Applicant also expresses readiness and willingness to offer necessary security.
19. As regards the question of substantial loss, such loss could result as the Applicant would lose his liberty if the Application is granted. I note a defect pointed out in the Appellant's affidavit in support of the Motion but I do not find the same material as the affidavit is signed, commissioned and dated.
20. In the premises, the Application is granted on condition that the Appellant pays out half of the decretal sum to the Respondent within 60 (sixty) days from the date hereof, and deposit the other half into court within the same period. In default of compliance with the two orders, the Respondent shall be at liberty to levy execution in any

lawful manner desired. The costs of the Application shall abide the Appeal.

21. Ruling accordingly.

J. M. NANG'EA, JUDGE.

Ruling delivered virtually this 11th day of February, 2026.

In the presence of:

The Advocate for the Appellant, Ms Weere.

The Advocate for the Respondent, Ms Somba for Mr Oketch.

Court Assistant, Jeniffer

J. M. NANG'EA, JUDGE.