

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. E018 OF 2025

(CORAM: HON. CHARLES M. KARIUKI – J)

SAMSON ODHIAMBO NUNDU.....APPELLANT/APPLICANT

~VERSUS~

GEOFFREY SHISUMU MACKENZIE..... RESPONDENT

RULING

18/02/2026

Introduction

1. This ruling concerns the Notice of Motion dated 11th June 2025 filed by the Appellant/Applicant, Samson Odhiambo Nundu. The Application seeks an order of stay of execution of the decree arising from Narok CMCC No. E147 of 2024, delivered on 4th March 2025, pending the hearing and determination of this appeal.
2. The Application is expressed to be brought under Order 42 Rule 6, Order 50 Rule 4, and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 3, 3A, and 95 of the Civil Procedure Act, and all other enabling provisions of the law.
3. It is supported by the affidavit of the Applicant, sworn on 11th June 2025. The Respondent opposes the Application through Grounds of Opposition dated 16th June 2025 and written submissions.

The Application

4. The Applicant contends that he was aggrieved by the ruling of Hon. Mutuku Esther Mwikali delivered on 27th May 2025 and has since filed an appeal before this Court. He avers that unless stay is granted, execution will proceed and the appeal will be rendered nugatory.
5. He states that he is likely to suffer substantial loss if compelled to satisfy the decretal sum. In particular, he asserts that the Respondent is not a person of means and that recovery of the decretal sum, should the appeal succeed, would be difficult or impossible.
6. The Applicant further avers that the Application was filed without delay and that he is ready and willing to furnish security for the due performance of the decree, including by depositing a title deed in court.

Grounds of Opposition

7. The Respondent opposes the Application on the grounds that it does not meet the mandatory conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules.
8. He relies on the decision of the Court of Appeal in *Vishram Ravji Halai v Thornton & Turpin (1990) KLR 365*, where it was held that the conditions for grant of stay are mandatory.
9. The Respondent further relies on *Kenya Shell Ltd v Benjamin Karuga Kibiru & another [1986] KLR 410*, arguing that substantial loss is the cornerstone of an application for stay and must be proved by evidence.
10. It is also submitted that a successful litigant is entitled to enjoy the fruits of his judgment, as stated in *Machira t/a Machira & Co. Advocates v East African Standard [2002] eKLR*.

11. Additionally, the Respondent points out that this Court had earlier granted a conditional stay requiring deposit of half the decretal sum within fourteen days, which condition has not been complied with.

Summary of the Applicant's Submissions

12. The Applicant submits that the three conditions under Order 42 Rule 6(2) are: demonstration of substantial loss, provision of security, and filing of the Application without unreasonable delay.

13. He relies on *G.N. Muema P/A Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another [2018] eKLR*, where the Court held that substantial loss need not necessarily be large in monetary terms and that hardship in recovering decretal sums may suffice.

14. He also cites *Ujagar Singh v Runda Coffee Estates Ltd [1966] EA 263*, where the Court preserved the status quo pending appeal, and *Siegfried Busch v Music Copyright Society of Kenya (MCSK) [2013] eKLR*, where it was emphasized that courts should avoid rendering appeals nugatory.

15. The Applicant maintains that the Respondent has not demonstrated his financial ability to refund the decretal sum and that this uncertainty constitutes substantial loss.

Summary of the Respondent's Submissions

16. The Respondent submits that the three conditions under Order 42 Rule 6(2) are conjunctive and must all be satisfied. He relies on *James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR*, where the Court emphasized that failure to satisfy any one condition is fatal.

17. He also cites *Mukuma v Abuoga (1988) KLR 645*, where the Court of Appeal underscored the importance of demonstrating substantial loss.

18. The Respondent argues that this being a money decree, payment alone does not amount to substantial loss. He relies on *Standard Assurance Co. Ltd v Alfred Mumea Komu [2008] eKLR and Jeniffer Wachuka Njehu v Gititu Coffee Growers Co-operative Society [2019] eKLR*, where it was held that substantial loss must be proved and not merely alleged.

Issues for Determination

19. The issues for determination are:

- i. Whether the Applicant has demonstrated substantial loss.**
- ii. Whether the Application was filed without unreasonable delay.**
- iii. Whether adequate security has been provided.**
- iv. Whether the Court should exercise its discretion in favour of the Applicant.**

ANALYSIS AND DETERMINATION

I. Substantial Loss

20. The law is settled that substantial loss is the cornerstone of an application for stay. In *Kenya Shell Ltd v Benjamin Karuga Kibiru & another*, the Court of Appeal stated that without evidence of substantial loss, it is difficult to justify depriving a successful litigant of the fruits of judgment.

21. In the present case, the Applicant merely asserts that the Respondent is not a person of means. No documentary or affidavit evidence has been placed before this Court to demonstrate the Respondent's inability to refund the decretal sum.

22. As held in *Standard Assurance Co. Ltd v Alfred Mumea Komu*, proof of loss must be substantiated by the party alleging it. The burden does not shift to the Respondent merely because an allegation has been made.

23. I therefore find that the Applicant has failed to demonstrate substantial loss.

II. Delay

24. The ruling appealed against was delivered on 27th May 2025, and the present Application was filed on 11th June 2025. I find that the Application was filed without unreasonable delay.

III. Security

25. The Applicant expresses willingness to deposit a title deed as security. However, this Court had earlier granted a conditional stay requiring deposit of half the decretal sum within fourteen days. That condition has not been complied with.

26. Security must not be illusory. It must be real, accessible, and capable of satisfying the decree without further litigation. Mere willingness, without compliance with earlier court orders, does not suffice.

IV. Exercise of Discretion

27. The discretion to grant stay must balance two competing principles: the right of a successful litigant to enjoy the fruits of judgment and the right of an appellant to have his appeal heard without being rendered nugatory. This balance was articulated in *Mukuma v Abuoga*.

28. In *Machira t/a Machira & Co. Advocates v East African Standard*, the Court emphasized that a successful litigant should not be deprived of the fruits of judgment without just cause.

29. Given the failure to demonstrate substantial loss and the failure to comply with earlier conditional orders, this Court is not persuaded to exercise its discretion in favour of the Applicant.

Conclusion

30. The Applicant has failed to satisfy the mandatory requirements under Order 42 Rule 6(2) of the Civil Procedure Rules.

- i. Accordingly, the Notice of Motion dated 11th June 2025 is hereby dismissed with costs to the Respondent. The interim stay orders previously granted are vacated.**
- ii. It is so ordered.**

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS

APPLICATION, THIS 18TH FEBRUARY, 2026

.....

CHARLES KARIUKI

JUDGE