



REPUBLIC OF KENYA



**Western Express Coach Ltd v Wainaina (Civil Appeal E031 of 2025)
[2026] KEHC 1526 (KLR) (11 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E031 OF 2025
PN GICHOHI, J
FEBRUARY 11, 2026**

BETWEEN

WESTERN EXPRESS COACH LTD APPELLANT

AND

ISAAC LEE NGUGI WAINAINA RESPONDENT

RULING

1. By a Notice of Motion dated 26th February, 2025 and brought under Order 21 Rule 1B, Order 22 Rule 22 (1), Order 40 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B & 3A, Section 79 G and 95 of the *Civil Procedure Act*, Article 159 (2) (a) & (d) of *the Constitution* of Kenya, the Appellant / Applicant seeks for Orders that:-
 1. Spent.
 2. Spent.
 3. This Honourable Court be pleased to grant interim stay of judgment delivered by Honourable K. Kibellion on 29th January 2025 holding the Appellant 100% liable and awarding the Respondent General Damages of Kshs. 800,000/-; Special Damages of Kshs. 996,405/-, Future Medical Expenses of Kshs. 530,000/- plus costs and interest in Nakuru CMCC No. 205 of 2018 pending the hearing and determination of this Appeal.
 4. This Honourable Court be pleased to grant Order of stay of all proceedings in the trial court pending hearing determination of this appeal.
 5. This honourable court allow the Applicant / Appellant to furnish the court with security in a joint interest earning account in the name of both Advocates.
 6. Spent.



7. This Honourable Court be pleased to issue any other order and /or direction it deems fit to grant in the circumstances.
8. The costs of this application to abide the outcome of the Appeal.
2. The Application is premised on the grounds on the face of the Motion and supported by the Affidavit of Audrey Mwira sworn on even date.
3. While emphasising the prayers sought and the grounds thereof, she deponed that being dissatisfied with the said judgment, they filed the Memorandum of Appeal dated 13th February 2025 which has high chances of success and if the stay is not granted, the Appeal will be rendered nugatory as the Respondent will go ahead and proclaim the vehicle.
4. She further deponed that if any part payment is ordered to be paid to the Respondent pending hearing and determination of the appeal, then such payments will be utilised and alienated by the Respondent and therefore, recovery of the same will be arduous in the event the Appeal is successful.
5. Ultimately, she stated that the application is made in good faith and without unreasonable delay.
6. She reiterated that the Applicant/ Appellant's Insurance is ready, willing and able to furnish the Court with security by depositing the entire decretal sum in Joint Interest Earning Account in the name of the Advocates on record.
7. She stated that no prejudice will be suffered by the Respondent if the Orders sought are granted.
8. There was no response by the Respondent despite being served and there was no attendance either for directions on disposal of this application by way of written submission. Compliance was by the Appellant/Applicant only.

Applicant's submissions dated 9th December 2025

9. While emphasising on the well-known criteria for granting stay of execution, the Applicant placed reliance on the case of Halai & another vs Thorton & Turpin f (1963) Ltd [1990]KLR 369 where the Court of Appeal stated the conditions to be met before granting of orders of stay of execution, these being; sufficient cause, substantial loss; that the Applicant must furnish Security and that the application is brought without unreasonable Audrey Mwira . Audrey Mwira . Audrey Mwira . Audrey Mwira . Audrey Audrey Mwira . Audrey Mwira . Mwira . Audrey Mwira . delay; in addition that the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted.
10. On Sufficient cause, the Applicant submitted that the appeal will be rendered nugatory if stay is not granted as the Respondent will have sold the Defendant's motor vehicle already attached yet that is the only source of his livelihood.
11. On substantial loss, it was submitted that the judgment is of substantial amount and the Applicant is apprehensive that if the Respondent is paid, he may deal with it in a manner prejudicial to the Applicant and if the Appeal succeeds, the Applicant may not be able to recover it from the Respondent and the Respondent may not be in a position to refund it.
12. Further, it was submitted that the Respondent's capability is unknown. In support of that argument, the Applicant cited the case of Jackline Tabitha Kinyua v Jacob Mugo Nyaga & another [2019]eKLR where it was held that an order that the Applicant deposits the whole decretal sum with half being released to the Respondent would not serve the interest of justice as refund cannot be guaranteed in event of a successful appeal.



13. On Furnishing of Security, the Applicant reiterated his offer of depositing the decretal sum in joint interest earning Account in the name of both Advocates but went ahead to pray that the Applicant furnishes the Court with a Bank Guarantee pending hearing and determination of the Appeal. In support, he relied on the case of Bernard Zebedeo v Julius Nyamega Ontere [2022]eKLR where High Court allowed Bank Guarantee as security.
14. On whether the Applicant moved the Court without unreasonable delay, the Applicant submitted that the judgment was delivered on 23rd March 2025 and preferred an appeal being Nakuru HCCA No. E031 of 2025 High Court dated 13th February 2025 and filed on even date, and further, that the application before this Court was filed 26th February 2025 just a few days after filing the Memorandum of Appeal and therefore, the application was filed within reasonable time. In conclusion, the Applicant urged this Court to allow the application as prayed.

Analysis and determination

15. From the material placed before this Court, the main issue for determination is whether Applicant has met the threshold for granting stay of execution pending appeal as sought.
16. For an application for stay of execution, the principles are well set out as acknowledged by the Applicant herein. Order 42 Rule 6 (2) of the Civil Procedure Rules provides that:-
 - “(2) No order to stay of execution shall be made under sub-rule (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.”
17. Accordingly, the Applicant is obliged to satisfy the above elements as has been time and again reiterated by superior courts and in particular the case of Butt v Rent Restriction Tribunal [1982] KLR 417 where Madan JA (as he was then) held:-

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 459: “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”
18. On the first consideration, that is, whether the application was filed timeously, the judgment of the trial court in this matter was delivered on 29th January, 2025. This Appeal was lodged on 13th February, 2025, while the instant application for stay herein was filed 26th February 2025. Accordingly, there was no delay in the circumstances.



19. On whether the Applicant will suffer substantial loss, the term “substantial loss” was enunciated in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR, where Platt JA stated that:-

“But this court must look at the matter from the point of view of rule 5(2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent’s circumstances, but the information that was forthcoming did not confirm the applicant’s misgivings. 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.”

20. The onus of proving substantial loss rests upon and must be discharged by the Applicant. In this case, the Applicant argued in his submissions that if stay is not granted, the Respondent will sell the Defendant’s vehicle already attached in execution of the decree, and therefore, he might not recover the decretal sum if the Appeal succeeds considering the high award of damages by the trial court.
21. The Respondent did not participate in this matter and therefore, there is nothing to show his capacity to refund the said money.
22. The Applicant in this matter has proposed that he furnishes security in form of a Bank Guarantee and at the same time talks of depositing the entire decretal sum in a Joint Ineptest Earning Account in the name of both Advocates. It is not sufficient for the Applicant to boldly make those proposals. He does not appear certain of the nature of the security to provide.
23. This Court is persuaded by the decision in *Arun C. Sharma v. Ashana Raikundalia T/A Rairundalia & Co. Advocates* (2014) eKLR, where F Gikonyo J held that:- “The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
24. In this case, the offer for a Bank Guarantee cannot serve the purpose herein. and further, and considering that there was no participation by the Respondent despite service, the prayer for deposit of decretal sum in a joint account of both advocates is not tenable.
25. Further, a look at the Memorandum of Appeal reveals that the Appellant /Applicant is aggrieved by quantum only. He urges the Court to set aside the trial court’s judgment on award of damages and substitute it with a fresh award. The Appellant also asks to be awarded costs of the Appeal.
26. From the grounds of appeal, it is clear that the issues raised in the Appeal are arguable and in the event stay is not granted at this stage the Appeal might be rendered nugatory.



27. In the circumstances and in order to balance the rights of the applicant to Appeal, with the corresponding right of the Respondents herein , this Court hereby grants the following Orders: -
1. A stay of judgment delivered by Honourable K. Kibelion on 29th January 2025 in Nakuru CMCC No. 205 of 2018 be and is hereby issued pending the hearing and determination of this Appeal.
 2. A stay of all proceedings in Nakuru CMCC No. 205 of 2018 be and is hereby issued pending hearing determination of this appeal.
 3. The above Orders are on condition that the Appellant/Applicant deposits the entire decretal sum in Court within 45 days from the date of this Ruling.
 4. In default of Order No. 3 above, the Orders herein automatically lapse.
 5. The Appellant to file and serve his Record of Appeal within 45 days from the date of this Ruling.
 6. The costs of the Application to abide the outcome of the Appeal.
28. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF FEBRUARY, 2026.

PATRICIA GICHOHI

JUDGE

N/A for parties duly notified

Erickson, Court Assistant

