

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CIVIL APPEAL NO. E039 OF 2024**

ERASTUS KINYUA KANGA .....APPLICANT/APPELLANT

VERSUS

FLORENCE KENDI MUCHENA.....RESPONDENT

**RULING**

1. This ruling is in respect of the Application dated 26<sup>th</sup> November 2024 seeking the following orders: -

- i. Spent
- ii. That pending the interpartes hearing of this application an order do issue to stay the execution of the judgment delivered on 14<sup>th</sup> November 2024 in Chuka SCCCOMM NO. E038 of 2024 and the decree arising therefrom.
- iii. That pending hearing and determination of this Appeal an order do issue to stay

the execution of the judgment delivered on 14<sup>th</sup> November 2024 in Chuka SCCCOMM NO. E038 of 2024 and the decree arising therefrom.

iv. That costs of this application do abide the outcome thereof.

2. The Application is founded on the grounds on the face of the motion and the supporting affidavit of Erastus Kinyua Kanga, the Applicant. He deponed that he was aggrieved by the judgment of the trial court, and had lodged an appeal.

3. He averred that the amount claimed by the Respondent was colossal and that he was apprehensive that execution may commence. That he was uncertain that the Respondent will refund any money or property recovered in execution if he (the Applicant) later succeeded on appeal.

4. He further stated that the Application was filed without any delay and the Respondent already holds the title deed to LR Magumoni/Thuita/4855 as security for due performance.
5. The Respondent despite being granted leave by the court to file his response and submissions elected not to do so rendering the application unopposed.

### **Analysis and determination**

6. The Applicant filed his written submissions dated 2<sup>nd</sup> April 2025 raising one issue for determination being whether he has met the threshold for grant of stay of execution which issue I adopt for determination.
7. He submitted that the decretal sum of Kshs. 577,500 plus interest is colossal and any form of execution would inevitably result in a substantial

loss as he doubts the Respondent's ability to refund the sum should the appeal succeed.

8. He further submitted that the Application was filed 12 days after the impugned judgment thus no delay and that he had offered a title deed held by the Respondent as security for due performance. He relied on the case of **Joseph Simiyu Mukenya v Agnes Naliaka Cheseto [2011] eKLR** where the court held that the kind of security the Applicant should give may ultimately be binding on the Appellant and Order 42 Rule 6 of the CPR is to ensure the discretion of the court is not fettered.
9. The law governing stay of execution pending appeal is found under **Order 42 Rule 6(2) of the Civil Procedure Rules, 2010**, which provides that:

“No order for stay of execution shall be made unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made;

(b) the application has been made without unreasonable delay; and

(c) such security as the court orders for the due performance of the decree has been given by the applicant.”

10. The Court of Appeal in **Butt v Rent Restriction Tribunal [1979] eKLR** the Court of Appeal held that the power to grant stay of execution is discretionary and should be exercised in such a manner as not to render an appeal nugatory, while at the same time safeguarding the interests of the successful litigant.

11. The Applicant has deposed that the decretal sum of Kshs. 577,500 plus interest is substantial and that he doubts the Respondent’s ability to

refund the same in the event the appeal succeeds. The apprehension expressed by an applicant regarding the Respondent's inability to refund the decretal amount is a relevant consideration.

12. In **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR**, the Court of Appeal held that once an Applicant expresses a reasonable fear that a Respondent may not be able to refund the decretal sum, the evidential burden shifts to the Respondent to demonstrate his financial ability to make such refund.
13. In the present case, the Respondent did not file any response to rebut the Applicant's assertion. In the absence of any evidence demonstrating the Respondent's ability to refund the decretal sum, the Applicant's apprehension remains uncontroverted. I am therefore satisfied that the

Applicant has demonstrated the likelihood of suffering substantial loss if stay is not granted.

14. The judgment sought to be stayed was delivered on 14th November 2024, while the present Application was filed on 26th November 2024, approximately twelve (12) days later.

15. In my view, such a period cannot be said to constitute unreasonable delay. Courts have consistently held that prompt filing of an Application for stay demonstrates diligence on the part of an Applicant. I therefore find that the Application was filed timeously.

16. The final requirement under **Order 42 Rule 6(2)** is the provision of security for the due performance of the decree.

17. The Applicant has stated that the Respondent is already in possession of the title deed to **LR Magumoni/Thuita/4855**, which he proposes

should stand as security for the due performance of the decree. This court, not being the trial court, is however not privy to the circumstances under which the title got into the hands of the Respondent and for what purpose or whether the said title belonged to the Applicant. No explanation was offered beyond stating that the Respondent was holding the title.

18. The purpose of security is to ensure that the successful litigant is not prejudiced by the grant of stay. In **Focin Motorcycle Co. Ltd v Ann Wambui Wangui & Another [2018] eKLR**, Nambuye J. held that security is intended to balance the competing interests of the parties by protecting the decree holder while preserving the appellant's right of appeal.

19. In light of the foregoing analysis, I am satisfied that the Applicant has met the conditions set out

under **Order 42 Rule 6(2) of the Civil Procedure Rules** for the grant of stay of execution pending appeal.

20. Consequently, the Application dated 26th November 2024 is allowed on the following conditions:-

- i. There shall be a stay of execution of the judgment delivered on 14th November 2024 in Chuka SCCCOMM No. E038 of 2024 and the resultant decree pending the hearing and determination of the appeal.
- ii. The Applicant shall pay into court Kshs.30,000/= being security for costs within 30 days.
- iii. Record of Appeal be filed within 30 days.
- iv. Costs of the Application shall abide the outcome of the Appeal.

Orders accordingly,

**Ruling delivered, dated and signed at Chuka  
this 5<sup>th</sup> day of March, 2026.**

.....

**R. LAGAT-KORIR**  
**JUDGE**

**Ruling delivered in the absence of the parties. Muriuki (Court Assistant.)**

ORIGINAL