



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gitonga v Chisembe (Civil Appeal E017 of 2025)  
[2026] KEHC 3024 (KLR) (6 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3024 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E017 OF 2025**

**M THANDE, J**

**MARCH 6, 2026**

**BETWEEN**

**NJOROGE GITONGA ..... APPELLANT**

**AND**

**FRANCIS AMOYI CHISEMBE ..... RESPONDENT**

**RULING**

1. By an Application dated 21.2.25, the Appellant seeks stay of execution, pending appeal, of the ruling delivered on 22.1.25 by Hon. James Ongondo (SPM) in Malindi Succession Cause No. E151 of 2024 in the matter of the estate of Agnes Akwana Njoroge. The Appellant further seeks leave to adduce new evidence in support of his case.
2. In the impugned ruling, the trial court dismissed the Appellant’s argument that the Respondent ought to have filed a cross petition and answer to petition and found the omission curable under Article 159(2)(d) of *the Constitution*. The trial court then “quashed” the petition filed by the Appellant. The court found that “the intention of the deceased to begin adoption of minor Kelly Kana was to exclude the petitioner from inheriting her estate having separated with him for up to 20 years. He is not entitled to a piece of the estate of the deceased and is therefore barred from filing such a petition. O (sic) order the local chief to issue introduction letter to the objector herein who will ensure the interests of the minor are protected.”
3. The Appellant is aggrieved by the said ruling has already filed an appeal against the same.
4. The Application is opposed by the Respondent vide his replying affidavit sworn on 11.3.25.
5. I have looked at the rival affidavits and find that they dwell on matters which ought to be considered and determined in the appeal. Accordingly, the Court will not delve into them.



6. The jurisdiction of the Court to grant stay of execution is set out in Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 2 provides:
  - (2) 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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
7. The general rule regarding an order for stay of execution is that first and foremost, it is discretionary. Where the Court is called upon, as in the present case, to exercise its discretion in any application, it must do so judicially, the overriding objective being to ensure that the ends of justice are met.
8. The Court of Appeal set out the factors to be considered in an application for stay of execution pending appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417, as follows:
  1. . The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.
9. Flowing from the cited decision, it can be discerned that while considering an application for stay, the discretion of the Court must be exercised in a manner that will not prevent an appeal or render an appeal nugatory. The Court will consider whether there is any overwhelming hinderance for the grant of stay and whether good grounds have been advanced. Additionally, the Court will take into account the existence of any special circumstances and unique requirements. Lastly the Court may order security for costs.
10. Access to justice is a right enshrined in Article 48 of *the Constitution* and extends to the right to appeal. As such, a party's right to appeal should be protected by ensuring that such party's appeal is not rendered nugatory. In exercising its discretion, the court must weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
11. The law requires that an application for stay of execution be filed without unreasonable delay. In the instant case, the decision of the lower court by which the Appellant is aggrieved, was made on 22.1.25 while the Application is dated 21.2.25. I am satisfied that the Application was filed timeously.



12. It is trite law that the purpose of stay of execution is to preserve the substratum of an appeal. In the present case, the impugned ruling was in respect of a petition by the Appellant for a grant of representation in respect of the estate of the deceased and an objection thereto. The trial court dismissed the Appellant's argument that the Respondent ought to have filed a cross petition and answer to petition. The trial court further quashed the petition and made a definitive finding that the Appellant is not entitled to the estate of the deceased and barred him from filing a petition. The trial court also directed that the local chief issue an introduction letter to the Respondent who will ensure that the minor's interests are protected. All these are issues to be decided in the appeal, and as indicated, the parties in their affidavits made averments which ought to be considered and determined.
13. Having considered the foregoing, I find that there is need to preserve the substratum of the appeal. I also find that there is no overwhelming hinderance to grant the stay sought herein. I say no more lest I preempt the appeal.
14. I now turn to the prayer for introduction of additional evidence.
15. Section 78 of the *Civil Procedure Act* confers upon an appellate court the power to admit additional evidence as follows:
  1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
    - (d) to take additional evidence or to require the evidence to be taken;
16. Order 42 Rule 27 of the Civil Procedure Rules stipulates the circumstances under which additional evidence may be allowed on appeal:
  1. The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—
    - a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
    - b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
  2. Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.
17. For an appellate court to exercise its power to admit additional evidence it must be demonstrated that the court below refused to admit evidence which ought to have been admitted. Additional evidence may also be admitted where the appellate court requires any document to be produced or any witness to be examined, to enable it make a decision or for any other substantial cause. The appellate court is required to record the reasons for allowing additional evidence to be produced.
18. In the case of *Mahamud v Mohamad & 3 others (Petition 7 & 9 of 2018 (Consolidated))* [2018] KESC 62 (KLR) (28 September 2018) (Ruling) the Supreme Court considered an application to take additional evidence and laid down the governing principles as follows:

We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:



- a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
  - b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
  - c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
  - d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
  - e. the evidence must be credible in the sense that it is capable of belief;
  - f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
  - g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
  - h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;
  - i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
  - j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
  - k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.
19. The Supreme Court further stressed that even with the application of the above-stated principles allowing additional evidence must be on a case-by-case basis and even then, sparingly with abundant caution.
20. In the present case, the Appellant has not told the Court that the lower court refused to admit evidence which ought to have been admitted. Further, this Court has not found that it requires any document to be produced. Additionally, the Appellant has not said or shown that he was unable to obtain the additional evidence with reasonable diligence for use at the trial or that the same was not within his knowledge. He has also not said that the same could not have been produced at the time of the hearing of the objection proceedings in the court below.
21. In light of the foregoing, I find that the Appellant has not satisfied the requirements of the applicable law or the guidelines set out by the Supreme Court in the cited case. Accordingly, the prayer for leave to produce additional evidence on appeal is rejected.



22. The upshot is that the Application dated 21.2.25 partially succeeds and I grant the stay sought on the following terms:
- i. The record of appeal shall be filed and served by 27.3.26. In default, the stay granted herein shall lapse.
  - ii. Mention for compliance on 13.4.26.
  - iii. The costs of this application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 6<sup>TH</sup> DAY OF MARCH 2026**

**M. THANDE**

**JUDGE**

