

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMMA NO. E229 OF 2025

ZACHARIA GITHINJI KARIA.....APPELLANT

-VERSUS-

JAMES WAHOME NDEGWA.....1ST RESPONDENT

ESTHER WANJIRU MUTURI.....2ND RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 13th August 2025 filed by the appellant pursuant to the provisions of Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act, Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, and Section 3(2) of the High Court Practice & Procedure Vacation Rules. The appellant prays that pending the hearing and determination of the intended Appeal, the Honourable Court be pleased to grant an order for stay of execution and enforcement of the Rulings and Orders issued on 31st July 2025 and 7th August 2025, as well as all consequential orders thereto. The appellant also prays for an order suspending any action arising from the said Orders, including the warrants of arrest issued against him and the directive requiring him to deposit his passport with the Court Administrator.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Zacharia Githinji Karia, the appellant herein. Mr. Karia averred that on 31st July 2025, the Court issued warrants for his arrest and committal to civil jail in execution of a decree dated 7th October 2022 and that on 7th August 2025, the Court ordered him to deposit his passport with the Court. He deposed that an initial

thirty-day stay of execution was granted, expiring on 29th August 2025, and that he has since filed a Notice of Appeal challenging the aforesaid Rulings.

3. Mr. Karia contended that the intended Appeal raises significant questions of law and fact, including the application of Section 38 of the Civil Procedure Act, the scope of a judgment debtor's constitutional rights under Article 29 of the Constitution, and the legal threshold for issuing arrest warrants in execution of a decree. He stated that his primary income derives from a horticultural export business focused on hass avocados, which was severely affected by regulatory restrictions imposed by the Agricultural and Food Authority, limiting his ability to pay the decretal sum. In addition, he asserted that he has an outstanding loan with Diamond Trust Bank, further straining his cash flow. He deposed that arrest and committal to civil jail would cripple his business operations, eliminating the means to satisfy the decree, despite having made prior partial payments.
4. Mr. Karia contended that the Order to deposit his passport in Court was made *ex parte* without evidentiary basis, infringing on his constitutional right to freedom of movement under Article 39. He asserted that he is not a flight risk due to strong family and business ties in Kenya. He averred that he is willing to pay the decretal amount in reasonable instalments and to provide security as directed. He maintained that an order for stay of execution is necessary to preserve his liberty, livelihood, and ability to prosecute the Appeal without suffering irreparable harm.
5. In opposition to the application herein, the respondents filed a replying affidavit sworn on 24th September 2025 by Mr. James Wahome Ndegwa, an Advocate of the High Court of Kenya and the 1st respondent herein. Mr. Ndegwa averred that the instant application is an abuse of the Court process and is part of a pattern by the appellant, a serial litigant, to delay and obstruct justice and evade obligations under the Judgment and decree issued by the

Court in **CMCC No. E328 of 2022** for Kshs.8,258,000/=, which the appellant defaulted on, despite prior commitments to settle out of Court.

6. Mr. Ndegwa stated that despite the appellant being a person of means, he has repeatedly diverted funds obtained through loans or other means, issued dishonored cheques and developed or sold properties acquired during the business partnership to avoid paying the decretal sum. He made specific instances of loans diverted to construct residential and commercial properties, acknowledgement of indebtedness through written agreements and cheques that were dishonored, and transfer or sale of properties to family members or third parties to evade execution. He asserted that attempts to recover assets through auction have been largely unsuccessful as the appellant has been hiding properties.
7. Mr. Ndegwa deposed that the appellant's filings and applications are designed to frustrate the enforcement of the decree and prevent the respondents from enjoying the fruits of their Judgment. He claimed that the appellant is dishonest, has unclean hands, and that minimal security ordered by the Court for stay of execution is inadequate given the magnitude of the decretal sum. In the end, he urged this Court to vary its orders to ensure full security of the decretal sum, possibly by depositing it into a joint interest-bearing account in the names of the Advocates for the parties, to prevent irreparable loss and prejudice to the respondents and to uphold justice.
8. In a rejoinder, the appellant filed a supplementary affidavit sworn on 16th October 2025 by Mr. Zacharia Githinji Karia, the appellant herein. Mr. Karia challenged the propriety of the respondents' replying affidavit, stating that it was filed by Advocates who are not properly on record and should therefore be struck out. He confirmed compliance with the Court's Order for security, by depositing Kshs.1,000,000/= on 14th October 2025 as a demonstration of good faith, and noted that the respondents did not file a cross-appeal against

the Ruling of 31st July 2025. He clarified that the instant application and the intended Appeal are narrowly confined to the setting aside of the warrants of arrest issued on 31st July 2025, and not an Appeal against the Trial Court's Judgment or other previously litigated matters.

9. In response to allegations of abuse of the Court process, dishonesty, and being a person of means, Mr. Karia denied the claims and asserted that the said applications were filed as of right and that financial constraints and multiple debts have genuinely hindered payment of the decretal sum. He contended that several allegations raised by the respondents, including claims relating to loans, property acquisitions, dishonored cheques, motor vehicles, and alleged transfers or sales of property, are either unsupported by admissible evidence, violate principles of bank - client or Advocate - client confidentiality, relate to matters not before the Court, or had already been struck out by the Trial Court in its Ruling of 31st July 2025. He disputed claims of fraud, concealment of assets, and deliberate evasion of execution, describing such assertions as scandalous and oppressive.
10. Mr. Karia maintained that efforts have been made to settle the decretal sum, including a prior payment of Kshs.500,000/= acknowledged by the Court. He reiterated that committal to civil jail would paralyze the business that provides the only viable means of satisfying the decree. He emphasized that the Court itself found no scheme to avoid execution, but rather a lack of demonstrated good faith through regular payments, which he now seeks to address. In that regard, Mr. Karia proposed to continue acting in good faith by maintaining the deposited security and undertaking to pay the decretal sum in monthly instalments of Kshs.700,000/= commencing December 2025, until payment in full.
11. The application herein was canvassed by way of written submissions. The appellant's submissions were filed on 20th October 2025 by the law firm of

Kilomenn Advocates, while the respondents' submissions were filed by the law firm of Githinji Kimamo & Company Advocates on 25th October 2025.

12. Mr. Opiyo, learned Counsel for the appellant relied on the case of **Gathenge Engineers & Electrical Limited v Postal Corporation of Kenya** [2018] KEHC 44447 (KLR), and submitted that the respondents' replying affidavit sworn on 25th September 2025 is incompetent and ought to be struck out because it was filed by a firm of Advocates not properly on record, contrary to the provisions of Order 9 Rule 5 of the Civil Procedure Rules, 2010, there having been no Notice of Change of Advocates or Notice to Act in Person filed. He argued that the instant application stands unopposed and should be allowed as prayed
13. Mr. Opiyo contended that the appellant has fully satisfied the conditions for being granted stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules, 2010. He cited the case of **James Wangalwa & another v Agnes Naliaka Cheseto** [2012] KEHC 1094 (KLR), and submitted that substantial loss will occur if stay is denied, as the intended Appeal challenges the orders of arrest, committal to civil jail, and passport deposit, which would cripple his avocado export business, his sole source of livelihood, by restricting his liberty and movement, contrary to the provisions of Article 29 of the Constitution.
14. He relied on the Court of Appeal case of **Ngatuny & 2 others v Mosoiko & 2 others** [2024] KECA 1656 (KLR), and argued that execution prior to the hearing of the intended Appeal would render the Appeal nugatory. Counsel emphasized that the application herein was filed promptly following the Ruling of 31st July 2025, and asserted that the appellant has complied with Court Orders by depositing Kshs.1,000,000/= as security within the stipulated period.

15. Mr. Githinji, learned Counsel for the respondents submitted that the instant application fails to meet the mandatory threshold under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. While conceding that the application herein was filed timeously after the issuance of warrants of arrest in August 2025, he argued that the appellant has since 2022, persistently engaged in a pattern of filing multiple unmeritorious applications and Appeals, many of which were dismissed or abandoned, solely to delay execution and deny the decree-holder the fruits of a lawful Judgment delivered over three (3) years ago. He contended that the appellant's conduct demonstrates indolence, disregard of Court Orders, and abuse of the Court process, and asserted that justice must balance the appellant's rights against the decree-holder's right to enjoy the fruits of his Judgment without further obstruction.
16. On the issue of substantial loss, Counsel relied on the case of **Antoine Ndiaye v African Virtual University** [2015] KEHC 6783 (KLR), and submitted that in money decrees, substantial loss is demonstrated by the appellant showing the respondent's inability to refund the decretal sum if the Appeal succeeds, which burden squarely lies on the appellant. Mr. Githinji maintained that the appellant has failed to demonstrate any such inability or to show how the Appeal would be rendered nugatory, noting that the decree itself has not been appealed against and remains valid and enforceable. He further relied on the case of **Machira t/a Machira & Co. Advocates v East African Standard** [2002] KEHC 1167 (KLR), and emphasized that Courts should not overprotect appellants at the expense of successful litigants who are entitled to the fruits of their judgments.
17. In regard to furnishing of security for the due performance of the decree, Mr. Githinji submitted that the requirement under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, is mandatory and not discretionary. Citing the case of **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co**

Advocates & 2 others [2014] KEHC 2430 (KLR), Counsel argued that failure to offer or propose adequate security is fatal to an application for stay of execution. He contended that the appellant has neither offered security nor demonstrated any concrete measures to safeguard the respondents' interests should the Appeal fail. He further claimed that the appellant has transferred assets to family members to defeat execution, demonstrating bad faith and unclean hands. In arguing that civil jail is appropriate for debtors who are able but unwilling to pay, Mr. Githinji referred to the case of **Wanjiku & another v Attorney General & another; Muna & another (Interested Parties)** [2012] KEHC 5410 (KLR).

ANALYSIS AND DETERMINATION.

18. I have considered the instant application and the affidavits filed in support thereof. I have also considered the replying affidavit by the respondents and the written submissions by Counsel for the parties. The issues that arise for determination are –

- i) Whether the instant application is opposed; and**
- ii) Whether an order for stay of execution should issue.**

Whether the instant application is opposed.

19. The appellant relied on the provisions of Order 9 Rule 5 of the Civil Procedure Rules, 2010, and stated that the instant application is unopposed since the respondents' replying affidavit was filed by Advocates who are not properly on record for the respondents. Upon perusal of the provisions of Order 9 Rule 5, of the Civil Procedure Rules, 2010, it is noteworthy that it provides "*for change of Advocate*" and ensures that proceedings are not stalled or invalidated by informal or undisclosed changes of Advocates. The said Rule emphasizes that formal notice is what gives legal effect to the change, and not private instructions between client and new Counsel.

20. The applicable provisions in this case however would be Order 9 Rule 1 of the Civil Procedure Rules, 2010, since from the Court record and the case tracking system, the respondents have never had an Advocate on record acting on their behalf before this Court. The said provisions state that –

Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

Provided that -

- a) any such appearance shall, if the court so directs, be made by the party in person; and***
- b) where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney-General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.***

21. From the Court record and the case tracking system, it is manifest that before the filing of the respondents' replying affidavit by the law firm of Ndegwa Wahome & Company Advocates, neither the said firm of Advocates nor any other firm of Advocates had been appointed by the respondents to act on their behalf, in line with the provisions of Order 9 Rule 1 of the Civil Procedure Rules, 2010. It therefore follows that the respondents' replying

affidavit was filed by an Advocates who are not properly on record and it is therefore not properly before this Court. In the premise, it is hereby struck out.

22. In light of the above, I am inclined to agree with the appellant that the instant application is unopposed.

Whether an order for stay of execution should issue.

23. Stay of execution pending Appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, 2010. Sub-rule 2 provides for the conditions to be considered by the Court when dealing with an application of this nature. It states that-

1) No order for 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.

24. The instant application was filed timeously and without any unreasonable delay, having been filed on 13th August 2025, whereas the impugned warrants of arrest were issued on 31st July 2025 and the order requiring deposit of the appellant's passport was made on 7th August 2025.

25. On the question of substantial loss, this Court notes that the intended Appeal is directed at the manner of execution, specifically the issuance of warrants of arrest, committal to civil jail, and the Order restricting the appellant's movement by deposit of his passport. The appellant's case is that his sole source of income is a horticultural export business that requires his constant

physical presence and mobility. He contended that his arrest, committal to civil jail, and restriction of travel would not only curtail his liberty, but it would also paralyze the very business that provides the means through which the decretal sum may ultimately be satisfied.

26. While it is true that the decree herein is a money decree, this Court is of the considered view that substantial loss is not confined to inability to refund the decretal sum alone. It encompasses a state of affairs that would irreparably affect or negate the essential core of the Appeal. I am therefore persuaded that in this case, execution by way of arrest and committal to civil jail before the Appeal is heard risks rendering the appellant's intended Appeal nugatory, as the appellant's liberty and livelihood, the very subject of the intended Appeal, would have already been curtailed.
27. This Court is alive to the fact that it is enjoined to balance the competing rights of the parties herein. The respondents' undoubted right to enjoy the fruits of their Judgment and the appellant's right to pursue an Appeal that raises issues touching on personal liberty, freedom of movement, and the proper application of Section 38 of the Civil Procedure Act, which in my considered view are arguable issues warranting this Court's consideration on Appeal. In view of the foregoing, this Court is persuaded that in balancing the said rights, the balance tilts in favour of preserving the *status quo*, pending the hearing and determination of the intended Appeal, provided that adequate safeguards are put in place to protect the respondents' interests.
28. As to the issue of deposit of security for the due performance of the decree, the appellant has demonstrated compliance with this Court's earlier directions by depositing Kshs.1,000,000/= as security. He has further expressed willingness to continue providing security and to service the decretal sum by way of regular instalments. Although this Court takes notice of the respondents' contention that the security offered by the appellant is

insufficient, the purpose of security under Order 42 Rule 6 of the Civil Procedure Rules, 2010, is not to punish the judgment debtor, but to guarantee due performance of the decree, as was stated in the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & another** [2018] KEHC 8358 (KLR), as hereunder -

Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.

29. In view of the analysis that I have made, and taking into account the nature of the Appeal and the partial security already furnished, this Court is satisfied that the requirement for security has been sufficiently demonstrated to warrant appellant being granted a conditional stay of execution, subject to the provision of further security.
30. This Court finds that the appellant has satisfied the conditions set out under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, and holds that the interests of justice would be best served by granting a conditional stay of execution to preserve the appellant's right of Appeal, while at the same time safeguarding the respondents' right to eventual satisfaction of the decree, if the appellant will not be successful in his Appeal.
31. This Court is satisfied that the appellant has made out a case to warrant being granted an order for stay of execution pending Appeal. The appellant's application dated 13th August 2025 is merited. It is allowed in the following terms –

- i) An order for stay of execution and enforcement of the Rulings and Orders made on 31st July 2025 and 7th August 2025, including the warrants of arrest and the Order requiring deposit of the appellant's passport in Court is hereby made pending the hearing and determination of the appellant's intended Appeal;**
- ii) The aforesaid Order for stay of execution is conditional upon the appellant depositing the balance of the decretal sum, in a joint interest earning account in the names of the Advocates for the parties within 30 days from the date of this Ruling. The said amount shall be in addition to the Kshs.1,000,000/= already deposited as security;**
- iii) If the appellant fails to comply with Order (ii) above, the Order for stay of execution shall automatically lapse and the appellant's application dated 13th August 2025 shall stand dismissed; and**
- iv) Costs of the application herein shall abide the outcome of the Appeal.**

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 6th day of March 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Ong'injo for the appellant/applicant

Mr. Ojare for the respondents

Ms B. Wokabi – Court Assistant.