



REPUBLIC OF KENYA



**Adan & another v Makanga (Civil Appeal E153 of 2025)
[2026] KEHC 2401 (KLR) (26 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E153 OF 2025
E OMINDE, J
FEBRUARY 26, 2026**

BETWEEN

ISSE ALI ADAN 1ST APPELLANT

SAHANE ENTERPRISES LIMITED 2ND APPELLANT

AND

VERONICA IMBOSA MAKANGA RESPONDENT

RULING

1. By way of Notice of Motion dated 21st July 2025, the Applicant seeks the following orders in the test suit;
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to grant stay of execution in respect of the Judgment of this Honourable Court delivered by Hon Cheronoh Kesse on the 24th day of June, 2025 pending the hearing and final determination of this Appeal.
 4. That the costs of this application be provided for.
2. The Application is expressed to be brought under Section 1A, IB, 3A, 79G of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 42 Rule 6 and Order 51 Rule 1 Section 3 of the Civil Procedure Rules 2010, and 'all other enabling provisions of the law'. The Application is premised on the grounds on the face of it and the averments in the affidavit sworn by Kenneth Macharia, the head of the Legal Department of Takaful Insurance of Africa Company, the Appellants/Applicants insurer.
3. In his affidavit, he deponed that the court delivered its judgement on 24th June, 2025 awarding the Respondent general damages, special damages, costs and interest from the date of judgement, parties



having entered into a consent on liability at the ratio of 10:90 in favour of the Respondent. He stated that the Judgement was availed to the Applicants' Counsel on record via email on 27th June, 2025. Further, that the Applicants are aggrieved by the whole decision and filed a Memorandum of Appeal on 18th July 2025. They are apprehensive that in the absence of orders of stay of execution, the Respondent may proceed to execute against them subjecting them to irreparable and/or substantial loss.

4. The deponent averred that the intended appeal raises triable and arguable issues for determination and if stay is not granted, the same will be rendered nugatory as it has high chances of success. Further, that the Applicants are apprehensive that the Respondent will not be in a position to refund the monies paid in the event the appeal succeeds. He stated that they are willing to furnish security for satisfaction of the judgment in favour of the Respondent in the nature of a bank guarantee or deposit of the judgment sum in a joint interest earning account in the name of Counsels for both parties or as may be directed by this Court.
5. He averred that there has been no delay in making this application and no prejudice will be suffered by the Respondent. Further, that the Applicants will suffer irreparable loss unless the orders sought are granted. He urged that it is in the interest of justice that this application be heard and orders granted.
6. The Respondent swore a Replying Affidavit dated 12th August 2025 in response to the application. She deponed that she was involved in a road traffic accident on 27th September 2024 and sustained injuries and sought compensation. Upon filing the primary suit in the subordinate court, the Applicant freely admitted liability for her injuries and now being a successful litigant, she is entitled to the fruits of her litigation.
7. She urged that the applicant is not entitled to the orders sought for the following reasons; That Liability was entered by consent and the quantum of damages awarded were not manifestly excessive; the applicant has not met the pre-requisite conditions for granting stay pending appeal; no substantial loss has been demonstrated; no proposal on security has been offered and the appeal being on quantum only has minimal chances of success.
8. The Respondent averred that if the court is inclined to grant stay, she be paid a substantial part of the decree as the appeal is merely on quantum. She additionally prayed that costs be paid in full as there exists no appeal on party and party costs, annexing and marking as "VIM 1" the certificate of assessed costs.
9. The deponent swore a Supplementary affidavit dated 7th July 2025 which was essentially a repetition of the contents of the supporting affidavit. The matter was canvassed by way of written submissions and Counsel filed their respective submissions on behalf of the parties.

Appellants' Submissions

10. Learned counsel for the applicant submitted that the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute, so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. Counsel cited the provisions of Order 42 rule 6 of the Civil Procedure Rules, 2010 and further, submitted that the principles for the granting stay of execution was captured in the case of *RWW vs. EKW* [2019] eKLR.
11. On whether substantial loss may result to the applicant unless the order is made, counsel urged that should stay of execution be denied, the Plaintiff/Respondent will proceed to execute and the applicant is likely to suffer substantial loss that may not be remedied by damages and costs.



12. Counsel submitted that the Application was filed timeously as the judgment was delivered on 24th June, 2025 and the Memorandum of Appeal together with the Application under Certificate of Urgency was filed on 18th and 21st July, 2025 respectively. He urged that this clearly shows that the Application has been made without unreasonable delay, placing reliance on the case of Stanley Kiplagat Rono & another v William Kiprotich Cherus [2021] eKLR.
13. Counsel urged that the applicants are ready and willing to deposit security of costs should the court order so. He submitted that it is trite law that a party should not be condemned unheard, citing the holding by the supreme court of Uganda in the case of The Management Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc. Application No.18 of 2010. He urged that the Appellant/Applicant is desirous of being heard, and the fact that they filed the present application in an attempt to be given an opportunity to defend their case and persuade this court to find that it would not be in the best interests of justice to deny them an opportunity to be heard on appeal. There is no prejudice that the Respondent would suffer and if any the same could be compensated by way of cost. He urged the court to allow the application as prayed.

Respondents' submissions

14. Learned counsel for the respondent submitted that Order 42 Rule 6(1) and (2) provides for principles aiding the grant or refusal of stay orders pending appeal. Further, that the order is largely discretionary and the court ought to consider each case with its own obtaining circumstances. He stated that in this case, the parties filed a consent on liability and the appeal is only on the quantum payable.
15. That it has been held severally that an appellate court will only disturb an award on quantum of damages if it is proved that the same was inordinately high or low so as to amount to a wholly erroneous estimate of the damage. He urged that the above principle was enunciated in the decided case of Nairobi Court of Appeal Civil Appeal No. 98 of 2024 Gitobu Imanyara & 2 others vs Attorney General. He additionally submitted that the judges of appeal insisted on the use of the word extremely high or so very small as to amount to an erroneous estimate of the damage.
16. In the present case the learned trial magistrate awarded Kshs 350,000/= for the injuries sustained by the plaintiff/appellant herein. In her judgment, she considered; the injuries sustained, the current trends courts adopt on awarding damages, the current obtaining situation of the Kenyan shilling, inflation rates and the current condition of the plaintiff/respondent. Counsel urged that the award is not excessive and cannot be said to have amounted to an erroneous estimate.
17. Counsel submitted that the appellant has not complied with the provisions of Order 42 of the Civil Procedure Rules as there is no proposal on security pending appeal as demanded by the rules. He urged that the applicant/appellant is not entitled to the orders sought as the application does not meet the threshold of the provisions of Order 42 of the Civil Procedure Rules. He urged the court to dismiss the application with costs to the respondent.

Determination

18. The sole issue that arises for determination is;

Whether a stay of execution pending appeal should issue

19. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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.

20. These principles were elaborated in the case of *Butt Vs Rent Restriction Tribunal* [1979] with emphasis being on the fact that to grant or not to grant an order of stay is a discretion of the court which discretion however must be exercised judicially bearing in mind the rights of a successful party to enjoy the fruits of his judgement but balancing this against the need to ensure that an appellants appeal is not rendered nugatory in the event that the same is successful.

21. What constitutes substantial loss is as was very aptly stated by Gikonyo J in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR which elucidation I associate myself with fully. The Learned Judge stated as follows:

“ 11. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

22. In *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates* [2014] eKLR the purpose of security and what it entails was discussed and the court 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.”

23. The Applicant has averred that the Respondent will be able to refund the decretal sum in the event that the appeal is successful. The court notes that the Respondent did not at all address this averment by either contradicting and demonstrating that she is indeed in a position to reimburse the decretal sum if the appeal is successful or even denying it in total. In this regard, the decision of the Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another* [2006] eKLR is instructive and it guided as follows:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them.



Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya....”

24. In the instant case, the court notes that the impugned decision was delivered on 22nd June 2025 and this Application seeking for a stay of execution of the judgement delivered therein was filed on 21st July 2025. The court is satisfied therefore satisfied that the application was filed without unreasonable delay. Further, even as the court notes that the Appellant has not sufficiently demonstrated the substantial loss that he stands to suffer if the stay is not granted, it is significant that he is ready and willing to avail security for the due performance of the decree in the form of a bank guarantee or by way of depositing a bank guarantee with the court. This is significant particularly in light of the fact that the Respondent on their part has not at all demonstrated that she will be able to refund the decretal sum in the event the appeal by the Applicant is successful.
25. I have also perused the memorandum of appeal. It is not in dispute that liability was agreed upon by consent and the appeal is on quantum. The appellant contends that the amount awarded was inordinately high in light of the injuries sustained. The issue of whether damages awarded are commensurate with the injuries sustained is a well-established ground of appeal and in this regard, I am satisfied that the Applicant has an arguable appeal and that the said appeal is not frivolous and is also not meant to delay and/or deny the Respondent from enjoying the fruits of her judgement.
26. In conclusion therefore, I am satisfied that the Application has merit. Accordingly, the same is allowed as follows;
 - i. That a stay of execution in respect of the Judgment of the Hon Cheronoh Kesse, PM delivered on the 24th day of June, 2025 be and is now hereby issued pending the hearing and final determination of Appeal herein filed.
 - ii. That this decision shall also apply in the following cases that are part of the same series; HCCA NO. E154 of 2025; HCCA NO. E155 of 2025; HCCA NO. E156 of 2025; HCCA NO. E157 of 2025; HCCA NO. E158 of 2025; HCCA NO. E159 of 2025; HCCA NO. E160 of 2025; HCCA NO. E161 of 2025; HCCA NO. E162 of 2025; HCCA NO. E 163 of 2025.
 - iii. That the Applicant is to bear the cost of the Application

READ DATED AND SIGNED AT ELDORET ON 26TH FEBRUARY 2026

E. OMINDE

JUDGE

