

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E255 OF 2025

**ANN NYANGIGI
GITAU.....APPELLANT/APPLICANT**

VERSUS

**JOB THUMBI MBUTHIA.....
RESPONDENT**

R U L I N G

Brief facts

1. The application for determination dated 7th October 2025 seeks for orders of stay of execution in respect of the judgment in Gatundu CM Civil Suit No. E191 of 2021 delivered on 9th September 2025 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 28th October 2025.

Applicant's Case

3. The applicant states that judgment in the lower court was delivered on 9th September 2025 in the presence of both advocates and the said court granted 30 days stay of

execution which is set to lapse on 9th October 2025. The applicant further states that she has

applied for certified copies of proceedings and judgment for the purposes of appeal.

4. The applicant argues that if the orders of stay of execution are not granted and execution commences, the appeal shall be rendered nugatory resulting to substantial loss. The applicant further states that the appeal raises arguable points of law and fact.

The Respondent's Case

5. The respondent states the applicant has not provided any security for costs. The respondent further states that the applicant be compelled to pay half of the decretal sum being Kshs. 1 million to him within 14 days and deposit the other half in a joint interest earning account in the names of both advocates.
6. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

7. The applicant submits that she has an arguable appeal and no delay was occasioned in filing either the appeal or the instant application. Judgment was delivered on 9th September 2025 and the appeal was filed on 6th October 2025 and a further request made for certified copies of

proceedings and judgment vide letter dated 6th October 2025.

8. The applicant relies on the cases of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR; Richard Muthusi vs Patrick Gituma Ngomo & Another [2017] eKLR** and **Nairobi Civil**

Application No. 238 of 2005 National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Another (UR) and submits that she has an arguable appeal and no delay was occasioned in filing the appeal or the instant application. On the issue of security, the applicant submits that the respondent has neither an executable decree nor has he made an order in the execution of the said decree. The applicant relies on the case of **Civil Appeal No. 144 of 2018 Kapa Oil Refineries Limited vs Festus Mutuku Muinde (2018) eKLR** and submits that the court ought to balance whether paying Kshs. 1 million to the respondent would be fair considering he has not placed any evidence of an affidavit to show that he would be able to refund back the said sum if the appeal is successful.

The Respondent's Submissions

9. The respondent refers to the case of **Fredrick Ignaza vs Agaseta Kauga Zaria [2015] eKLR** and submits that the motion was brought after inordinate and unexplained delay. The judgment of the lower court was delivered on 9th September 2025 and the instant application was filed

on 27th October 2025 more than 6 weeks after the judgment was delivered. The respondent submits that the applicant has failed to demonstrate that she has an arguable appeal with high chances of success.

10. The respondent relies on the cases of **Elijah Njagi & Another vs Yvonne Ndungu [2021] eKLR; Mohammed Salim t/a Choice Butchery vs Nasserapuria Memon Jamat [2013] eKLR** and **Shell Limited vs Kibiru & Another (1986) KLR 410** and submits that the

applicant has not shown any substantial loss. On the issue of security, the respondent relies on the case of **Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd [2019] eKLR**, the respondent submits that the applicant ought to be ordered to pay him half the decretal sum and deposit the balance in an interest earning account in the names of both advocates within 21 days.

The Law.

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal

11. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil

Procedure Rules. **Order 42 Rule 6 of the Civil Procedure Rules** stipulates:-

(1) “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem

just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

(2) 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 1st 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.

12. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

13. Substantial loss was clearly explained in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-**

“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...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

14. The applicant argues that she is apprehensive that the respondent shall proceed with execution at any time rendering the intended appeal nugatory.

15. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show that execution shall irreparably affect her or will alter the status quo to her detriment thus rendering the appeal nugatory. On perusal of the record, the applicant only raised the issue of the respondent's financial capabilities in her submissions. It was not in order to raise the said issue in the submissions while the supporting affidavit did

not bring up the said issue. As such, the said issue is of no consequence in this application. It is therefore my considered view that the applicant has not demonstrated the substantial loss she stands to suffer.

Has the application has been made without unreasonable delay

16. Judgment was delivered on 9th September 2025 and the applicant filed the instant application on 7th October 2025

and the memorandum of Appeal on 6th October 2025, thus the application has been filed timeously.

Security of costs

17. The purpose of security was explained in the case of **Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated:-

“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 the 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.

18. Evidently, the issue of security is discretionary and it is upon the court to determine the amount payable. The applicant has not offered any form of security herein.

19. Additionally, grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicant's unfettered right to file an appeal to fully ventilate his grievances. This was well stated in the case of **M/s Porteitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997** where the court held:-

That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.

20. Bearing the said balance in mind and considering the provisions of Order 42 Rule 6 of the Civil Procedure Rules, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal. Furthermore, I have perused the grounds of appeal in the memorandum of Appeal dated 6th October 2025 and without going into the merits of the appeal noted that the appeal cannot be said to have high chances of success but it is, nevertheless arguable.

21. However, the applicant having failed to establish that he will suffer substantial loss and the balance of convenience not being in his

favour, I reach the conclusion that this application for stay must fail.

22. This application is hereby dismissed for lack of merit with costs to the respondent.

23. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 27TH DAY OF FEBRUARY 2026.***

**F. MUCHEMI
JUDGE**