



REPUBLIC OF KENYA



KENYA LAW
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**Mwauti v Halako (Civil Appeal 018 of 2025)
[2026] KEHC 3173 (KLR) (26 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 3173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL 018 OF 2025
JN NJAGI, J
FEBRUARY 26, 2026**

BETWEEN

DANCAN KAMONI MWAUTI APPLICANT

AND

MEDIA HALAKO RESPONDENT

RULING

1. The applicant herein has filed an application dated 14th July 2025 seeking for the following orders: -
 1. Spent
 2. Spent
 3. That the Honourable Court be pleased to grant a stay of execution of the judgment/decre in of Hola CMCC No.E114 of 2023 dated 5th June 2025 pending the hearing and determination of the appeal herein.
 4. Costs of this application be provided for.
2. The application is based on grounds stated on the face of the application and supported by the affidavit of the legal officer of Jubilee Alianz General Insurance Ltd, the insurer of the Applicant herein.
3. The gist of the application is that the applicants have filed an appeal against the judgment and decree of the lower court and therefore that if execution of the judgment is not stayed the preferred appeal will be rendered nugatory and occasion the applicants to suffer substantial loss. They further argue that the appeal has high chances of success.
4. The application was opposed by the respondent vide a replying affidavit of counsel for the Respondent, Geoffrey Kilonzo sworn on 10th July 2025 in which he avers that the application does not meet the legal threshold for grant of the orders under the provisions of Order 42 Rule 6 of the Civil Procedure Rules



in that the applicant has not demonstrated that it will suffer substantial loss if the prayers sought are not granted. It was averred the Applicant has no arguable appeal and that should the appeal succeed the Respondent is capable of refunding the decretal sum as he is not a man of straw.

5. The application was canvassed by way of written submissions.

Applicant's submissions

6. The applicant submitted that the application has satisfied all the conditions as set out in Order 42 rule 6 of the Civil Procedure Rules for grant of stay of execution pending appeal.
7. The applicant submitted that it has shown sufficient cause to warrant grant of the orders sought.
8. The applicant submitted that it stands to suffer irreparable loss. It referred to the definition of substantial loss in the case of Tropical Commodities Suppliers Ltd v International Credit Bank Ltd (In liquidation), Misc. Application No.379 of 2003 (unreported) cited in the case of Antoine Ndiaye v African Virtual University (2015) KLR where it was held that:

“....Substantial loss does not represent any particular mathematical formular. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal....”

9. It was submitted that the decretal sum is Ksh.7,136,550,000/= which is a substantial amount. That the resources of the Respondent are not known and that he has not demonstrated that he is in a position to refund the decretal sum should the appeal succeed in which case the non-refund will occasion the Applicant substantial loss.
10. The Applicant submitted that the instant application was filed without delay in that it was filed within the 30 days allowed for lodging appeals after judgment.
11. On security for due performance of the decree, the applicant submitted that they are amenable to furnishing security as may be directed by the court. They cited the case of Elijah Njagi v Yvonne Ndunge (2021) eKLR where the court held that:

“the process of giving security in one which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them.....the court is concerned with preserving the rights of both parties pending that appeal, it is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even -handedly without prejudicing the issue pending the appeal.”

12. It was submitted that the obligation of the court is to preserve the subject matter pending appeal. The Applicant cited the case of Global Tours and Travels Ltd WC No.43 of 2000 (UR) where it was held that:

“.....whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should



be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

Respondent’s Submissions

13. The Respondent on the other hand submitted that the application has not met any of the requirements required for stay of execution pending appeal. That the Applicant has not demonstrated what substantial loss it would suffer should the court deny its application. That it has not pleaded anywhere that the Respondent is a man of straw and the inference is therefore that the Respondent will be able to refund the decretal sum should the appeal succeed. The Respondent in this respect relied on the case of Kenya Shell Ltd v Benjamin Karuga Kibiru & another (1986) KLR where the court held that:

“It is not sufficient by merely stating that the sum of Shs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient material to enable it to exercise its discretion in granting the order of stay.”

14. The Respondent submitted that a successful party in a case should not be deprived of the fruits of a judgment without just cause. That should the court be inclined to grant the application then it should order half of the decretal sum to be paid to the Respondent and the remainder be deposited in court as security
15. The respondent prayed that the application be dismissed with costs.

Analysis and Determination

16. I have given due consideration to the pleadings and submissions filed in this application. The main issue for determination is whether the application has merit and therefore whether the orders sought should be granted.
17. An Applicant for stay of execution pending appeal has to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. These are that:
1. The application was brought without unreasonable delay.
 2. The Applicant will suffer substantial loss unless the orders sought are granted.
 3. The Applicant has given security for due performance of the decree as may be binding on him.
18. The judgment that is being challenged in this appeal was delivered on 5th June 2025. The memorandum of appeal was filed on 17th June 2025 and the application herein filed on 4th July 2025. The application was therefore filed without delay.
19. On the second condition, an applicant is required to demonstrate that it will suffer substantial loss if the orders sought are not granted. I have noted that the decree sought to be executed is for the sum



of Ksh. 7,136,550/=. This is by any standard a substantial amount of money. Though counsel for the Respondent deposed that the respondent is not a man of straw and that he is capable of refunding the decretal sum in the event that the appeal is successful, nothing was filed to demonstrate that. It was the duty of the Respondent to show that he is in a position to refund the money. In the absence of such evidence this court is inclined to find that the Applicant may not be in a position to recover the money if the same is paid to the Respondent pending the hearing and determination of the appeal. The Applicant may have difficulties in recovering the money which will occasion it substantial loss.

20. The third condition for grant of stay of execution pending appeal is that the Applicant has to offer security for the due performance of the decree. This is meant to give the Respondent something to fall back to in the event that the appeal is not successful. In *Arun C. Sharm Vs. Ashana Raikundalia T/A Rairundalia & 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...”

21. The security offered by the Applicant must be sufficient. The court in the case of *Mwaura Karuga T/ a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* (2015) eKLR stated as follows:

...The security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words “ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.

22. The Applicant says that they are willing to comply with any orders of the court in regard to security. They offered to deposit security in the sum of Ksh.3,000,000/= in an interest earning account in the names of counsels for the parties. This, according to them, is in view of the fact that their liability is limited to Ksh.3,000,000/=.
23. The respondent was of the view that half of the sum be paid to the respondent and the balance be deposited in court as security.
24. In an application for stay of execution pending appeal, the court is required to balance the competing interests of the two parties where one party is exercising its undeniable right of appeal and the other which has a judgment in its favour and who should not be deprived the fruits of the judgment without just cause. This position was aptly articulated in the case of *Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 Others* [2012] eKLR where it was held:

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.

25. In the circumstances of this case, I am persuaded that I should allow the application for stay of execution so as to enable the Applicant to exercise its constitutional right of appeal. The mode of



security that commends itself to me is for the decretal sum to be deposited in an interest earning account to be opened in the names of the counsels representing the parties.

26. The upshot is that the application dated 4th July 2025 is allowed on the following terms:

1. Stay of execution of the judgment of the lower is granted on condition that the decretal sum is deposited in an interest earning account to be opened in the names of the counsels appearing for the parties within 35 days from the date of delivery of this ruling.
2. The costs of the application to abide by the outcome of the intended appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 26TH DAY OF FEBRUARY 2026.

J. N. NJAGI

JUDGE

In the presence of;

N/A for Applicant

Miss Nyambuto for Respondent

Court Assistant: Rahma

