



REPUBLIC OF KENYA



**North Rift Dairies Limited & 2 others v Chelimo (Civil Appeal
E299 of 2025) [2026] KEHC 2352 (KLR) (27 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E299 OF 2025
RN NYAKUNDI, J
FEBRUARY 27, 2026**

BETWEEN

NORTH RIFT DAIRIES LIMITED 1ST APPLICANT

EMILY CHEROTICH EGO 2ND APPLICANT

DR. KEN TARUS 3RD APPLICANT

AND

PIUS KIPROP CHELIMO RESPONDENT

RULING

Representation:

M/s Kimathi & Makobu Advocates

M/s Robson Harris Advocates LLP

1. This ruling determines the Appellants'/Applicants' Notice of Motion application dated 12th January, 2026 brought under the provisions of Article 159(2)(d) of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The application seeks the following orders:
 - a. Spent.
 - b. That this Honorable Court be pleased to stay execution of the Ruling delivered on 20th November, 2025 in Eldoret Magistrate Court MCCC No. E396 of 2025, and the Decree thereof pending the hearing and determination of this application.
 - c. That this Honorable Court be pleased to stay execution of the Ruling delivered on 20th November, 2025 in Eldoret Magistrate Court MCCC No. E396 of 2025, and the Decree thereof pending the hearing and determination of the appeal herein.



- d. That this Honorable Court be pleased to stay issuance of warrants of attachment and sale to Hegeons Auctioneers pursuant to the Ruling delivered on 20th November, 2025 in Eldoret Magistrate Court MCCC No. E396 of 2025, pending the hearing and determination of this application.
 - e. That this Honorable Court be pleased to stay issuance of warrants of attachment and sale to Hegeons Auctioneers pursuant to the Ruling delivered on 20th November, 2025 in Eldoret Magistrate Court MCCC No. E396 of 2025, pending the hearing and determination of the Appeal herein.
 - f. That the costs of this application be provided for.
2. The application is premised on the grounds therein and is further supported by the Affidavit of Emily Cherotich Ego sworn on 12th January, 2026.
 3. The Respondents filed a suit in the Chief Magistrate's Court at Eldoret being MCCC No. E396 of 2025. The Appellants/Applicants filed a Statement of Defence dated 21st July, 2025. The Respondent thereafter filed an Application dated 2nd September, 2025 seeking to strike out the Appellants'/Applicants' Statement of Defence on the ground that it was a generalized generic denial which did not raise any trial issue.
 4. That the Ruling was delivered on 20th November, 2025 by Hon. Peter Areri, Senior Principal Magistrate, wherein the Respondent's Application was allowed, the Appellants'/Applicants' Statement of Defence was struck out on the ground that it disclosed no triable issues, and judgment was consequently entered in favour of the Respondent against the Appellants/Applicants jointly and severally in the sum of Kenya Shillings Eleven Million (Kshs. 11,000,000/=) only, plus costs.
 5. Aggrieved by the said Ruling, the Appellants/Applicants lodged the Appeal herein on 16th December, 2025 through a Memorandum of Appeal, which Appeal raises serious, arguable and substantial questions of law and fact deserving full consideration on merit.
 6. That the Appellants/Applicants are yet to be served with a copy of the Decree by the Respondent but have discovered that the Respondent's Advocates uploaded on e-filing a letter dated 17th December, 2025 addressed to the lower Court's Executive Officer requesting for warrants of attachment and sale to be issued to the firm of Hegeons Auctioneers. The Appellants/Applicants are therefore apprehensive that execution of the Decree will be carried out imminently, which would occasion irreparable harm and render the pending Appeal nugatory.
 7. That this Application has been brought without unreasonable delay, immediately following the delivery of the impugned Ruling, and the Appellants/Applicants are willing and ready to comply with any reasonable conditions that this Honorable Court may impose upon granting stay of execution.
 8. In response to the application, the Respondent swore a Replying Affidavit on 30th January, 2026 in which he deposed as follows:
 - a. That the Honourable Learned Magistrate delivered a well-reasoned Judgment in his favour on 20th November, 2025, for the sum of Kshs. 11,000,000/= plus costs, and he is lawfully entitled to enjoy the fruits of this Judgment.
 - b. That the Application for stay of execution pending Appeal is incompetent, improper and has not been brought in good faith and the same is fatally defective.



- c. That it is the duty of the Applicants to show that they will suffer substantial loss if stay is not granted and that material particulars of loss must be shown by way of an Affidavit by the Applicants; it is not enough to only state that loss will be suffered. The Applicants have NOT demonstrated evidence of substantial loss in the event that stay is not granted.
- d. That the Applicant has not demonstrated that he is a person of straw who will be unable to refund the decretal sum should the Appeal ultimately succeed. He is a man of financial means and, therefore, in a position to refund the money should the Appeal succeed; hence no substantial loss will be suffered by the Applicants.
- e. That on the contrary, should stay be granted, the Respondent will be the one who suffers substantial loss by being unjustly denied the fruits of his judgment for an indeterminate period, effectively rendering the judgment nugatory. This is on account of the fact that the Applicants are indebted to him having breached the terms of the Loan Agreement as well as the Deed of Guarantee, both dated 2nd November, 2021, and which debt continues to accrue interest.
- f. That the Application for Stay of Execution is devoid of merit and does not meet the legal criteria set out in the Civil Procedure Rules, 2010 and granting it will prejudice the Respondent.
- g. That the Applicants have failed to fulfil the mandatory requirements of Order 42, Rule 6(2)(b) of the Civil Procedure Rules, 2010 by failing to offer any credible, sufficient, realizable security for the due performance of the Decree

Analysis and determination.

- 9. I have carefully considered the application, the affidavit in support and the response thereto together with the submissions. This Court is confronted with an application that invites this court to consider the question of stay of execution pending appeal. The applicant, having successfully filed an appeal against a judgment entered through the striking out of its Statement of Defence, now seeks the Court’s indulgence to stay execution of the decree while the appeal is pending determination. It is against this backdrop that this Court must determine whether the established threshold for stay of execution has been met.
- 10. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:
 - “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.”



11. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that: -

- “ 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.
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.”

12. On the issue of substantial loss, the applicant is required to clearly state what loss, if any, they stand to suffer. The Respondent in his Replying Affidavit avers that he is a man of financial means and is in a position to refund the decretal sum should the appeal succeed, thus maintaining that the Applicants will suffer no substantial loss. On the other hand, the Applicants’ apprehension arises from the very real and imminent threat of execution, as evidenced by the Respondent’s Advocates’ letter dated 17th December, 2025 requesting warrants of attachment and sale against the Applicants’ assets.

13. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, the Court of Appeal held thus:

“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...”

14. In the case of *G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another* [2018] eKLR, the Court stated as follows: -

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

15. While the Respondent asserts that he is a person of means capable of making restitution, it is noteworthy that this assertion is made by way of a bare averment unsupported by any affidavit of means or documentary evidence of financial capability. The decretal sum in the present matter is the substantial sum of Kshs. 11,000,000/=, which is no mean amount. The Appellants/Applicants have



demonstrated a reasonable apprehension of substantial loss, particularly where execution is imminent and they stand to lose property of significant value. I find that the Applicants have sufficiently demonstrated substantial loss for purposes of this application.

16. As to whether the application was made without unreasonable delay, the Ruling was delivered on 20th November, 2025, the appeal was filed on 16th December, 2025, and the instant application was filed on 12th January, 2026. The application was filed promptly after the Applicants discovered that the Respondent had taken active steps to execute the Decree by writing to the lower Court's Executive Officer to issue warrants of attachment and sale to Hegeons Auctioneers. The application has therefore been brought without unreasonable delay.

17. The other element to be satisfied by the applicants is security for the due performance of the decree. In the persuasive decision of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd* [2019] eKLR the court observed: -

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.”

18. Similarly in *Arun C. Sharma 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...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.”

19. It is important to note that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Mohammed Salim t/a Choice Butchery vs Nasserpuria Memon Jamat* (2013) eKLR where the court upheld the decision of *Portreiz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1991* and stated that: -

“That right of appeal must be balanced against an equally weighty rigid right 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. The total decretal sum awarded in this case is Kshs. 11,000,000/= plus costs and interests. This is a substantial sum arising from a commercial loan transaction. Considering the nature of this commercial dispute, which involves a loan agreement and deeds of guarantee executed between the parties, and having regard to the principle that the Respondent's right to enjoy the fruits of judgment must be balanced against the Appellants' constitutional right of appeal, I find that the just and fair balance would be for the Applicants to deposit the entire decretal sum of Kshs. 11,000,000/= in a joint interest earning account in the names of both advocates pending the hearing and determination of the Appeal.



The deposit of the full decretal sum as security is appropriate in the circumstances given the magnitude of the award and the commercial nature of the underlying dispute.

21. The factors which have influenced the exercise of discretion by this court to make the orders that shall follow shortly include:
 - a. Undoubted Right of Appeal which is also a constitutional imperative as read with Article 48 on access to justice. The court has been more inclined to grant a stay to protect that right.
 - b. The security for performance of the decree: From the brief facts of the case, this matter tilts more towards declining exercise of discretion in favor of the Applicant but due to the saving grace of the provisions on stay pending application dealing with deposit of security for the due performance of the decree in any event there is need for the Applicant to be prepared to give security for due performance of the decree and in this case it is the entire decretal sum of the Judgement delivered by the trial court.
 - c. It is imperative to note that a stay of execution is rarely granted for a simple money judgement unless the Applicant proves that the Respondent is a man of straw unable to repay if the appeal succeeds in his favor.
22. Therefore, at an opportune time the intended appeal shall be laid down for hearing and borrowing the dicta in the case of AG of Trinidad and Tobago v Miguel Regis Civil Appeal No 79 of 2011 these well-established principles shall form the yardstick of the merits of the appeal. “ The appellate court will generally only interfere if it can be shown that the trial judge was plainly wrong. Thus we may say that unless I can be demonstrated for example that the trial judge disregarded or ignored or failed to take sufficient account of relevant considerations or regarded and took into account irrelevant consideration or that the decision is so unreasonable or against the weight of the evidence or cannot be supported having regard to the evidence or that the judge omitted to apply or misapplied some relevant legal principle or that the decision is otherwise fundamentally wrong, the court of Appeal will not generally interfere with the exercise of a court’s discretion.”
23. For those reasons, I do find that the Applicants are entitled to pursue their appeal conditioned on the following orders:
 - a. That stay of Execution of the judgment /decree in Eldoret Magistrate Court MCCC No. E396 of 2025 be and is hereby stayed pending the hearing and determination of the appeal by this court.
 - b. That the intended Appellant and Applicant has leave of this court to file the record of appeal within 30 days from today’s date failure to which the stay orders shall lapse unless leave is sought for enlargement of time for compliance.
 - c. That in view of the stay orders of execution and the issuance of warrants of attachment and sale to Hegeons Auctioneers pursuant to the said Judgement be and is hereby stayed pending the hearing and determination of the Appeal.
 - d. That the Applicants by dint of the law shall deposit the entire decretal sum of Kshs . 11,000,000/= (Kenya Shillings Eleven Million) in a joint interest earning account of both advocates within thirty (30) days hereof and in default the right of appeal so issued shall be considered to have expired unless any such directions are issued by this court
 - e. That id default of complying with the orders issued above, the stay of execution against the impugned judgement shall lapse and the Respondent shall be at liberty to pursue the decree enforcement so that he can enjoy the fruits of a judgement.



f. That the Costs of the motion to abide by the outcome of the appeal.

Orders accordingly.

**GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT SHARED ON THIS DAY VIA
CTS, EMAIL AND KENYA LAW ON 27TH DAY OF FEBRUARY 2026**

.....

R. NYAKUNDI

JUDGE

