

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. E072 OF 2025

GEORGE GITAU WANJIRU.....APPELLANT

VERSUS

TIRYO GENERAL MERCHANDISE

COMPANY LIMITED.....1ST RESPONDENT

DOUGLAS GATHONDU KAHUMBIRA2ND RESPONDENT

RULING

1. The Appellant/Applicant moved this Court by a Notice of Motion dated 25th Day of March, 2025 expressed under Sections 1A, 3A and 79 G of the Civil Procedure Act , Order 42 Rule 6 (2) , Order 50 Rule 6, and Order 51 Rule 1 of the Civil Procedure (Amendment) Rules, seeking the following Orders;-

1) Spent.

2) Spent.

3) THAT this Honourable court be pleased to stay execution and /or intended execution of the Decree emanating from the judgment of Hon. Dominic Macharia , Magistrate in Nakuru SCCC. No. E504 of 2024 delivered on 7th March 2025 pending the hearing and final determination of the appeal filed herein.

4) THAT the costs of this application be provided for.

2. The grounds are on the face of the application and supported by the Affidavit sworn on 25th March, 2025 by Sally Njoki Mbeche Advocate in conduct of this matter. She states that the trial court entered judgment against the Appellant /Applicant thus:-

a) Liability by consent of parties.....90:10

b) Total award.....Kshs. 959, 888/=.

Total upon contributory negligence.....Kshs.
863,899/=.

c) Costs of the claim.....Kshs. 70,000/=

d) Interest of the decretal sum from the date of judgment.

e) Grand total.....Kshs. 933,899/=.

3. She depones that being aggrieved by the said Judgment, the Appellant/Applicant preferred an appeal vide a Memorandum of Appeal dated 21st March 2025, which Appeal is arguable with high chances of success.
4. She states that there is a high and probable likelihood of execution if stay of the Judgment is not granted and therefore, the Appeal will be rendered nugatory, thus, the Applicant will suffer substantial and irreparable loss.
5. Lastly, she depones that the Applicant is ready and willing to offer a bank guarantee as security for costs in due performance of the decree as shall be determined by this Court.
6. Upon being served, the Respondent filed both Grounds of Opposition and a Relying Affidavit.

1st Respondent's Grounds of Opposition dated 8th May 2025

7. His position is that that:-
 - *The Appellant/Applicant has not met the threshold of grant stay.*
 - *There was inordinate delay considering that counsel for the Appellant/ Applicant was fully involved during full trial and judgment.*
 - *The Appellant/Applicant's Memorandum of Appeal dated 21st March 2025 does not present any justifiable points of law rather, it contains facts contrary to Section 38 of the Small Claims Court Act.*
8. She therefore terms the application vexatious, an abuse of judicial process and a procrastination hence warranting outright dismissal with costs.

1st Respondent's Replying Affidavit

9. Maintaining his arguments contained in the Grounds of Opposition, Godfrey K. Kipkoech Advocate for the 1st Respondent swore an Affidavit on 8th May 2025.
10. He depones that after delivery of the impugned judgment on 7th March 2025, counsel for the Applicant herein reached out to counsel for the Respondents and the Insurers seeking settlement of the suit and therefore, the application herein is not in good faith, is misleading and the intended appeal has low chances of success as its sole purpose is to defeat settlement and delay proceedings.
11. He depones that in the event that stay of execution is granted, then the 1st Applicant would at the earliest opportunity file a Notice of Preliminary Objection against the Memorandum of Appeal dated 21st March 2025.

Appellant/Applicant's Supplementary Affidavit

12. On ordinate delay, Sally Njoki Mbeche Advocate depones that with the judgment having been delivered on 7th May 2025 and the application herein filed on 25th March 2025, there was no delay whatsoever or otherwise.
13. As regards the Respondent's argument that the Appeal does not raise points of law, she terms this argument unfounded arguing that the Appeal raises weighty legal issues including:-
- 1. Misinterpretation and misapplication of the doctrine of subrogation, which is a pure question of law***
 - 2. Award of compensation that amounts to double recovery in contravention of the legal principles governing indemnity and subrogation.***
 - 3. Award of special damages without strict proof, contrary to well established principles in law.***

14. The deponent therefore maintains that the appeal is based on a pure point of law that the trial Magistrate misdirected himself in law by entertaining and granting a claim that ought to have been prosecuted by

the Insurer, either on its own name or through a properly instituted subrogation process.

15. Further, it is deponed that the 1st Respondent failed to demonstrate, either through pleadings or evidence, that it had been authorized by the Insurer to commence the suit under subrogation.
16. She maintains that the 1st Respondent is claiming a sum of Kshs. 292,000/= cash in lieu and was fully compensated for this amount by Sanlam Insurance Company and has not disputed that it actually received this compensation.
17. It is maintained that under the doctrine of subrogation, once an insurer has indemnified its insured, as was in this case, the right to sue the third-party tortfeasor vests in the insurer and not the insured, unless there is clear and express authorization disclosed in the pleadings and supported by evidence, none of which was demonstrated by the 1st Respondent in their pleadings.
18. It is deponed that in claims involving subrogation, there must be proof of the insurer's indemnity to the insured and evidence of authority granted to the insured to sue on behalf of the insurer. He therefore states that the absence of such proof renders the claim incompetent as it amounts to double recovery.
19. It is maintained that this appeal is neither frivolous nor filed merely to delay settlement, but rather seeks to address a substantial miscarriage of justice stemming from a judgment based on incorrect application of the law.
20. Lastly, the Applicant reiterates that he has already indicated willingness to furnish a bank guarantee as security for the due performance of the decree should the appeal fail, demonstrating good faith and a balanced interest between both parties.

Applicant's Written Submissions

21. The Applicant listed three issues for determination:-

1. Whether the Applicant has demonstrated sufficient cause to warrant an order for stay of execution pending appeal;

2. Whether the Applicant has demonstrated that substantial loss may result if stay of execution is not granted.

22. On the **first issue**, it is submitted that he has satisfied the legal threshold for the grant of stay of execution pending appeal as required under Order 42 Rule 6(1) & (2) of the Civil Procedure Rules.

23. He submits that he has demonstrated sufficient cause through the filing of a competent appeal against the judgment of the trial court delivered on 7th March 2025. In those circumstances, he states that denying the Applicant stay would render the appeal nugatory, as execution is imminent. In support, he has cited the case of **Butt vs Rent Restriction Tribunal [19821 KLR 417**, where Madan JA) held that;

"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. The general principle is that if there is no other overwhelming hindrance, a stay should be granted so that an appeal may not be rendered nugatory should it succeed."

24. Further, the Applicant submits that with the Judgment having been delivered on 7th March 2025, this application was brought while the 30 day stay of execution was about to lapse thus, the Applicant has moved with speed to safeguard the substratum of the appeal.

25. Arguing that the Applicant's appeal raises arguable issues on quantum, it is submitted that the Applicant's challenge to the assessment of damages raises serious and substantive questions of both fact and law that deserve ventilation at the appellate stage where the Applicant need not demonstrate that the appeal will succeed, only that it is not frivolous.

26. In support, he relies on the case of **Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR**, where the Court of Appeal held that ;
- "An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous."**
27. Further, while citing Article 50 (1) of the Constitution, the Applicant submits that the courts duty is to safeguard the right to a fair hearing which includes the right to have an appeal heard and determined on its merits and that in this case, the Applicant's right of appeal will be rendered nugatory if execution is allowed to proceed.
28. **On substantial loss**, it is submitted that the Applicant has demonstrated that should execution proceed, he will be compelled to satisfy the decretal sum, which is a substantial amount, before the appeal is heard and determined.
29. While acknowledging that this is a money decree, the Applicant argues that should the appeal succeed, it may be extremely difficult or impossible to recover the monies from the Respondent, thus rendering the entire appeal an academic exercise. In support, he cites the case of **Kenya Shell Ltd v Kibiru & Another [1986] KLR 410**, where the Court of Appeal stated ;
- "It is not normal for a money decree to be stayed. However, where the applicant demonstrates that the appeal would be rendered nugatory if stay is not granted, and that he has an arguable appeal, the court will exercise its discretion in his favour."**
30. Arguing that the decretal sum of Kshs. 933,899/= is not insignificant, the Applicant submits that payment of this sum would occasion him financial hardship and irreparable prejudice, particularly where recovery of the same is uncertain.
31. He submits that the Respondents have not provided any undertaking or evidence of financial capacity to refund the decretal amount. In the absence of such proof, the Applicant submits that his fears are well founded. In support , reliance is placed in the case of **National Industrial**

Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR
where it was held:

"The onus is on the Applicant to prove that the Respondent would be unable to refund the decretal sum if the appeal is successful. However, once an Applicant expresses that he would suffer substantial loss unless stay is granted, the evidential burden shifts to the Respondent to show that he would be able to refund the decretal sum if the appeal succeeds."

32. On **security for due performance of the decree**, it is submitted that the Applicant has offered a Bank Guarantee, thus demonstrating a willingness to cushion the Respondents in the event the appeal is unsuccessful. On this, reliance is placed on the case of *Arun C Sharma V Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others [2014] eKLR*, where it was held that:

"The purpose of the security under Order 42 is to guarantee the due performance of the decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor. Civil process is quite different from criminal process which is intended to punish. In civil process, the judgment is like a debt hence the security is normally given in monetary terms or otherwise to guarantee its satisfaction should the appeal not succeed."

33. In the circumstances, the Applicant submits that denying the stay would expose the Applicant to irreparable loss and risk rendering the intended appeal an academic exercise. Conversely, that granting the stay will not prejudice the Respondents as their interests can be secured through appropriate orders on security.

1st Respondent's Written Submissions

34. The 1st Respondent submits that the Appellant has not fully satisfied the requirements of Order 42 Rule 6 of the Civil procedure Rules that: No order for stay of execution shall be made unless—

i) 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

ii) 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.

35. Further, that the 1st Respondent has made reference to the principles for the grant of an injunction as set out in ***Giella v Cassman Brown & Co. Ltd [1973] EA 358***, namely:

i) a prima facie case with a probability of success,

ii) irreparable injury which cannot be compensated by damages, and

iii) if in doubt, determination on a balance of convenience.

36. The 1st Respondent therefore maintains that the Appellant's application is without merit, is an abuse of the court process, and ought to be dismissed with costs for reasons that the right of Appeal under Section 38 of the Small claims Court is on matters of law only yet the Memorandum of Appeal dated 21st March 2025 also raises factual matters already determined by the trial court based on the evidence presented.

37. Further, the 1st Respondent submits that the Appellant is clearly misleading the Court knowing that it willingly entered into a consent on liability with full knowledge that the matter was one of subrogation.

38. The 1st Respondent argues that the Applicant has failed to meet the legal threshold for a stay. It is submitted firstly that under Section 38 (1) of the Small Claims Court Act, 2016, an appeal is limited to matters of law only. They contend the Applicant's appeal improperly raises factual issues regarding quantum and subrogation. They cite **Kenya Power & Lighting Company Limited v Julius Wambale & Another (2019) eKLR** regarding the doctrine of subrogation and **Nyamu v Mwangi & 2 others (Civil Appeal**

E188 of 2024) [2025] KEHC 1812 (KLR) that referencing **Mrao vs First American Bank** on a prima facie case that;-

“One which on the material presented to court or a tribunal a conclusion can reasonably be reached that the applicant's right has been infringed as to call for an explanation or rebuttal.”

39. On that basis, it is argued that the Applicant has not established any prima facie case.

40. The Respondent argues that the Applicant delayed the application and failed to prove the 1st Respondent cannot reimburse the decretal sum. In this, he cites the case **Equity Bank Limited V Taiga Adams Company Limited [2006] KEHC 860 (KLR)**, which held;-

“The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent, that is execution is carried out in the event the appeal succeeds, the Respondent would not be in a position to pay or reimburse as they are persons of no means.”

41. The Respondent argues that granting a stay would delay their enjoyment of the fruits of the judgment. They challenge the proposed bank guarantee as vague and non-specific. Reliance was placed on the case of **Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR**, that held that;-

“... 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 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 degree in order to enjoy the fruits of his judgment in case the appeal fails.”

42. Further, the case of *Co-operative Bank of Kenya v Otuoma (Miscellaneous Civil Application E004 of 2023) [2025] KEHC 4256 (KLR) (3 April 2025)* cited as High Court stated;-

“I am inclined to agree with the Respondent, although the Applicant are willing to put up a security in form of a bank guarantee, the same has not been specified as to respondent and further there is no guarantee that the same will be renewed if the guarantee expires or that it is tailored to cater to the interest of the Respondent to the finalization of this Appeal.”

43. The Respondent concludes that the Court should direct a cash deposit of the entire decretal sum into a joint interest-earning account.

Analysis and Determination

44. From the material placed before this Court, the only issue for determination is whether an order of stay of execution pending appeal should issue.

45. The principles upon which this Court may grant a stay of execution pending appeal are well-settled as enshrined in Order 42 Rule 6(2) of the Civil Procedure Rules which provides that;-

“(2)No order to 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.”

46. Accordingly, the Applicant is obliged to satisfy the Court that: -Substantial loss may result to the applicant unless the order was made; The application was made without unreasonable delay; and Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.

47. The above elements have been time and again reiterated by superior courts as seen in classic case of **Butt v Rent Restriction Tribunal [1982] KLR 417** where Madan JA (as he was then) held:-

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 459: “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

48. On the first consideration, whether the application was filed timeously. The judgment of the trial Court in this matter was delivered on 7th March, 2025. The Appeal was lodged on 25th March, 2025, while the current Application dated 25th March, 2025 was filed on 1st April, 2025. The Application herein was filed within one month. Accordingly, the Applicant has moved this Court in a timely manner and without any delay.

49. On the second consideration, the Applicant contends that he will suffer substantial loss if the orders sought are not granted, as the Respondents will execute the Decree to their detriment. Though the specific loss was not indicated, arguments were made in the submissions that the sum of money in question is colossal and may not be refunded in the event the Appeal succeeds.

50. The Respondent argues that they have the means to refund the decretal sum in the event that the Appeal is decided against them. They however, did not furnish the Court with evidence of such means. Without such evidence, it is difficult for this Court to ascertain the capability of the Respondent to refund

the decretal sum in the event the Appeal succeeds. I thus find the Applicant has demonstrated substantial loss.

51. On security, F Gikonyo J in *Arun C. Sharma v. Ashana Raikundalia T/A Rairundalia & Co. Advocates [2014] eKLR* explained the purpose of security thus:-

“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.”

52. The Applicant in this matter has offered security in the nature of a bank guarantee in the event that the appeal fails. The Court notes that the alleged bank guarantee has not been annexed to the Application herein, therefore this Court is unable to ascertain the existence and the terms of the purported bank guarantee.

53. Nonetheless, in order to balance the rights of both parties in the circumstances herein, it is in the interest of justice that this Court grants the following orders:-

- 1. Stay of execution of the Judgment delivered on 7th March, 2025 by Honourable Dominic Macharia (Adjudicator) in Nakuru SCCC No. E504 of 2024 be and is hereby granted pending the hearing and determination of this Appeal.**
- 2. The Applicant shall deposit the entire decretal sum in Court within the next thirty (30) days from the date hereof.**

3. In default of (2) above, the stay of execution shall automatically lapse.

4. Costs of the application to abide the outcome of the Appeal.

Dated, signed and delivered at Nakuru this 26th Day of February, 2026.

PATRICIA GICHOHI

JUDGE

In the presence of :

Mr. Maina for Appellants

N/A for Mr. Kipkoech for Respondent

Erickson, Court Assistant