



REPUBLIC OF KENYA



**Ahenda v Lengesen (Civil Appeal E841 of 2025)
[2026] KEHC 2933 (KLR) (Civ) (27 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 2933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E841 OF 2025**

**WA OKWANY, J
JANUARY 27, 2026**

BETWEEN

ADONIJAH EDGAR AHENDA APPELLANT

AND

LTASHAWA LENGESEN RESPONDENT

RULING

1. The Applicant filed the Notice of Motion dated 12th August 2025 under Order 42 Rule 6 of the Civil Procedure Rules (CPR) seeking stay of execution of the judgment delivered on 18th July 2025 in Milimani CMCC No. E3278 of 2023 pending the hearing and determination of the appeal.
2. The Respondent opposed the application through grounds of opposition dated 22nd August 2025 in which he mainly contends that the application does not meet the threshold set for the granting of orders for stay of execution pending appeal.
3. The Application was canvassed by way of written submissions which I have considered. I find that the main issue for determination is whether the Applicant has made out a case for the granting of the orders sought.
4. Stay of Execution is provided for under order 42 Rule 6 of the CPR which provides as follows: -
 6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order 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 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.
5. 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. In balancing the parties' rights, the court is required to weigh the Appellant's right to appeal against the rights of the successful litigant to the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
 6. On whether substantial loss has been demonstrated, the Applicant argued that unless stay is granted, the Respondent will proceed with execution, and given that the Respondent has not demonstrated ability to refund the decretal sum, the appeal will be rendered nugatory. He cited the case of *National Industrial Credit Bank Ltd v Aquinas Wasike* [2006] eKLR, where the Court of Appeal held: -

“Once an applicant expresses a reasonable fear that the respondent will be unable to repay the decretal sum, the evidential burden shifts to the respondent to show what resources he has since that is a matter within his peculiar knowledge.”
 7. Reference was also made to *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR, where the court stated that the financial position of the Applicant and the Respondent becomes an issue where execution of a money decree is sought to be stayed and that the court must balance the interest of preserving the status quo so that the appeal is not rendered nugatory.
 8. The Applicant also argued that since the Respondent has not filed a replying affidavit, and has not presented any evidence of means, he had not discharged the evidential burden.
 9. The Respondent, on the other hand, maintained that the Applicant has not proved substantial loss. Reliance was placed on the decision in *Karuga Kibiru & Another v Kenya Commercial Bank* [1986] KLR, for the argument that substantial loss is the very cornerstone of both jurisdictions for granting stay and that if there is no evidence of substantial loss, it would be a rare case when an appeal would be rendered nugatory.
 10. Reliance was also place on the cases of *Machira v East African Standard (No. 2)* [2002] KLR 63, where the court held that execution per se does not constitute substantial loss and *Paul Mbugua Mugo & Another v James Gichuru Mwaura* (HCCA No. E558 of 2021) which reaffirmed that execution alone does not constitute substantial loss unless inability to refund is specifically alleged.
 11. My finding is that since the decree herein is monetary in nature and the Applicant has expressly pleaded the Respondent's inability to refund the decretal sum the Respondent was required to file an affidavit of means so as to demonstrate his financial capacity. The Respondent did not file such an affidavit to assuage the Applicant's apprehension. This is the position that was stated in *National Industrial Credit Bank Ltd v Aquinas Wasike* (supra).
 12. In this case, the Respondent did not discharge that burden and I therefore find that the Applicant has demonstrated substantial loss.



13. On whether there was an unreasonable delay in filing the application, I note that the impugned judgment was delivered on 18th July 2025, and the current application filed on 12th August 2025, less than a month later. I find this delay reasonable and excusable.
14. On security, I note that the Applicant proposes to deposit half the decretal sum in a joint interest-earning account. I find that the said proposal is reasonable and is a sign of good faith and satisfies the requirement of security subject to the court's directions.

Disposition

15. Having considered the application, the submissions, the cited authorities, and the law, I am satisfied that the Applicant has met the requirements of Order 42 Rule 6 of the CPR.
16. Accordingly, I make the following orders: -
 - a) There shall be a stay of execution of the judgment and decree in Milimani CMCC No. E3278 of 2023 pending the hearing and determination of the appeal on condition that the Applicant deposit the entire decretal sum in a joint interest-earning account in the names of both advocates within 30 days from today.
 - b) Failure to comply with the order in a) above, the stay of execution shall automatically lapse.
 - c) Costs of this application shall abide the outcome of the appeal.

Orders Accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2026.

HON. W. A. OKWANY

JUDGE

27/01/2026

For Appellant.....

For The Respondent.....

Court Assistant Uber

