

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E946 OF 2025

**AVENUE HOSPITAL & ANOTHER
APPELLANTS/APPLICANTS**

VERSUS

ARTHUR WATATUA RESPONDENT

RULING

1. This ruling is in respect to the Appellants’/Applicants’ Notice of Motion dated 21st October 2025 seeking, *inter alia*, orders of stay of execution pending hearing and determination of the appeal arising from the judgment delivered on 18th August 2025 in Milimani CMCC No. E295 of 2023. The Applicants also seek orders for the lifting of the proclamation issued on 16th October 2025 and recall of warrants of attachment issued on 15th October 2025.
2. The application is supported by an affidavit sworn on the same date by one **Mr. Chengecha** and the Applicants’ written submissions. The Applicants contend that the Respondent has taken steps towards execution, including issuance of warrants of attachment and proclamation of the Applicants’ property.

3. The application is premised on **Order 42 Rule 6, Order 22 Rule 22**, and **Section 3A of the Civil Procedure Act**.
4. The Respondent opposed the said application through his replying affidavit dated 27th October 2025 wherein he states that the application does not meet the threshold set for the granting of orders for stay of execution.
5. Prayer No. 1 of the application, on urgency, having been granted, the Court is called upon to determine the substantive prayers for stay.
6. I have carefully considered the application, the replying affidavit, and the parties' submissions on record. I find that the main issue for determination is whether the Applicants have made out a case for the granting of the orders sought in the application.

Analysis and Determination

7. This court is under Order 42 rule 6 (1) granted the power to order for stay of execution in the following terms: -

(1)No appeal or second appeal shall operate as a stay of execution or proceeding 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 order set aside.

8. The principles governing the grant of stay of execution pending appeal are expressed under Order 42 rule 6(2) of the Civil Procedure Rules which states that;

“(2)No order for stay of execution shall be made under subrule (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.”

9. In the oft cited case of ***Butt vs. Rent Restriction Tribunal [1982] KLR 417*** the court of Appeal outlined how a court should exercise discretion in an application for stay of execution 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. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

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.”

10. Similarly, in ***Halal & Another vs. Thornton & Turpin Ltd, (1963) Ltd [1990] eKLR*** the Court of Appeal held that: -

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay. In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted...”

11. In determining whether or not to grant stay of execution orders, the court must also be satisfied that there is an arguable appeal. (See ***Benedict Ojou Juma & 10 Others vs. A.J. Pereira & Sons Ltd [2016] eKLR***).
12. The question that now begs an answer is whether the Applicants have satisfied the above conditions for the grant of stay orders.
13. On the arguability of appeal, courts have taken the position that an arguable appeal need not necessarily succeed and that it suffices that it raises bona fide issues deserving judicial consideration. (See ***Mwalimu & 6 others vs. Halal & another (Civil Application E091 of 2022) [2023] KECA 634 (KLR)***)
14. In the instant case, I note that the Applicants have filed a Memorandum of Appeal which raises several issues including; whether negligence was proved to the required standard, whether causation was properly established in

light of the Respondent's pre-existing conditions and whether quantum awarded was excessive.

15. This Court is satisfied that the appeal herein is arguable and is not frivolous.
16. On whether the application was filed without undue delay, I note that judgment was delivered on 18th August 2025. The Applicants averred that they became aware of the judgment upon the commencement of execution in September 2025. The present application was filed shortly thereafter.
17. The Court finds that the explanation offered by the Applicants is reasonable and that the application was filed without undue delay.
18. As to whether substantial loss will be occasioned to the Applicants if stay is not granted, the Applicants submitted that execution is imminent as warrants of attachment have already been issued. They contended that payment of the decretal sum, before the appeal is heard, will occasion irreparable loss.
19. The Applicants further contended that the Respondent's financial ability to refund the decretal sum, in the event the appeal succeeds, is unknown as no affidavit of means has been filed to demonstrate such ability.
20. In ***Daniel Chebutul Rotich & 2 Others vs. Emirates Airlines Civil Case No. 368 of 2001*** Musinga J. (as he then was) stated that: -

“It is not enough for an applicant to merely state that it is likely to suffer substantial loss,

it must make effort to demonstrate how the same is likely to occur. Disruption of business and loss of reputation can only be suffered if stay of execution was refused and the applicant refused to pay or became unable to pay and auctioneers had to move in to carry out execution. "Substantial loss" is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum."

21. Since the instant case relates to a money decree, the Applicants were required to place before court such material as would indicate, for instance, that they may encounter difficulties recovering the decretal sum should they succeed in the appeal. In this regard, the Applicants claimed that they stand to suffer substantial loss since the Respondent has not proved that he is financially capable of refunding the decretal amount if the same is released to him.
22. The Respondent, on the other hand, did not tender any proof of financial means but attributed his financial woes to the consequences of Applicants' medical negligence that has had the effect of incapacitated him.
23. In ***National Industrial Credit Bank Limited vs. Aquinas Francis Wasike and Another (UR) C.A. 238/2005*** it was held: -

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses 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.”

24. In the present case, I note that the Respondent has not discharged the burden of proving his financial means and I am therefore satisfied that the Applicants have demonstrated the likelihood of substantial loss.
25. Turning to the issue of security for the due performance of the decree, the Applicants expressed willingness to deposit Kshs. 1,500,000 as security or such other amount as the Court may direct. In ***Focin Motorcycle Co. Ltd vs. Ann Wambui Wangui & Another [2018] eKLR***, the Court held that it is sufficient for an applicant to depose readiness to provide security, the nature and quantum thereof being at the discretion of the Court.
26. The Court is satisfied that the requirement on security has been met.

27. In balancing the interests of the parties herein, this court is mindful of the fact that a successful litigant is entitled to the fruits of judgment. However, the Court must equally ensure that the Applicants' right of appeal is not rendered illusory. This is in line with the decision in **Victory Construction vs. BM (a minor suing through next friend PMM) [2019] eKLR** where the Court emphasized that stay of execution is meant to preserve the substratum of an appeal.
28. Guided by the overriding objective under Sections 1A and 1B of the Civil Procedure Act, I find that the interests of justice favour preservation of the status quo pending appeal.
29. Having considered the application in its entirety, the Court finds that the Applicants have satisfied the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules.
30. Consequently, I make the following orders:
- a) ***There shall be a stay of execution of the judgment and decree issued in Milimani CMCC No. E295 of 2023 pending hearing and determination of the appeal.***
 - b) ***The proclamation issued on 16th October 2025 and the warrants of attachment issued on 15th October 2025 are hereby lifted and recalled.***
 - c) ***The Applicants shall deposit Kshs. 3,000,000 as security in a joint interest-earning account in the names of the advocates for the parties within 30***

days of this ruling, failing of which the stay shall lapse automatically.

- d) The appeal shall be set down for hearing on priority basis, and in any event, within 60 days from the date of this ruling.***
- e) Costs of the application shall abide the outcome of the appeal.***

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JANUARY, 2026.

**HON. W. A. OKWANY
JUDGE
29/01/2026**

FOR APPELLANT
FOR THE RESPONDENT
COURT ASSISTANT Uber