

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E209 OF 2024

INDOKEN LIMITEDAPPELLANT/APPLICANT

-VERSUS-

KATUMO NDIVO (Suing as Personal Representatives
of the Estate of JONATHAN MUEMA
KATUMARESPONDENT

RULING

1. This ruling is on the Appellants/Applicants' application by way of Notice of Motion dated 24th September 2024 seeking for orders:
 - a) **Spent**
 - b) **Spent**
 - c) **THAT the Judgment of the lower Court that was delivered on 10/7/2024 be stayed pending the hearing and determination of this Appeal.**
 - d) **THAT the costs of the Application be in the cause.**

2. The application is supported by the supporting affidavit of **Hitesh Kumar Shah** sworn on 24th September 2024 and which application is premised on the grounds on the face of the application as follows:
 - a) The Judgment was delivered by the Principal Magistrate on 10/7/2024 and a stay of execution for 30 days was given.

- b) The Appellant made this Appeal on 12/9/2024 and had also requested for the Certified copies of the Judgment and proceedings with instructions to file the Appeal.
 - c) The Appellant's properties were proclaimed on 20/9/2024 and seven days shall end on 27/9/2024 and the Appellant's property shall have been attached and by so doing, the Applicant shall suffer substantial damages that cannot be compensated by money since the Respondent is a man of straw and if the sum is paid to him and if the Appeal shall succeed the money might not be recovered.
 - d) The Appellant shall suffer irreparable harm and I urge the Court to maintain status quo.
 - e) The Appellant is ready to provide sufficient security if the Appeal does not succeed, the Respondent shall recover the damages without a lot of efforts.
 - f) The Application has been within a reasonable time because the certified copies of the proceedings and Judgment have not been provided.
 - g) The Appellant has an arguable Appeal which shall be dealt with in the time of arguing the Appeal
3. In opposition to the said application, the Respondent **Katumo Ndivo** filed a replying affidavit sworn on 7th October 2024 and sought for Applicant's notice of motion to be dismissed for reasons that;
- a) the application is untenable, an abuse of the court process and meant to unduly delaying the settlement of the Decretal Sum.
 - b) the Applicant has not discharged the duty imposed under Order 42 Rule 6, to wit;

- c) it has not been demonstrated in the Affidavit what or how substantial loss will result to the Applicant;
 - d) No sufficient cause for the stay has been demonstrated;
 - e) No sufficient security has been provided for grant of stay.
4. The Respondent contend that what is before court is a money decree and going by case law, a stay of execution can only be granted on special circumstances whereof the same is lacking in the present suit.
 5. That in the unlikely event that the court grants a stay, the scales of justice should be balanced by requiring the Applicant to deposit the decretal sum in an interest earning account in the joint names of the Advocates on record for the parties or in the alternative and without prejudice to the foregoing, half of the decretal sum be paid to the Respondent and the balance be deposited in court.
 6. Directions were given for the application to be canvassed through written submissions. The Applicant's submissions are dated August 2025 whilst the Respondent's submissions are dated 24/10/2025.

Analysis and Determination

7. I have carefully perused and considered the application, the supporting affidavit, the replying affidavit and the Parties' Counsel submissions as well as the judicial decisions relied upon. In my view, the issues for determination are as follows:-

- a. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.***
- b. Who shall bear costs of the application?***

a. Whether the Applicant/Appellant has met the criteria for grant of orders of stay pending Appeal.

7. The law relating to stay pending Appeal is Order 42 Rule 6 (2). It is also important to state that the power to grant an order of stay is discretionary and is dependent on certain conditions being met.

8. Order 42 rule 6(1) and (2) of the **Civil Procedure Rules, 2010** provides as follows:

“(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.

(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 **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365**, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely:
- (i) **establishment of a sufficient cause,**
 - (ii) **satisfaction of substantial loss and**
 - (iii) **the furnishing of security.**

Further the application must be made without unreasonable delay.

10. In **Butt Vs. Rent Restriction Tribunal [1979]**, the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated thus:

- i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.***
- ii. 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 the Appeal court reverse the judge's discretion.***
- iii. Thirdly, 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.***

iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

11. On the first criterion as set out in Order 42 Rule 6 (2) i.e. Whether Applicant/Appellant has brought this application without unreasonable delay. The Judgement was delivered on 10/07/2024. The Memorandum of Appeal dated 09/08/2024 and was filed on 12/08/2024. The instant application dated 24/09/2024 was filed in court on 25/09/2024, which was outside the 30 days span of filing an appeal by some two weeks. The delay of two weeks is not inordinate. In the circumstances, I find that application has been brought without unreasonable delay.
12. On second criterion is whether the Applicant/Appellant has demonstrated that he is bound to suffer substantial loss if orders of stay of execution are not granted. The question that follows is what comprises substantial loss. In **Silverstein Vs Chesoni (2002)1 KLR 867** it was held that

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory”

13. The Appellant/Applicant has deposed that the Appellant's properties were proclaimed on 20/9/2024 and were to be attached after seven days on 27/9/2024 and the Appellant's property shall have been attached and by so doing, the Applicant shall suffer substantial damages that cannot be compensated by money since the Respondent is a man of straw and if the sum is paid to him and if the Appeal shall succeed the money might not be recovered

14. The court is under a duty to hold the rings of justice even handed; it should not offer any illegitimate advantage to either party. The Appellant/Applicant appeals to this Honourable Court to grant the order of stay to enable the Applicant an opportunity to be heard on its Appeal.
15. In **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR**, it was held that:

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a situation that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what must be prevented by preserving the status quo because such loss would render the appeal nugatory."

16. In response to the Applicant's assertions the Respondent averred that what is before court is a money decree and going by case law, a stay of execution can only be granted on special circumstances whereof the same is lacking in the present suit.
17. That in the unlikely event that the court grants a stay, the scales of justice should be balanced by requiring the Applicant to deposit the decretal sum in an interest earning account in the joint names of the Advocates on record for the parties or in

the alternative and without prejudice to the foregoing, half of the decretal sum be paid to the Respondent and the balance be deposited in court.

18. The Appellant/Applicant has a duty to demonstrate facts, and not merely to allege that the Respondent's is a man of straw whose means are unknown. Indeed, on a similar issue in **ISAAC MUTETI KISUA -VS - FELIX MWANGI NDEGWA [2016] eKLR** the Court rendered itself thus:

“This Court finds that the Applicant from the reading of the above quoted provisions has the burden to demonstrate that he would suffer "substantial loss" and not just loss unless stay of execution is granted. I am not convinced that the burden of demonstrating financial means is the other way round as submitted by the Applicant. Looking at the authorities quoted, especially by the Respondent and the provisions of the quoted rules it is clear that an applicant has a duty to demonstrate that a substantial loss may result to him/her unless an order of stay is made”.

19. Similarly, in **SOCFINAC COMPANY LIMITED -VS- NELPHAT KIMOTHO MUTURI [2013] eKLR** Odunga J, held as follows:

“The appellant's belief that the respondent will be unable to repay the same is solely based on the appellant's lack of knowledge as to the respondent's financial ability or capability. In my view, the mere fact that an appellant does not know the respondent's financial capability does not give rise to the presumption that the respondent will be unable to repay the sum. There must be other factors that lead to that presumption. On the material before the court. I am not satisfied that the appellant has shown that it stands to suffer substantial loss if the stay sought is not granted.

20. Further, Radido J at paragraphs 16 - 18 in **VAN DEN BERG (K) LIMITED VS- CHARLES OSEWE OSODO [2015] eKLR** rendered himself thus:

*“ 16. I have carefully perused the supporting affidavit sworn by Isaac M. Wamaasa and I have not been able to decipher what substantial loss the Appellant would suffer if stay were not grant.
17. The closest contention is that the Respondent is a man of straw who has not demonstrated that he could refund the decretal sum. 18. The position as urged by the Appellant on this point cannot be correct. It is not a burden placed upon decree holders to prove that they can refund the decretal sum. It is the appellant who alleges that the decree holder is a man of straw to demonstrate that fact.*

21. In granting an order of stay of execution, the court should not be seen to interfere with a party's enjoyment of the fruit of the judgment. See the case of **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No.6726 of 1991** where the court stated as follows: -

"The financial ability of a decree-holder solely is not a reason for allowing stay, it is enough that the decree-holder is not a dishonourable miscreant without any form of income. Suffice to state that the respondent, at this moment, is the successful party and in order to deny him the fruits of his success, it is upon the applicant to prove that he is unlikely to make good whatever sum he may have received in the meantime."

22. The loss the Appellant has alluded to is that the appeal herein will be rendered nugatory should the stay order be declined. It is my considered view that this being a monetary claim, any loss to be suffered by either party can adequately be compensated by an award in damages. The Applicant has not

shown by evidence through an affidavit that the Respondent is incapable of refunding the decretal sums should the appeal succeed.

23. On the third criterion where the Applicant/Appellant must furnish security for the due performance of the decree. I am fully aware that the court has a delicate task of balancing the interests of both the Appellant and the Respondent. The Appellant who seeks to preserve the status quo pending the hearing of the Appeal so that his Appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgement. It is true that under Order 42 rule 6 aforesaid, the Applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. I agree with the position in **Mwaura Karuga t/a Limit Enterprises .vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR**, where it was held that:

“... 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.”

24. I also associate myself with the holding in **Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] eKLR**, where 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 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 fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine.”

25. The law is that where the Applicant intends to exercise its undoubted right of appeal, and in the event, it were eventually to succeed it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in **Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100** where the Court of Appeal expressed itself as follows:

“The process of giving security is 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. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. 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. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide

security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so. The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it”.

26. The Applicant has not commented on the issue for security for costs in his supporting affidavit although in conclusion of his submissions he submitted that as follows:-

“the Applicant be allowed to furnish security in-form of security”

27. However, the Respondent is of the view that in the unlikely event that the court grants a stay, the scales of justice should be balanced by requiring the Applicant to deposit the decretal sum in an interest earning account in the joint names of the Advocates on record for the parties or in the alternative and without prejudice to the foregoing, half of the decretal sum be paid to the Respondent and the balance be deposited in court
28. I find that the Applicant has not satisfying the legal requirement for security for costs as he has failed to specify what kind of security it intends to offer for costs.

b) Who should bear the cost of this application?

29. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section **27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012: [2014] eKLR**. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.
30. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the Civil Procedure Act, I will in the interest of administration of justice allow the application dated 24th September 2024 on conditions that:-

- a. The Applicant shall deposit the entire decretal sum into a joint interest earning bank account to be opened in the names of Parties' Advocates on record or by depositing the same in court within Forty-Five (45) days of this Ruling.**
- b. That failure by the Appellant/Applicant to comply with Order in (a) the Respondent will be at liberty to execute.**
- c. The Appellant shall file and serve a record of appeal within Sixty (60) days of this ruling failure to which the appeal will stand dismissed.**
- c. Costs shall be in the appeal;**
- d. A mention date to be fixed for directions on the disposal of the appeal.**

It is so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 12TH MARCH 2026

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 12TH MARCH 2026