

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(CIVIL DIVISION)

HCCA NO E025 OF 2026

HARRISON NZIOKI KIILU1ST APPELLANT/APPLICANT

FESTUS KIILU2ND APPELLANT/APPLICANT

VERSUS

TEDDY KATANA TAKI1ST RESPONDENT

MONTEZUMA MONALISA FUNERAL HOME2ND RESPONDENT

RULING

1. On 17th February 2026, the court below issued a mandatory injunction in **MCCC No E133 of 2026; Teddy Katana Taki v Montezuma Monalisa Funeral Home Ltd and Festus Kiilu and 1 other**, vide which it ordered the 2nd respondent herein to release the body of **Janet Mutile Kiilu to Teddy Katana Taki** for burial, pending the hearing and determination of the suit.

2. The appellants were dissatisfied with the said decision and lodged an appeal. They argued in their memorandum of appeal that the learned magistrate erred by issuing final orders while considering an interlocutory application and by neglecting the fact that the marriage between the 1st respondent and the deceased was, in practical terms, already over. It was claimed that the 1st respondent and the deceased entered into a post-nuptial agreement in August 2025, which demonstrated their wish to separate and divide their property amicably.

3. The appellants filed a notice of motion dated 17th February 2026, seeking a stay of execution of the impugned decision until the hearing and determination of the application and the appeal. They also request a stay of further proceedings in the court below pending the decision on the application and the appeal.
4. Upon the filing of the said application, this court stayed the execution of the impugned orders pending a hearing interpartes of the application on **25th February 2026**. However, by the time the orders were issued and served, the body of the deceased had been released to the 1st respondent. This compelled the appellants to file a second application dated **19th February 2026**, through which they sought to have the 1st respondent ordered to transport the body of Janet Mutile Kiilu to the Coast General Teaching and Referral Hospital for storage and to prevent the 1st respondent from burying or otherwise disposing of her body pending the hearing and determination of the appeal.
5. The latter application was allowed by this court on **20th February 2026**.
6. The 1st respondent opposes the two applications. In a replying affidavit sworn on 24th February 2026, he averred that the appellants/applicants were meddling with the estate of the deceased person. He deposed that the orders of the court below were valid and regular. In his view, this court was misled into issuing the orders of 17th and 20th February 2026. He further averred that there was material non-disclosure of information regarding the children begotten by the deceased and the 1st respondent. Regarding the second application, the 1st respondent urged that it was

impractical for the body to be returned to the Coast General Hospital, as the said institution was, in his opinion, the scene of an alleged crime.

7. The 1st respondent contended that unless the orders sought were denied, the court would be departing from binding authorities in matters of burial disputes. In support of the said contention reliance was placed in the following decisions of the Court of Appeal, **SAN v GW [2020] KECA 46 (KLR)**, **Apeli v Buluku [1980] KECA 39 (KLR)** and **Anne Nyathira v Samuel Mungai Mucheru, Diana Gathoni Mucheru, Obadiah Mburu Mucheru & David Njuguna Mucheru [2016] KECA 758 (KLR)**, in which cases it was held that the wishes of a deceased person in how his body is to be disposed of is not binding as there is no property in a deceased person's body nor can the departed take part in the court proceedings. It was further urged that the body of a deceased person ought to be handled by the person closest to them, which in this case was her estranged husband.
8. The first applicant filed a supplementary affidavit sworn on 26th February 2026, in which he admitted that the deceased and the first respondent got married at AIC Shanzu, but denied that he paid dowry to "solemnize it". He reiterated his earlier contention that there was an implied divorce based on the parties' conduct. He relied on the decision of Anthony Ndungu, J, in **re Estate of Henry Mbogo Kuria (Deceased) [2025] KEHC 10818 (KLR)** and averred that the deceased and the first respondent ought to be deemed as divorced for all practical purposes.

9. The application was canvassed by way of written submissions. The applicant's submissions are dated **26th February 2026**. In the said submissions, counsel for the appellants, while reiterating the contents of the application and the depositions in support thereof, urged that the application would be rendered nugatory unless stay orders were issued and that the appellants would thereby suffer substantial loss. It was further contended that the appeal is arguable.
10. On the other hand, the 1st respondent filed written submissions dated 3rd March 2026, vide which the application for stay pending appeal was opposed on the grounds that the threshold for grant of such orders was not met.
11. I have considered the application, the supporting and further affidavits, and the annexures thereto, as well as the responses of the 1st respondent. The issue, as far as I can tell, is whether the court ought to issue orders for a stay of execution pending appeal and whether proceedings in the court below ought to be stayed.
12. Under **Order 42 Rule 6 (2) of the Civil Procedure Rules**, a stay of execution pending appeal may be issued where the following 3 conditions are met:
- a. The applicant will suffer substantial loss unless a stay is granted;
 - b. The application was filed without undue delay; and
 - c. Security or undertaking as to costs has been given for the due performance of the decree or order that may ultimately be binding, has been made or given by the applicant.

13. In my view, a party will only suffer substantial loss where the appeal is arguable. In the case of **JAMES WANGALWA & ANOTHER V AGNES NALIKA CHESETO [2012] KEHC 1094 (KLR)**, the court stated as follows:

“With this observation, of course, a frivolous appeal cannot, in practical terms, be rendered nugatory. The only admonition, however, is that the High Court should not base the exercise of its discretion under Order 42 Rule 6 of the CPR only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above.”

14. Does the instant appeal meet the stated conditions? I note at the outset that the application was filed without undue delay. Regarding the third requirement, this being a matter concerning the interment of a deceased person, it is my opinion that no deposit of security is necessary; it will be sufficient to have the body of the deceased preserved pending appeal; if at all, the court is convinced that orders of stay ought to be issued. Having stated this, I must note that all three elements must coexist for the order of stay to be granted. In the well-known phrase, the three conditions are conjunctive, not disjunctive. This leads to the first condition: whether the appellants will suffer substantial loss.

15. **RWW v EKW [2019] KEHC 6523 (KLR)**, it was stated that:

“8. 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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of 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.”

16. Gikonyo, J, in the case of James Wangalwa (supra), opined that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

17. The court notes that the 1st respondent is the husband of the deceased. Although it has been stated that he paid no dowry, the payment of dowry in respect of a statutory marriage is not a prerequisite.

18. The foregoing notwithstanding, it has been stated that the deceased and 1st respondent had parted ways and were no longer married for all intents and purposes. The appellants rely on the postnuptial agreement to support their contention that the court should hold that a presumption of divorce should be made. Presumption of divorce was discussed in the case of **In re Estate of Henry Mbogo Kuria (Deceased) [2025] KEHC 10818 (KLR)**, where the learned Judge stated that:

“I associate myself with the legal sentiments of Rawal J and Nyakundi J in their decisions in *Nelia Wanjiru Gitumbi v Jacinta Wanjiru Gitumbi, Joseph Kagwiri Gitumbi and In re Estate of Jecinter Njoki Okoth (supra)* respectively and make the conclusion that for all practical purposes the couple had by the time of the death of the deceased severed the relation of marriage with the knowledge of all concerned. I thus find and hold that Teresia was not a wife of the deceased at the time of his death.”

19. In the case of **SAN v GW [2020] KECA 46 (KLR)**, the Court of Appeal held that:

“In *Samuel Onindo (supra)*, it was explained that a person’s conduct towards a deceased person while alive could extinguish his or her right to bury the deceased. Since the appellant did not show any closeness towards the deceased after their

separation, and she did not show any sympathy towards him when he was ailing, it was only just that the deceased's wishes and choice of where he was to be buried were to be honoured.”

20. What emerges from the above is that the conduct of the 1st respondent towards the deceased is a key consideration. In this case, there is clearly a dispute as to whether the deceased and the 1st respondent could still be regarded as spouses. A determination of the true situation at the time the deceased departed can only be made after a hearing on the merits.
21. That being the case, I am persuaded that the appeal is arguable and that the appellants will suffer substantial loss unless a stay is granted. In the result, I allow the application dated 17th February 2026 and order that a stay of execution be issued and that the body of the deceased be preserved in the mortuary pending the hearing and determination of the appeal.
22. Regarding stay of proceedings, I note that it is an extraordinary remedy that is granted sparingly and only in exceptional circumstances where grave injustice might otherwise result or where justice might not be attained by other means.
23. J Ngugi, J (as he then was), stated as follows in the case of **Turbo Highway Eldoret Ltd v Muniu [2022] KEHC 10197 (KLR)**

“All these factors must be considered, in a given case, in the spirit concisely expressed in Halsbury’s Laws of England, 4th Edition, Vol. 37 at p. 330:

The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing, or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.”

- 24.** I am persuaded that a stay of proceedings should issue in this cause. Allowing the proceedings may embarrass the court, as the High Court and the court below may reach different conclusions on the matters in issue. In a nutshell, there are exceptional circumstances in this case that warrant a stay. The court notes that burial matters are highly emotive. Once the mortal remains of the departed are interred, it will be difficult to undo, as

disinterment may be taken as a disturbance of the peaceful repose of the deceased. It is therefore better for the court to act with caution and allow a burial only once the hearing is concluded and a decision based on the facts and the law is reached.

25. Based on the foregoing, the orders that commend themselves to me are:

- a.** Stay of execution of the orders issued by the Hon **Gathogo Sogomo** on **17th February 2026**, in **MCCC No. E133 of 2026** is hereby issued pending the hearing and determination of the appeal;
- b.** Further proceedings in **Mombasa MCCC No E133 of 2026** are hereby stayed pending the hearing and determination of the appeal;
- c.** Costs of the application shall be in the appeal.

26. It is so ordered.

Dated and signed at Mombasa, this 10th day of March 2026. Delivered
virtually through **Microsoft TEAMS.**

Gregory Mutai
JUDGE

In the presence of:

Mr Koech for the Appellants;

Ms Choni for the 1st Respondent;

No appearance for the 2nd Respondent; and

Ms Bancy - Court Assistant.

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