

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E248 OF 2025

**KINATWA SOCIETY SACCO
LIMITED.....APPELL
ANT/APPLICANT**

VERSUS

**JOSEPH MWANYA MUTHITHYA & CATHERINE KISUU
MWANIA (Suing on their own behalf and the
Administrators of the Estate of**

**JUDY MWANIA (Deceased).....1ST
RESPONDENT**

**GEORGE KIMOTHO ILEVE.....2ND
RESPONDENT**

**MUMINA MUTINDA NGUI.....3RD
RESPONDENT**

R U L I N G

Brief facts

1. The application for determination dated 3rd October 2025 seeks for orders of stay of execution in respect of the ruling in Thika CM Civil Suit No. 353 of 2020 delivered on 7th May 2025 pending hearing and determination of the appeal.

2. In opposition to the application, the 1st respondent filed a Replying Affidavit dated 22nd October 2025.

Applicant's Case

3. The applicant states that the ruling in the lower court was delivered on 7th May 2025 whereby the court dismissed its application for setting aside the judgment entered against it. Being aggrieved and dissatisfied with the ruling, the applicant states that it has filed an appeal pursuant to leave granted by the lower court on 24th September 2025.
4. The applicant states that there is imminent threat of execution and if the orders sought are not granted its property is likely to be attached and sold to third parties and in the event the appeal succeeds it will not be able to recover the said properties. The applicant avers that it has a meritorious appeal with high chances of success and should execution occur, the appeal will be rendered nugatory.

The 1st Respondents' Case

5. The 1st respondents state that the application is a constructed mode of delaying and denying them from enjoying the fruits of their judgment. The 1st respondents further state that the applicant should not be entertained further by the court since it has been a vexatious litigant

with the urge of filing applications after application yet litigation must come to an end. The 1st respondents aver that the ruling of the lower court ought not to be disturbed as it will aid the applicant's ill intent to delay the recovery of the decretal sum and yet the same was delivered in a procedural and substantive manner.

6. The 1st respondents argue that the applicant has not demonstrated any substantial loss. He Further stated that the applicant ought to be directed to release half the decretal sum and the other half to be deposited in a joint interest earning account, should the court find it fit to grant the orders.
7. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

8. The applicant submits that it promptly lodged an appeal and thereafter filed the present application. As such it argues that there was no inordinate delay. The applicant refers to the cases of **Vishram Ravji Halai vs Thornton & Turpin Civil Application No. Nai 15 of 1990 [1990] KLR 365** and **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike [2006] eKLR** and submits that it stands to suffer substantial loss as execution may issue at anytime yet it had no legal liability for the alleged accident and if execution proceeds, the appeal will be rendered nugatory as recovery of the decretal sum from the respondents is uncertain. The respondents in their

replying affidavit merely allege ability to refund but provide no evidence whatsoever of means or financial capacity.

9. The applicant argues that the appeal raises serious triable issues such as whether liability can be imposed without proof of ownership as required under Section 8 of the Traffic Act and whether beneficial ownership can be inferred without documentary evidence. The applicant further argues that the court

ought to be guided by the decision in **Absalom Dova vs Tarbo Transporters [2013] eKLR** and balance the interests of the decree holder and the right of appeal.

The 1st Respondents' Submissions

10. The 1st respondents submit that the applicant has not offered any explanation for not paying the decretal sum within the 30 days stay period. The applicant has not given any cogent reasons for the noncompliance with court orders and it is clear that the applicant is attempting to escape the consequences by disobeying court orders.
11. The 1st respondents submit that the applicant has not demonstrated any substantial loss or offered any form of security. Further the applicant has failed to settle the decretal sum yet the matter has been in court from 10th august 2020. To support their contentions, the 1st respondents refer to the decisions in **Antoine Ndiaye vs**

African Virtual University (2015) Civil Suit No. 422 of 2006 and Machira t/a Machira & Co. Advocates vs East African Standard (No. 2).

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal

12. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order

for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. **Order 42 Rule 6 of the Civil Procedure Rules** stipulates:-

(1) “No appeal or second appeal shall operate as a stay of execution or proceedings 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 orders 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 1st 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.

13. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

14. Substantial loss was clearly explained in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-**

“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, that is to say, 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 state of affairs 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 has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

15. The applicant argues that it is apprehensive that the respondents shall proceed with execution at any time rendering the intended appeal nugatory.

16. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show that execution shall irreparably affect it or will alter the status quo to its

detriment therefore rendering the appeal nugatory. On perusal of the record, the applicant only raised the issue of the respondents' financial capabilities in its submissions. Thus, the issue being raised in its submissions, the respondents did not have a chance to show their financial capabilities in their affidavit. It is trite law that submissions are not evidence.

17. Additionally, the trial court dismissed the applicant's application dated 27th November 2024 which is in effect a negative order. Notably, the court cannot grant stay of the impugned ruling as it dismissed the applicant's application which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in **Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR** where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay - called a positive order - either an order

that has not been complied with or has partly been complied with.

18. Similarly in **Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR**

the Court of Appeal expounded on stay of execution stating:-

In Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.

The same reasoning was applied in the case of Raymond M. Omboga vs Austine Pyan Maranga (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where

there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

19. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order.

20. Accordingly, it is my considered view that the applicant has not demonstrated the substantial loss it stands to suffer.

Has the application has been made without unreasonable delay

21. The ruling was delivered on 7th May 2025 and the applicant filed the instant application on 3rd October 2025 which is a duration of 5 months from the date of the ruling. The applicant has not offered any explanation as to the delay. It is therefore my considered view that the delay of 5 months is inordinate and inexcusable.

Security of costs

22. The purpose of security was explained in the case of **Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated:-

“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 the 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.

23. Evidently, the issue of security is discretionary and it is upon the court to determine the issue as well as setting the terms to be complied with. The applicant has not offered any form of security in its application.

24. Additionally, grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicant's unfettered right to file an appeal to fully ventilate its grievances. This

was well stated in the case of **M/s Porteitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997**

where the court held:-

That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.

25. Bearing the said balance in mind and considering the provisions of Order 42 Rule 6 of the Civil Procedure Rules, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal. I have also perused the grounds of appeal in the memorandum of Appeal dated 28th September 2025 and without going into the merits of the appeal noted that the said grounds do not raise arguable points of law. The parties had already agreed on the issue of liability at 100% in favour of the respondent. In the memorandum of appeal, the appellant raises the issue of liability. The applicant may be not serious in his intention to file an appeal looking at the facts of this appeal as well as the grounds relied on.

26. Accordingly, it is my considered view that the application dated 3rd October 2025 lacks merit and is hereby dismissed with costs to the 1st respondent.

27. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 13TH DAY OF MARCH 2026.***

**F. MUCHEMI
JUDGE**