REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL NO. E056 OF 2025

DENNIS MATHENGE MUTHEE……………..APPELLANT/APPLICANT

VERSUS

BURTON NDIRITU MAHINDA ……………………….. 1ST RESPONDENT

HABIB GULAM ……………………………………………… 2ND RESPONDENT

FRANCIS MUTHEE MATHENGE ……………………3RD RESPONDENT

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RULING

1. Appellant filed an application dated 15.09.2025, seeking an Order of Stay of Execution of Judgment and Decree in Karatina PMCC No. 6 of 2018. The applicant was a 2nd defendant in the said case. The case involved motor vehicle registration number KBJ 761 X, a Mitsubishi Canter owned by Francis Muthee Mathenge and Habib Gulam. The court found the appellant 100% liable for the accident involving the said vehicle.

2. There is no appeal from the judgment issued in the trial court. Francis Muthee Mathenge sought to have the judgment set aside but failed. He filed E060 of 2025. The appellant, who is a son of Francis Muthee Mathenge, filed an objection to

execution against motor vehicle registration number KBJ 761 X, a Mitsubishi Canter, which they said was owned by the appellant. On 10.07.2025, the applicant's son filed an application stating that he is the registered owner of motor vehicle registration number KBJ 761 X, Mitsubishi Canter, which was the accident vehicle. What was sought to be stayed was the execution of a judgment in the lower court. There were advocates appointed and who ceased acting. The Objection was dismissed on 15.09.2025.

3. The appellant stated that he had an arguable appeal. The appellant stated that his vehicle was attached in execution of the decree in Karatina PMCC 6 of 2018. The order sought was a dismissal of the application.

4. The quagmire in this matter is that the attached motor vehicle was the suit motor vehicle. The objection was dismissed. The agreement between son and father was said to have been entered on 2.04.2024. The agreement is not attached, and the consideration is not shown to have passed.

5. What then are the parameters for staying pending appeal? The Court of Appeal stated in **<u>Butt v Rent Restriction Tribunal</u>** (Civil App No. NAI 6 of 1979) addressed the factors to be considered as follows:

    a. *The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be*

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exercised in such a way as not to prevent an appeal.

b. *The general principal 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.*

c. *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.*

d. *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.*

Although stay may be granted as a matter of discretion, the discretion must be executed judiciously and only as circumstances of each case may require. And from the wording of Order 42 rule 6, the guiding principle is that the applicant should show that he will suffer substantial loss if stay is not granted. As to what substantial loss is, has been the subject of consideration by Courts. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, the Court observed that:

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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.

7. The Court has a duty to balance the interests of both the applicant seeking a stay and those of the successful decree holder who has obtained a decree in his favour. The Court stated as much in *Machira T/A Machira & Co Advocates v East African Standard (*[2002] 2 KLR 6thus:

> [Io]be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put

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into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.

8. Therefore, an Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

   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. Substantial loss for purposes of Order 42 rule 6 of the Civil Procedure Rules was discussed in **James Wangalwa & Another v Agnes Naliaka Cheseto** [2012] eKLR, 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, 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.

10. In the case of **G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR**, the court held as follows:-

It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.

11. In **RWW v EKW [2019] eKLR**, considered the purpose of a stay of execution order pending appeal, in the following words:

> **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.**

12. On security in the case of **<u>Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others [2015] eKLR</u>** the Court held as doth:

> …the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. 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 and that the security to be given is to be measured on that yardstick

13. On timeous filing, the Court in *Asike-Makhandia J* in *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR* stated that:-

> There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR this Court stated:-
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> The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.

14. Parties filed humongous submissions. They go to the merit of the appeal. The court will not decide whether the appeal is arguable. The appellant had not offered security for due performance of the decree.

15. Secondly, the application was dismissed. There is nothing to stay in an application that was dismissed.

16. Further, there is no security offered in the application itself. The court will not deal with security unless offered.

17. In this respect, there is no security offered. It is unnecessary to go further than that. In the circumstances, the application lacks merit and is accordingly dismissed.

18. This leaves the issue of costs, which is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
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> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

19. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

> "It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

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20. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others** [2014] KESC 31 (KLR), as follows:

> 18.It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation
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> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

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21. The matter is at the interlocutory stage. The costs shall therefore be in the course.

Determination

22. In the circumstances, the court makes the following orders:-

a) The application dated 15.09.2025 is dismissed for lack of merit.
b) Costs in the cause.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **17th** day of **March**, **2026**. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kariuki for the Applicant

No appearance for the Respondent

Court Assistant – Michael/Martin

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