

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ISIOLO**  
**CIVIL APPEAL NO. E036 OF 2025**

**PAUL  
MWITI .....APPELLANT/  
APPLICANT**

**VERSUS  
HENRY**

**KIRIMI .....**

**RESPONDENT  
RULING**

1. What is coming up for determination is the Applicant's Notice of Motion dated 3<sup>rd</sup> December, 2025. The Applicant seeks orders as follows:
  - a) *Spent*
  - b) *spent*
  - c) *That the Honourable Court be pleased to order stay of execution of the judgment and any subsequent Decree the Honourable Chief Magistrate Hon. L Mutai delivered on 13<sup>th</sup> November 2025 pending hearing and determination of the Appeal before this Court.*
  - d) *Any other relief that the Honorable Court deem fit to grant.*
  - e) *The costs of this Application be provided for.*
2. The Application is supported by the Affidavit of Paul Mwiti, who deposes that the trial court delivered judgment on a liquidated amount , and consequently , he stands the risk of execution proceedings; that the intended appeal raises substantive and meritorious grounds and that he is reasonably apprehensive that should execution proceed, the appeal will be rendered nugatory. He

further states he is willing to abide by such terms as the court deems just.

3. The Respondent opposed the application through a Replying Affidavit dated 19<sup>th</sup> December 2025. He states that the Applicant fully participated in the proceedings and hence the allegation in the memorandum of Appeal that he was not heard are untrue; that the decree is a money decree and hence no harm or substantial loss will be suffered by the Applicant. He further argues that the Applicant has failed to offer security for the due performance of the decree, which he asserts is a fatal omission.

### **Analysis and Determination**

4. The parties filed submissions which I have read through, and considered. The only issue for determination is whether the Applicant has satisfied the conditions for staying a decree or order pending Appeal.
5. The power of the high court to grant a stay of execution is founded on **Order 42 Rule 6(2) of the Civil Procedure Rules**, which stipulates:  
*“(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”.*
6. The cornerstone of an application for stay is the demonstration of substantial loss, as observed by

Justice Gikonyo in the case of **James Wangalwa & another v Agnes Naliaka Cheseto (2012) eKLR**, Gikonyo where the Judge held:

*“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..... Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.*

7. The Applicant argues that he stands to suffer significant financial loss and that the Appeal will be rendered nugatory if execution proceeds. The Respondent counter this submission by stating that a money decree cannot result in substantial loss as it is reversible. However, as held in **Butt v Rent Restriction Tribunal KLR 417**:

*“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory”.*

8. The Application must be made without unreasonable delay. The Applicant filed his notice of motion shortly after the judgment. As noted in **James Wangalwa & another v Agnes Naliaka Cheseto (supra)**, the rest of the time that lapsed between the decree and the application must be explained by legal processes undertaken. I find that there was no unreasonable delay in bringing the Application.
9. The Respondent argues that the failure to offer security is fatal. However, **Order 42 Rule 6(2)(b)** clarifies that it is the court that orders the security to be given. The purpose of such security was

explained in ***Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others (2014) eKLR***:

*“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”.*

10. It is trite law that the right of appeal is a constitutional right that actualizes access to justice. Having considered that the Applicant has an arguable appeal and that substantial loss may occur if the status quo is not preserved, I am inclined to grant the prayers, subject to strict timelines and the provision of security.

11. Consequently, the Application is allowed on the following terms:

a) There shall be a stay of execution of the judgment and decree in Isiolo CMCC No. 67 of 2022 pending the hearing and determination of the appeal.

b) The stay in (a) above is conditional upon the Applicant depositing the sum of Kshs. 100,000 as security for the due performance of the decree, within 30 days from the date of this Ruling.

c) Costs of this application shall be in the cause.

Dated, signed and delivered at Isiolo this 19<sup>th</sup> day of March 2026

S. Chirchir  
Judge.