REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. E030 OF 2024

CHARLES YEGON ..... 1ST APPELLANT

JETHROW KIPRONO CHERUIYOT ..... 2ND APPELLANT

VERSUS

IMARISHA SAVINGS & CREDIT

CO-OPERATIVE SOCIETY .....

RESPONDENT

R U L I N G

1. The Applicant filed his Notice of Motion Application dated 8th August 2025 which sought the following orders: -

I. Spent.

II. THAT this Honourable Court order a stay of execution of Judgement and order made on 13th November 2024 pending the hearing and determination of the Applicant's Appeal.

III. Spent

IV. THAT the costs of this Application be provided for.

2. The Application was brought under **Order 51, Order 42 Rule 6 of the Civil Procedure Rules** and **section 3A of the Civil Procedure Act.** The Application was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Charles Yegon on 8th August 2025.

The Applicant's case.

3. The Applicant stated that Judgement was entered against him on 13th November 2024. That he was aggrieved with the

impugned Judgement. The Applicant further stated that if the decretal amount is paid to the Respondent, his intended Appeal would be rendered nugatory and he would suffer irreparable loss and damage.

4. It was the Applicant's case that he had an arguable appeal with an overwhelming chance of success. That he would suffer substantial loss if the order of stay of execution is not granted.

5. At the time of writing this Ruling, the Applicant had not filed his written submissions.

Response

6. Through its Replying Affidavit and Further Affidavit both sworn by Mercy Mutai on 1st September 2025 and 9th March 2025 respectively, the Respondent stated that the Applicant was served with summons to enter appearance, Plaint and

all the documents in support of the Respondent's claim but failed to respond. That the Applicant was aware of the suit in the trial court and despite being granted numerous opportunities to respond and file their documents, they failed to file their defence.

7. It was the Respondent's case that the trial did not err when it found them liable for the loss of Kshs 3,510,000/=. That the Applicant was the author of his own misfortune. It was the Respondent's further case that as a financial institution, they stood to be highly prejudiced if the Judgement and Decree dated 13th November 2024 is delayed.

8. The Respondent stated that if the court was inclined to grant the order of stay, then the same should be granted on the condition that the Applicant deposit the entire decretal sum in court.

9. It was the Respondent's case that the Applicant had not shown any evidence to show that the Applicant had been paid any amount by any insurance company in respect to

the money stolen by the Applicant. That it was seeking to recover from the Applicant the money he stole from its clients. It was the Respondent's further case that the sentence served by the Applicant in Bomet MCCR No. 882 of 2017 did not absolve them from their civil liability.

10. Through its written submissions dated 9th March 2025, the Respondent submitted that the Application was brought after an unreasonable delay with the intent of frustrating the Respondent from enjoying the fruits of its Judgement. The Respondent further submitted that the Applicant had not shown how they would suffer substantial loss. That this court had to balance the interests of both parties when deciding whether or not to grant the stay order. It relied on **Kenya Shell v Benjamin Karuga Kibiru & another (1986) eKLR** and **Loice Khachendi Onyango v Alex Inyangu & another (2017) eKLR.**

11. It was the Respondent's submission that the Applicant had not provided any security for the performance of the Decree.

It relied on **Nicholas Macharia Maina v John Macharia Maina (2023) eKLR.**

12. I have gone through and considered the Notice of Motion Application dated 8th August 2025, the Respondent's Replying and Further Affidavits dated 1st September 2025 and 9th March 2025 respectively and the Respondent's written submissions dated 9th March 2025. The sole issue for my determination was whether this court should issue stay of execution for the Judgement dated 13th November 2024.

13. The principles that relate to stay of execution orders are well settled. 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 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.

14. Thus, under **Order 42 Rule 6(2) of the Civil Procedure Rules**, the Applicant should satisfy the court that: -

    i. Substantial loss may result to him unless the order of stay is granted.

    ii. That the Application has been made without unreasonable delay.

    iii. The Applicant gives such security as the court orders for the due performance of such Decree or order as may ultimately be binding to them.

15. Regarding the issue of substantial loss, the court in **Jason Ngumba Kagu & 2 others v Intra Africa Assurance Co. Limited [2014] KEHC 2183 (KLR)** held that: -

"The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of "the appeal will be rendered nugatory'', the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather,

whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process."

16. Similarly in **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) (2004) 2 EA 331**, the court stated that: -

"Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal."

17. The Applicant stated that he would suffer substantial loss unless execution was stayed. He has not stated how he would suffer substantial loss. In my view, the Applicant's

assertion amounted to fear of execution. This court however holds the view that execution is a lawful process as aptly guided by the Court of Appeal in **Machira t/a Machira & Co. Advocates vs East African Standard (No 2) (2002) KLR 63** where it held: -

> ***"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."

18. The Applicants did not adduce any evidence or set out factual circumstances to demonstrate that they would suffer substantial loss if the execution was not stayed. They failed to discharge their burden of proof.

19. On the issue of unreasonable delay, the trial court delivered its Judgement on 13th November 2024 and the Applicant filed the present Application on 8th August 2025 which was an approximate period of nine months. In my view, there was a delay in filing the present Application and the delay has not been explained by the Applicant. It is therefore my finding that there was inordinate delay in filing the present Application.

20. Regarding security for the performance of the Decree, Gikonyo J in the persuasive case of **Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014] KEHC 2430 (KLR)** held that: -

> ***"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 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."

21. Similarly in **Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] KEHC 7586 (KLR**) Nyakundi J. 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 a 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 falls.

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 judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal….

Thus, 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……..”

22. Under this head, I agree with the Respondent that the Applicant has not shown any payment as security for the performance of the decree and had not shown any willingness to do the same.

23. Flowing from the above, it is clear that the Applicant has not met all the conditions for grant of stay under **Order 42 Rule 6 of the Civil Procedure Rules**.

24. In the end, the Notice of Motion Application dated 8th August 2025 has no merit and is dismissed.

Ruling delivered, dated and signed at Bomet this 14th Day of April, 2026.

.....

HON. JULIUS K. NG'ARNG'AR

JUDGE

Ruling Delivered in the presence of;

Susan/Siele Court Assistant

Langat for the Respondent

N/A for Appellant