

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. 137 OF 2025

SAIDA NASICHE ADHIAMBO.....1ST

APPELLANT

SHABIR JUMA MOHAMMED.....2ND

APPELLANT

LIBINUS ODUOR JUMA.....3RD

APPELLANT

VERSUS

IBRAHIM MUSTAFA

MATSESHE.....RESPONDENT

RULING

1. This is a ruling in respect of a Notice of Motion application brought under a Certificate of Urgency in which the Appellants/Applicants seek orders for stay of execution of the judgment and decree in Kakamega Small Claims Court Civil Case No. E391 of 2024 pending the hearing and determination of the appeal.
2. The application is premised on the grounds that:
 - I. Judgment was delivered on 12th August 2025 in the absence of the parties;
 - II. The Applicants were denied an opportunity to be heard;
 - III. The trial court entered judgment against them in the sum of Kshs. 234,050/=;
 - IV. No stay of execution was granted and execution is imminent;

- V. The Respondent is allegedly not a person of means and may not refund the decretal sum if the appeal succeeds.

Issues for Determination

3. The sole issue for determination is whether the Applicants have met the legal threshold for grant of stay of execution pending appeal.
4. Order 42 Rule 6 of the Civil Procedure Rules, which sets out the conditions for grant of stay of execution.
5. The principles governing such applications have been settled in a number of decisions:
6. In **Butt v Rent Restriction Tribunal**, the Court of Appeal held that the power to grant stay is discretionary and should be exercised in such a manner as not to render an appeal nugatory.
7. In **Kenya Shell Limited v Benjamin Karuga Kibiru & Another**, the court emphasized that substantial loss is the cornerstone of the jurisdiction for granting stay.
8. In **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another**, the court held that once an applicant expresses reasonable fear that the respondent would be unable to refund the decretal sum, the evidential burden shifts to the respondent.
9. In *Halai & Another v Thornton & Turpin Ltd*, the court affirmed that provision of security is a mandatory requirement.
10. In *RWW v EKW*, the court reiterated that the purpose of stay is to preserve the subject matter pending appeal.

Analysis

Substantial Loss

11. The Applicants contend that the Respondent is not a man of means and would not be able to refund the decretal sum if the appeal succeeds.
12. In line with the holding in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another**, once such an allegation is made, the burden shifts to the Respondent to demonstrate financial capability. At this stage, no rebuttal has been presented.
13. Further, as stated in **Kenya Shell Limited v Benjamin Karuga Kibiru**, substantial loss is the cornerstone of such applications. The risk of irrecoverability of the decretal sum satisfies this requirement.
14. Whether the Application was Filed Without Delay
15. The judgment was delivered on 12th August 2025 and the application was filed shortly thereafter. There is no evidence of inordinate delay. The requirement is therefore satisfied.

Security for Due Performance

16. The Applicants have not expressly proposed security. However, as held in *Halai & Another v Thornton & Turpin Ltd*, security is a mandatory requirement, and the court has discretion to determine its nature.

Arguable Appeal

17. The Applicants allege that they were denied an opportunity to be heard. This raises a serious issue touching on the right to a fair hearing under

Article 50 of the Constitution.

18. Without making a definitive finding, the court is satisfied that the appeal is not frivolous and raises arguable points.

Determination

19. Guided by the principles in *Butt v Rent Restriction Tribunal*, the court must balance the competing interests of the parties while ensuring that the appeal is not rendered nugatory.

20. The court is satisfied that the Applicants have met the threshold for grant of stay.

Orders

21. Accordingly, the court makes the following orders:

I. There shall be a stay of execution of the judgment and decree in Kakamega Small Claims Court Civil Case No. E391 of 2024 and E390 of 2024 pending the hearing and determination of the appeal.

II. Costs of the application shall abide the outcome of the appeal.

21. Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 22nd DAY OF APRIL, 2026.

S.N.MBUNGI

JUDGE

In the Presence of:-

CA: Velma

Ms Juma for the Respondent/Applicant present online.

Mr. Wandala for the Appellant/Respondent absent.