

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. E164 OF 2025

ANDREW RAJAB KALUME.....APPLICANT

VERSUS

ROBERT MUTUA MWANZWII

STEPHEN MWACHIA MNJALA

CHRISPINUS MAKHAGA OGOTI

OCHOLA OKULO JAMES

TAAURA MASHA MWENI

ZUBEDA MOHAMED ALIDIN

MOHAMED.....RESPONDENTS

RULING

1. The Applicant filed a Notice of Motion application dated 4th June 2025 under Certificate of Urgency pursuant to Section 1A, 1B and 3A of the Civil Procedure

Act, Order 42 Rule 6, 7, 14, Order 22 Rule 22, Order 51 of the Civil Procedure Rules, and all enabling provisions of the law.

2. The Applicant seeks for orders that there be a stay of execution of the judgment and decree of the trial court dated 30th May 2025 pending the hearing and determination of the appeal, and that costs of the application be in the cause.
3. The application is premised on grounds on its face and the affidavit of Andrew Rajab Kalume that the trial court in its judgment of 30th May 2025 allowed the Respondent's suit as against the Appellant by ordering the Appellant to pay each of the Respondents a sum of Kshs. 613,391.14 against the cumulative claim of a sum of Kshs. 615,591.14.
4. That the Appellant has lodged an appeal against the said decision with high chances of success. That the trial court judgment was uploaded on the CTS in the absence of parties, therefore stay orders were not issued. That the Appellant is apprehensive the Respondents may initiate execution process which will be prejudicial to him.
5. That if the stay is not granted, the appeal will be rendered nugatory, that the Appellant is willing to abide by conditions of this court regarding security for costs, that the application has been brought without unreasonable delay, and that the Respondents will not suffer prejudice if the application is allowed.

6. The Respondents in their Replying Affidavit sworn on 3rd July 2025 by Taaura Masha Mweni stated that the Applicant has not demonstrated sufficient grounds to warrant stay of execution of the judgment and that the Applicant stands a risk of suffering any prejudice or loss that cannot be compensated after the appeal has been heard and determined. That the application is intended to delay payment as ordered but should the court feel inclined to allow the application, the Applicant should be ordered to furnish security by depositing the judgment sum of Kshs. 3,693,546 in a joint interest earning account pending hearing and determination of the appeal.
7. The Applicant filed Supplementary Affidavit sworn on 25th July 2025 and stated that the deponent of the Replying Affidavit had no authority to swear the affidavit on behalf of the other Respondents. The Applicant reiterated contents of their application save to add that the decreed sum of Kshs. 3,693,546 was an error by the court and contrary to what was pleaded by the Respondents.
8. That the Respondents wrote to the Applicant's advocates on record demanding payment of the contested decretal sum within 30 days from 16th June 2025, failure to which they would proceed to execute. That the application herein is necessary to preserve the substratum of the appeal as it would amount to unjust enrichment. That the Applicant's constitutional right to be heard is absolute and cannot be impeded by payment of the contested decretal sum of Kshs. 3,693,546.

9. The application was canvassed by way of written submissions. The Applicant filed submissions dated 25th July 2025 and argued on whether the 5th Respondent had authority to represent and/or swear the Replying Affidavit on behalf of the rest of the Respondents that, the Respondent had no authority as he had not been authorized by the said Respondents. That in effect therefore, the Respondents did not respond to the application. The Applicant cited **Order 1 Rule 13** of the **Civil Procedure Rules** on the procedure to be adopted if one appears on behalf of another.
10. On whether the application is merited, the Applicant submitted that **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** provides for conditions precedent for grant of stay pending appeal. That before a court can issue an order of stay pending appeal, it must be satisfied that substantial loss is likely to result unless the order is granted, that the application was filed without unreasonable delay and that the applicant is able to furnish security for costs for the due performance of the decree.
11. The Applicant also relied on the holdings in *Kango v Nthuli* (Civil Appeal 219 of 2023) (2024) KEHC 117 (KLR) (17 January 2024) (Ruling) and *Westmond Holdings SDN BHD v Central Bank of Kenya & 2 others* (Petition 16 (E023) of 2021 (2023) KESC 11 (KLR) (17 February 2023) (Judgment). The Applicant submitted that this court has discretionary powers to order that no security for

costs ought to be deposited. The Applicant stated that he has met the conditions for grant of the orders sought and prayed that the application is allowed as prayed.

12. The Respondent in their submissions dated 21st August 2025 on whether the Replying Affidavit sworn by the 5th Respondent is properly on record argued that the Respondents, as co guarantors for the Applicant's loan, have an identical and indivisible interest in this matter. The Respondents argued that the dispute arose from a single transaction and that their defence has been consistent in both the lower court and on appeal.
13. They contended that the 5th Respondent, as a co-plaintiff and co-decree holder, is competent to swear an affidavit on matters common to all Respondents. They urged the court to prioritize substantive justice over procedural technicalities, noting that the Applicant has not shown any prejudice from the absence of written authority.
14. They further submitted that while formal representation under Order 1 Rule 13 of the Civil Procedure Rules exists, it is not the exclusive means, and the law allows a party with a shared interest to depose to facts within their knowledge. The 5th Respondent, they argued, is not acting as an advocate but merely stating relevant facts. Consequently, they asked the court to deem the affidavit properly filed and consider it in the interest of justice.

15. The Respondent submitted that stay of execution pending appeal is a discretionary remedy, not an automatic right, and the Applicant has failed to satisfy the conditions under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. In particular, the Applicant has not demonstrated substantial loss, which is the key requirement. They argued that the Applicant's claim of error in the trial court's award is a misrepresentation, as the Plaintiff sought recovery of individual losses suffered by each Respondent due to deductions from their shares with STIMA SACCO.
16. The trial court therefore correctly awarded each Respondent the amount individually lost, rather than a cumulative sum. The Respondent further contends that they are salaried employees of Kenya Power (KPLC) with stable incomes, capable of refunding the decretal sum if the appeal succeeds. They distinguish the authority cited by the Applicant, noting that unlike in that case, there is no doubt about their financial ability. Consequently, they maintained that the Applicant will not suffer substantial loss, as payment of money is merely a normal consequence of an adverse judgment, and the appeal will not be rendered nugatory.
17. The Respondents acknowledged that the Application was filed without delay but argued that timeliness alone is insufficient, as all conditions for stay must be met cumulatively. They emphasized that under **Order 42 Rule 6(2)(b)** of the **Civil**

Procedure Rules, the provision of security is mandatory. They contended that the Applicant's claim that furnishing security would hinder access to justice is misplaced, noting that the cited Supreme Court authority of *Westmond Holdings* only cautions against unreasonable or punitive conditions.

18. In this case, requiring security for a monetary decree is reasonable and ensures the Respondents are not left with an unenforceable judgment if the appeal fails. The Respondents further argued that the Applicant has not demonstrated that providing security would be oppressive or deny him justice. They therefore urged the court, in balancing the parties' rights, to order reasonable security, proposing that the full decretal sum be deposited in a joint interest-earning account as a fair and appropriate safeguard.
19. The Respondent urged the court to dismiss the Application with costs. Alternatively, if stay of execution is granted, they requested that the Applicant be ordered to deposit the full decretal sum of Kshs. 3,693,546 in a joint interest-earning account held by both parties' advocates within 30 days.

Analysis

20. This court has considered the Notice of Motion application dated 4th June 2025, the Replying Affidavit sworn on 3rd July 2025, the Supplementary Affidavit

sworn on 25th July 2025 and submissions by the parties. The issues for determination are: -

- (a) Whether the Replying Affidavit sworn by the 5th Respondent is properly on record*
- (b) Whether the Applicant has met the conditions for grant of stay of execution pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules*
- (c) What orders on costs should issue.*

21. On the first issue, the Applicant challenges competence of the Replying Affidavit on the ground that the 5th Respondent lacked written authority under **Order 1 Rule 13** of the **Civil Procedure Rules**. Which provides as follows: -

- (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.*
- (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.*

22. However, this court notes that the 5th Respondent is a co-plaintiff and co-decree holder with a common and identical interest in the subject matter. The affidavit deposes to facts within his knowledge arising from a single transaction affecting all Respondents. This court is guided by the principle that procedural rules are handmaidens of justice and should not be elevated to defeat substantive justice. **Article 159(2)(d)** of the **Constitution** enjoins courts to administer justice without undue regard to procedural technicalities. Similarly, in *D.T. Dobie & Company (Kenya) Limited v Muchina* [1982] KLR 1, the court emphasized that: -

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

23. Further, a party with a common interest is not precluded from swearing an affidavit on matters within his knowledge. The 5th Respondent is not acting as an advocate but merely deposing to factual matters. Accordingly, this court finds that the Replying Affidavit is properly on record.

24. On whether the Applicant has met the conditions for grant of stay of execution pending appeal, the principles governing stay of execution pending appeal are well settled under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** provides that:-

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.

25. These principles were succinctly set out in *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR), where the court held that: -

*“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:*

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

26. Substantial loss is the cornerstone of an application for stay. In *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR), the Court of Appeal held that: -

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

27. The Applicant contends that the decretal sum is erroneous and that payment would render the appeal nugatory. However, this argument goes to the merits of the appeal rather than the risk of loss.
28. The Respondents are salaried employees of Kenya Power (KPLC), and no evidence has been placed before this court to demonstrate that they would be unable to refund the decretal sum if the appeal succeeds. The mere fact that a decretal sum is payable does not amount to substantial loss. In *National Industrial*

Credit Bank Ltd v Aquinas Francis Wasike & another [2006] KECA 333 (KLR), it was held that: -

“... the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum ...”

29. This court finds that the Applicant has failed to discharge this burden. On delay, the judgment was delivered on 30th May 2025 and the application filed on 4th June 2025. This court is satisfied that the application was filed without unreasonable delay.
30. On security, **Order 42 Rule 6(2)(b)** of the **Civil Procedure Rules** is couched in mandatory terms. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] KEHC 8358 (KLR), the court held that: -

“In Arun C Sharma -V- Ashana Raikundalia T/A Rairundalia & Co. Advocates Justice Gikonyo the Court stated 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.”

31. The Applicant has expressed willingness to abide by any conditions but has not made a concrete proposal. The Respondents have proposed deposit of the entire decretal sum in a joint interest earning account, which this court finds reasonable. Courts have been cautioned against imposing punitive conditions. The Supreme Court in *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* [2023] KESC 11 (KLR) held that: -

“A court could impose a condition precedent when imposing an order for security for costs in special and exceptional circumstances, such as extraordinary and important cases, for instance, election petitions. The same was, however, to be done in a manner that was reasonable and not to punish or subdue a genuine claim. In that regard, imposing a condition precedent was not in itself unconstitutional, provided it was not unreasonable to the extent that it impeded a party’s access to justice.”

32. However, requiring security for a money decree is neither punitive nor unreasonable but a safeguard to balance the interests of both parties. Having considered all the circumstances, this court finds that the Applicant has not

satisfactorily demonstrated substantial loss. However, in balancing the right of appeal with the Respondents' right to enjoy fruits of their judgment, it is in the interest of justice that the discretion is exercised conditionally.

Determination

33. Accordingly, this court makes the following orders: -

(a) There shall be a stay of execution of the judgment and decree dated 30th May 2025 pending hearing and determination of the appeal.

(b) The stay is conditional upon the Applicant depositing the entire decretal sum of Kshs. 3,693,546 in a joint interest-earning account in the names of the advocates for the parties within thirty (45) days from the date of this ruling, in default the stay shall automatically lapse and the Respondents are at liberty to execute.

(c) Costs of the application shall abide the outcome of the appeal.

Dated and delivered virtually at Mombasa this 19th day of March, 2026

.....

HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of: -

Mr. Mwawasi Advocate for the Applicant

N/A by the Respondents

Ms. Getrude, Court Assistant

