

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**HIGH COURT CIVIL APPEAL NO. E011 OF 2025**

**GEOFFREY G. MWANGI**

**T/A ARDENT**

**TRADERS.....APPELLANT**

**VERSUS**

**WALOKANA MULTIPURPOSE**

**COOPERATIVE SOCIETY LIMITED.....1<sup>ST</sup>**

**RESPONDENT**

**DENNIS KAGIRI KARARI**

**T/A MAXIMA INK ENTERPRISES.....2<sup>ND</sup>**

**RESPONDENT**

**RULING:**

1. This is a ruling in respect of a Notice of Motion application dated 29<sup>th</sup> January,2025, seeking the following orders:
  - a) **Spent**
  - b) **Spent**
  - c) **THAT Pending the hearing and determination of the appeal herein, this Honourable Court be pleased to grant an order of stay of execution of the Judgment delivered on 18<sup>th</sup> December,2024 by the Hon. Catherine Mburu in *CMCC No. 386 of 2018* at Kikuyu Chief Magistrate's court.**
  - d) **That costs of this application be provided for**
2. The Application is based on the grounds as set out on the face of it and the Supporting Affidavit of **Geoffrey G. Mwangi** sworn on the even date. The Applicant hold that

the trial court delivered a Judgment against him on the 18<sup>th</sup> December,2024 and being dissatisfied, he has lodged the present appeal.

3. The Respondents opposed the applicant through the Replying affidavit of **Dr. Owen Mwaniki** sworn on 8<sup>th</sup> March,2025 as the current chairman of the 1<sup>st</sup> respondent. He holds that it filed a suit against the Applicant for the sum of Kshs 876,000/= which was owing since 2018 and the trial court entered judgment in its favour.
4. On 25<sup>th</sup> March,2025 the court directed that the application be canvassed by way of written submissions which the court has read and considered the applicant's submission's dated 5<sup>th</sup> June, 2025 and the 1<sup>st</sup> Respondent dated 26<sup>th</sup> June, 2025.

#### **ANALYSIS AND DETERMINATION:**

5. In determining the prayers sought by the applicant, I have carefully read through the respective affidavit in support and opposition of the application alongside the parties submissions and find the main issue for determination being whether the Applicant has satisfied the condition for the court to grant an order for stay of execution pending appeal.
6. For an order of stay of execution pending appeal to issue, an applicant must satisfy the conditions set under **Order 44 rule 6 of the Civil procedure rules** which states as follows:

**“(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 order set aside.**

**(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.**

**(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have**

been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

7. This provisions have set out the conditions upon which a court should grant an order for stay of execution. By virtue of the said condition, an applicant is required to:

- a) ***Demonstrate that the application has been made without unreasonable or inordinate delay.***
- b) ***Demonstrate that they are likely to suffer substantial or irreparable loss that cannot be compensated by way of damages if the order of stay of execution is not granted.***
- c) ***Demonstrate that his willingness to provide such security as the court may order for the due performance of such decree or order.***
- d) ***Demonstrate that the intended appeal is not frivolous and that it would be in the interest of justice to secure it for hearing and determination.***

8. With regard to the issue of the timeous filing of the application, the court has noted that the impugned

judgement was delivered on 18<sup>th</sup> December,2024 and the instant application filed on 29<sup>th</sup> January,2025 which is slightly over one month by exactly eleven days. The court finds that such period cannot be said to be unreasonable or inordinate delay.

9. On the issue of demonstrating the likelihood of substantive loss or irreparable damage, it is the Applicant's argument that if stay is not granted, the Respondent is likely to extract the decree and execute the same against his assets and yet, he may not be in position to refund the same if payment of the decretal sum is made to him. On the other hand, the Respondent confirms that it is a Multi-Purpose Sacco with a membership of 180 members hence financially stable and capable of refunding the decretal sum given that it operates a Petrol station and has let out its premises for generating an income.
10. In considering this issue, the court requires that the applicant proves or demonstrates that a respondent is incapable of refunding the payment if at all the same is made to him/her. However in this case, the court has observed that the applicant has stated that the Respondent may not be able to refund the sums that would have been deposited as security but has not provided any evidence to confirm that the Respondent is incapable of refunding him this said sum.
11. In the case of **KENYA SHELL LIMITED VS KIBIRU & ANR (1986), KLR**, the Court of Appeal had this to say:

**“Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down**

**particulars and, so to speak, throw them at the head of the court, saying ‘This is what I have lost, I ask you to give me these damages.’ They have to prove it. The evidence in this case with respect to damages is extremely unsatisfactory.”**

12. It is worth noting that the Respondent has demonstrated that it has the financial capacity to refund the decretal sum if the same is paid to it by the Applicant. The Applicant has not provided any explanation or evidence to support his claim that the Respondent may not be in a position to refund the same if it is paid to it.
13. The other ground is in regard to the Applicant’s willingness to deposit security for the due performance of the decree or ensure that it is honoured. The Applicant has expressed his willingness to furnish security as would be directed by the court. It is noted that the Respondent did not respond to either rebutting or agreeing with the proposal.
14. In view of this, this court finds the proposal unchallenged and relies on the decision in the case of **NYANGA’U V. CHUI & 2 others CIVIL APPEAL No. E088 of 2021(2022) KEHC 3015 (KLR) 2 June 2022 (Ruling)** where the Court of Appeal held that:-

**“Whereas he had also met the third condition of being granted an order for stay of execution, this court took the view that security in the form of a bank guarantee was not suitable. There was a possibility of a bank that had given a bank guarantee not honouring the**

**same. Not being a party to a suit would make it difficult for a successful party to enforce any orders he or she might get concerning such a bank guarantee. This court therefore determined that the security to be furnished herein would be in form of money.”**

15. On the arguability of the appeal, it is the Applicant’s contention that if the order for stay of execution does not issue, he stands to suffer loss and his appeal may not be rendered nugatory. He has urged that it will be in the interest of justice that the application be allowed. The Court of Appeal in the case of **JOSEPH GITAHU GACHAU & ANOTHER V. PIONEERS HOLDINGS (A) LIMITED & 2 OTHERS (2009) KLR** held that:

**“There indeed has been a non-disclosure of facts by the plaintiffs. There along (sic) has been a fall of the hammer which facts would be passed in the main suit.**

**In the case I do not think that injunction should issue. The plaintiffs’ remedy may be in damages which in effect part (sic) of the main suit.**

**I hereby dismiss this application dated 18<sup>th</sup> November, 2005 on grounds of material non- disclosure. The plaintiff misled the court that he was being evicted from his house and would be rendered homeless where (sic) the house was only 45% complete.”**

16. I have perused the Memorandum of Appeal dated 20<sup>th</sup> January, 2025 and find that the Applicant raised an issue of Third Party Notice and third party proceedings directions where it is alleged that the applicants evidence against the Respondent was not considered. In view of this, the

court finds that it would be in the interest of justice for the parties to be heard on appeal.

17. All in all, the court in the case of **RWW VS EKW (2019) ekIR** stated that :

**“Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”**

18. In the upshot, it is this court’s finding that although the Appellant/Applicant has satisfied three out of the four for conditions required for stay of execution orders to issue, it would be in the interest of justice and fair hearing for the Notice of Motion application dated 29<sup>th</sup> January, 2025 to be allowed.

19. Subsequently, the following orders issue: -

- a) ***The Appellant/Applicant is hereby granted stay of execution on condition that the full decretal sum be deposited within thirty (30) days from the date of this ruling.***
- b) ***The Deputy Registrar to call and avail the original record of proceedings from the trial court.***
- c) ***The Applicant shall file and serve a Record of Appeal within thirty (30) days from the date of this Ruling.***
- d) ***Mention on 11<sup>th</sup> May, 2026 for parties to confirm compliance and the further directions.***

e) ***Failure to comply with the directions, will render the application dismissed without recourse to this court.***

20. It is so ordered.

**RULING DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF MARCH, 2026 VIA MICROSOFT TEAMS.**

**HON. D. O. CHEPKWONY  
JUDGE**