



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

COUNTY COURT NAME: MAKUENI HIGH COURT

CASE NUMBER: HCCA/E030/2025

DAVID MUTINDA MWILU AND GL WILLAMS CONSULTING LIMITED VS SHEILA
MUTHONI MUIRURI

RULING

REPUBLIC OF KENYA
IN THE HIGH COURT AT
MAKUENI CIVIL APPEAL NO.
E030 OF 2025

DAVID MUTINDA MWILU.....1ST APPELLANT
GL WILLIAMS CONSULTING LTD.....2ND APPELLANT

-VERSUS-

SHEILA MUTHONI MUIRURI.....RESPONDENT

RULING

Introduction

1. On 24/4/2025 the Learned Trial Magistrate in **Makindu MCC E046/22** delivered a judgment and awarded the Plaintiff/Respondent General Damages of 3,500,000/= and loss of earning capacity at Kshs.1,000,000/=. This was after liability was agreed and settled at



90:10 in favour of the Plaintiff.

2. The Defendant/Appellant was aggrieved and filed this appeal and the application dated 24/04/2025 seeking *inter alia* stay of execution pending appeal under **Order 42 rule 6**, Order 22 Rule 22 (1), and Order 51 of the **Civil Procedure Rules, Section 1A, 1B, 3A and 63 E** of the **Civil Procedure Act** seeking the following orders;

a) *Spent.*

b) **THAT** this honorable Court be pleased to grant a temporary stay of execution pending appeal of the lower court's judgment/decreed delivered on 24/03/2025 pending the hearing and final determination of the intended appeal.

c) **THAT** this Honourable court be pleased to grant and give any further or other orders it may deem fit and just to grant.

d) **THAT** the costs of this application be in the cause.

3. The Application is supported by the grounds on its face, the Affidavit of Wincate Macharia sworn on the same day and Further Affidavit sworn on 25/05/2025. She deponed that she is the Legal Officer of AIG Insurance Company and duly authorized to swear the affidavit on behalf of the Directors. That, she is well versed with the facts of the case and has received advise from their advocates on record which she verily believes to be true.

4. She deponed that AIG Insurance Company is the insurer of motor vehicle registration No. KBX 007S, Toyota Station Rav 4 belonging to the 2nd Applicant and that by virtue of the insurance policy No. 012053874, they shall be called upon to pay the decretal sum in the matter arising from a

road accident that occurred on 31/10/2020, involving the said motor vehicle, in which the Respondent was a passenger. A copy of the plaint is exhibited as

WM1.



5. She deponed that judgment was delivered on **24/03/2025** in favor of the Plaintiff and the net award was kshs **4,090,230/=**. A copy of the judgment is exhibited as **WM2**. That, they were dissatisfied with the judgment and instructed their advocates to appeal on quantum only. Copies of Memorandum of Appeal and letters calling for typed proceedings are exhibited as **WM3 & 4** respectively.
6. She deponed that if stay of execution is not granted, the insurer will suffer irreparable and substantial loss in that, firstly, the decretal award is colossal and the Respondent will not be in a position to refund in the event that the intended appeal is successful. Secondly, she deponed that the intended appeal will be rendered nugatory as they verily believe that the Respondent will have difficulties in refunding the money due to his station in life as well as vicissitudes, vagaries and uncertainties of life.
7. She deponed that the appeal has a high probability of success and this court has unfettered jurisdiction to grant the orders. That, the insurer is able and willing to abide by the orders of this court with regard to security and is also ready to issue an insurance bond as security.
8. The Application is opposed through the Respondent's Replying Affidavit sworn on 23/05/2025 and Further Affidavit sworn by Wincate Macharia on 28/05/2025. The Respondent deponed that according to advice from her Advocate which she verily believes to be true, the award is reasonable due to the serious nature of injuries sustained hence the appeal is not arguable.
9. She deponed that she is entitled to enjoy the fruits of her judgment and the present application is a delaying tactic and afterthought brought in bad faith hence she will be greatly prejudiced if the application is allowed.

10. She deponed that she needs money as her ability to make a living was affected and also deponed that she is a person of means and able to refund the decretal award if the application is allowed.



11. She deponed that prior to the hearing of this matter, the Appellants had indicated their willingness to pay kshs 2,000,000/= as compensation. An email extract dated 29/08/2023 is exhibited as **SMM-1**.
12. She deponed that if the court is inclined to allow the application, the same should be conditional upon the Applicants paying $\frac{3}{4}$ of the decretal award through her Advocates on record. That, according to information from her Advocate which she verily believes to be true, the Applicants have not satisfied the conditions in Order 42 Rule 6 of the Civil Procedure Rules.
13. In rejoinder, Wincate Macharia deponed that the Respondent has failed to demonstrate that she is a person of means and has therefore not fully satisfied the conditions set out in the Evidence Act, Cap 80 Laws of Kenya. She reiterated that if the decretal award is released to the Respondent, the insurance company will suffer irreparable loss to its business and by extension, its employees will suffer.
14. The Application was canvassed through written submissions.

The Applicants' Submissions

15. It was submitted that the principles of Order 42 Rule 6(2) of the Civil Procedure Rules have been fulfilled by the Applicants. That the Application was filed without undue delay and substantial loss will occur as the Respondent has no known financial ability hence unlikely to refund if the appeal succeeds.
16. It was submitted that the appeal has *high chances of success* and will be rendered nugatory if stay of execution is not granted. It was contended

that the Respondent has not disclosed any source of income which she would use to reimburse the decretal award. That, the averments in the Replying Affidavit prove that the Respondent is in dire need of money



hence a confirmation that she will not be able to refund the decretal award.

17. It was submitted that the *sum involved is colossal* and this court should take notice of the fact that payment of such a large amount may affect the business activities of the insurer.

Reliance was placed on **G.N Muema P/A sic Mt. View Maternity & Nursing Home -vs- Miriam Maalim Bishar & Anor (2018) eKLR** where the Court stated;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a Respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

18. Further reliance was placed on **Tropical Commodities Supplies Ltd & Others -vs- International Credit Bank Ltd (in liquidation) 2004 EA** where the court stated;

“Substantial loss does not represent any particular amount but refers to any loss, great or small, that is of real value or worth or value as distinguished from a loss that is merely nominal.”

19. It was submitted that the Applicants have demonstrated their willingness to comply with court orders by depositing kshs 1,000,000/= as security. It was contended that an Applicant should not be subjected to a situation where it would be difficult to get back the money if the Appeal succeeds. Reliance was placed on **Nduhiu Gitahi -vs- Warugongo (1988) KLR 621; 1KAR 100 (1988-92)2 KAR 100** where the Court of Appeal stated;

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but

two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending the appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs...”

20. It was submitted that the overriding objective in the Civil Procedure Act aims to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. That, balancing of the parties’ interests is paramount in an application for stay of execution.

Reliance was placed, *inter alia*, on **Juma Ali Mbwana & Anor -vs- Umi Omar Musa [2014] eKLR** where the court stated;

“The fact that the insurer is expected to be notified of the proceedings leading to the judgment and to thereafter pay the judgment amount means that the insurer has interest in the proceedings leading upto the judgment and/or any appeal against the judgment....an insurance company which has a statutory duty to satisfy a judgment is entitled to apply to the court to set aside the judgment in appropriate case.”

21. It was submitted that the costs of this Application should abide the outcome of the main appeal.

The Respondent’s Submissions

22. It was submitted that the Further Affidavit dated 28/05/2025 was filed without leave of court and should therefore be struck out. Reliance was placed on **Kiru Tea Factory Company Ltd -vs- Stephen Maina Githiga & 13 Others [2019] eKLR** where the court of appeal ruled;

“17. It is a question of law whether the amended Notice of Motion and the further



affidavits are properly on record.

22. *We now consider whether the Further Affidavits deponedby Mr. Geoffrey Chege Kirundi filed in support of the amended Notice of Motion are properly on record. In the Uganda case of Samuel Mayanja vs. Uganda Revenue Authority, HCT – 00 – CC – MC – 0017 of 2005 (unreported) the trial judge stated inter alia that:*

“Where the Applicant wants to file a further affidavit, he ought in my view, to seek the leave of the Court; otherwise, the proceedings may turn simply into unregulated game of ‘ping pong’. As the affidavit was filed without leave of the Court, and it was objected to by the Respondent, I shall not have regard to the same.”

24. *The common thread from the decisions cited above is that where leave of court is required, any pleading filed without leave is a nullity and liable to be struck out.”*

23. As to whether the Applicants have met the conditions for grant of stay of execution, it was contended that the insurance bond offered by the Respondent is not sufficient security to safeguard the Appellants’ interests or satisfy the judgment if the appeal fails. Reliance was placed on **Kenya Commercial Bank Ltd -vs- Suntra Investment Bank Ltd [2015]** eKLR where the court held: -

“Security must be real and not illusory; it must provide a firm assurance that if the appeal fails, the respondent will be able to realize the fruits of the judgment.”

24. It was submitted that the insurance company offering the bond is not a party to these proceedings and is therefore not bound by any orders that may be made herein. That, there exists no privity of contract between the Appellant and the insurer, and any attempt to enforce the bond in the event of default may encounter legal and practical hurdles.

Reliance was placed on **Joash Ochieng Opiyo -vs- Kenya Commercial**

**Bank Ltd &
Another [2013] eKLR** where the court stated;

“...a bond issued by an entity not party to the suit may pose enforcement



difficulties especially where the undertaking is not unequivocally enforceable or the issuer is not under the jurisdiction of the court.”

25. It was submitted that there is no guarantee that the insurer will honour the bond when called upon to do so. That, insurance contracts are subject to various clauses, terms, and exclusions that may be invoked to avoid liability. That, the bond may also be disputed, requiring separate litigation, thereby delaying the Appellant’s ability to enjoy the fruits of a successful appeal. Reliance was placed on **Westmont Power (Kenya) Limited -vs- Commissioner of Income Tax [2007] eKLR** where the court observed;

“The security offered must be such that it does not occasion further litigation or controversy. Courts should lean towards forms of security that are readily enforceable without creating additional disputes.”

26. It was submitted that the insurance market is volatile and susceptible to collapse and accepting an insurance bond without evidence of the financial stability and creditworthiness of the insurer poses an unjustifiable risk to the Appellant. Reliance was placed on the case of **Diamond Trust Bank Kenya Ltd -vs- Nyangilo Ochieng & Another [2008] eKLR** where the court stated;

“Security should be in a form that is not susceptible to future uncertainty or collapse, lest it renders the right to recover hollow.”

27. It was contended that security must come from the Appellant and in the absence of such an offer the suit must fail. Reliance was placed on **Mbugua -vs- Mutua (civil appeal 359 of 2023) [2024] KEHC 8670 (KLR) (11 July 2024) (Ruling)** where court ruled;

“Furthermore, the bank guarantee is between Family Bank and the insurer, nowhere does it mention the applicant.”



28. As to whether substantial loss will be occasioned if the Application is not allowed, it was submitted that the Applicant has not demonstrated the loss to be suffered and all he said is that the appeal will be rendered nugatory. Reliance was placed on **Njenga -vs- Njeri & 2 Others (civil appeal e125 of 2023) [2023] KEHC 23991 (KLR) (24 October 2023) (Ruling)** the court ruled that;

“It is the duty of the Applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In Machira t/a Machira & Co. Advocates v East African Standard (No 2) (2002) KLR 63 the Court of Appeal considered as to what amounts to substantial loss and held that –“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.”

29. Further reliance was placed on **Samvir Trustee Limited -vs- Guardian Bank Limited (2007) eKLR** where court held;

“It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”

30. It was submitted that the Respondent suffered serious bodily harm



in the accident,



resulting in permanent incapacity assessed at 25%. That, she continues to suffer the long- term consequences of those injuries, both physically and economically. That, the Appellant has not made any effort to compensate her and this appeal only serves to frustrate justice. That, the appeal is an abuse of the court process aimed at denying the Respondent the

fruits of her judgment. Reliance was placed on **Kenya Shell Ltd -vs- Benjamin Karuga Kibiru & Another [1986] eKLR** where the Court of Appeal held;

“As I said I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of judgment in his favor without just cause.”

31. I have carefully considered the Application, the Supporting, Replying and Further Affidavits, and the rival submissions. The for determination is whether the application is merited.

Whether stay of execution should be granted

32. Before addressing the issue of stay, it is important to note that leave to file the Further Affidavit dated 28/05/2025 was granted by this court on 26/05/2025. The complaint by the Respondent is therefore misplaced.

33. According to Order 42 Rule 6 of the Civil Procedure Rules, the conditions which should guide the Court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.



34. Judgment by the trial court was delivered on 24/03/2025 and this application was filed on 24/04/2025 hence no delay.



35. As for substantial loss, the Appellants are apprehensive that if the decretal amount is released to the respondent, they might not recover the same if the appeal succeeds. I have looked at the trial court's judgment in which the trial Magistrate awarded the Respondent a net award of kshs 4,090,230/= as general damages, loss of earning capacity and special damages.
36. The Respondent contradicted herself in her affidavit by deposing that she is in need of money as her ability to make a living was affected and on the other hand, she deponed that she is a person of means and is able to refund the decretal award. She did not file an affidavit of means hence this court is not in a position to ascertain her capacity to refund the decretal award.
37. As for security, the Applicants deponed that they are able to abide by orders of this honorable court and are ready to issue an insurance bond as security. The details of the proposed insurance bond were not furnished hence the court is not in a position to ascertain its appropriateness.
38. Be that as it may, the Court has a duty to balance the competing interests between the parties. While it is the Appellant's right to pursue an appeal, the Respondent should also enjoy the fruits of winning the first round. The fact that the appeal is purely on quantum means that the Respondent will not walk away empty handed.
39. There was email communication between the parties in which the Applicants proposed to pay kshs 2,000,000/= as general damages. In the circumstances it would be in order to have the kshs 2,000,000/= released to the respondent, as a condition for the stay of execution pending the appeal.
40. In the end the application is allowed . An order of stay of execution be and is hereby issued pending the hearing and determination of the appeal of the lower court's judgment/decreed delivered on 24/03/2025 ,

on condition that the sum of Ksh 2,000,000 is released to the respondent and the balance of the decretal sum be deposited in a joint interest earning account in the names of both Advocates on record, within 45 days hereof.

41. In default the stay will lapse
42. Costs of this application to abide the appeal.

43. Orders accordingly.

Dated, signed and delivered virtually this 4th March
2026 Mumbua T Matheka
Judge

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SIGNED BY/FOR:
LADY JUSTICE MATHEKA, TERESIA MUMBUA

