



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. E174 OF 2025

KENYA REDCROSS HEADQUARTERS

APPELLANT

-VERSUS-

NICHOLAS SIMIYU CHEMUKU.....

RESPONDENT

RULING

1. *Vide* Notice of Motion dated 8th July 2025 the Appellant craves the following reliefs;-
 - a) **Spent.**
 - b) **Spent.**
 - c) **That the court does issue an order staying execution of judgement dated 13/6/2025 in the sum of Kshs. 2,213,760/= entered against the Appellant, pending hearing and determination of this Appeal.**

d) That the costs of the Application be provided for.

e) That any other orders deemed fit to grant be issued.

2. The Appellant's Advocate (Faith Mbirwe) swore an affidavit in support of the Motion. She avers *inter alia* that the above judgement sum was granted to the Respondent in the lower court's **Civil Suit Number E294 of 2022**. The Appellant is aggrieved by the court's decision and brought this Appeal and Application. According to Counsel, the Appellant would suffer substantial loss if stay is not granted since the Respondent may not refund the decretal sum if paid out, his source of income being unknown.
3. The Respondent opposes the Application through his affidavit in reply. Among other averments, he contends that the Appellant is guilty of inordinate and unjustifiable delay to bring the Application which was filed more than a month after entry of the impugned judgement. On advice of his Advocates, the Respondent therefore thinks that the Appellant has not met the legal threshold for grant of the discretionary remedy of stay of execution pending appeal.

4. If the court is minded to allow the Application the Respondent pleads that the Appellant be ordered to pay half of the decretal sum to him and the other half be deposited into court or in a joint interest-earning account of the parties.

5. Learned Counsel for the Parties filed Submissions which the court has perused against the Application, the Respondent's reply and all annexures to the parties' rival affidavits. **Order 42 rule 6(1) (2) of the Civil Procedure Rules 2010** governs disposal of an application such as before me for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-

- “a. unless 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.”**

6. In **Mohsen Ali & Another vs Priscillah Boit & Another, E& LC Case No. 2000 of 2012 (2014) eKLR**

the court stressed that such an Application ought to be brought without unreasonable delay to show the Applicant's *bonafides* . "Unreasonable delay" is of course dependent on the surrounding circumstances of each case.

7. There is about 30 days delay to bring this Application after delivery of the impugned Judgement. The Appellant has not explained the long delay which is found to be unreasonable in the circumstances and therefore this condition has not been satisfied.
8. Based on its affidavit evidence, the Appellant has neither offered the necessary security for costs nor expressed willingness and readiness to deposit such security. This crucial condition precedent to grant of an order of stay of execution pending Appeal has not therefore been satisfied as well . The court has power to determine the appropriate security for costs but the Applicant must first express willingness and readiness to offer security. In **John Odungo vs Joyce Irungu Muhatia [2014] eKLR** the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of

stay of execution. It suffices if he shows “preparedness as well as readiness to provide security should one be called upon to do so”.

9. The Appellant has not therefore satisfied the requirement for offer security for costs to merit the discretionary order of stay of execution pending the Appeal.
10. Determination of the Application turns on the question of substantial loss, if any, the Appellant might suffer if stay of execution is not ordered. The case of **Nyatera vs Nyakundi (Civil Appeal E033 of 2022) [2023]KEHC 3086 KLR) (16 March 2023) (Ruling)** is relevant for the proposition that the Applicant ought to show the manner in which his Appeal would be rendered nugatory if stay of execution is not ordered.. The court opined in the case that it is not enough to say that because the Respondent intends to proceed with execution, he should be stopped because of the Appeal. The court is therefore required to tread a delicate balance of the parties’ interests. As it is now trite, this is the cornerstone of the court’s discretion to grant or refuse stay of execution pending Appeal. The

onus is on the Appellant to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the Appeal eventually succeeds. In **Tropical Commodities Ltd. International (in liquidation) (2004) 2 EA 331** my senior brother (*Ogolla J*) explained that ***substantial loss*** 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.”

11. In **RWW vs EKW [2019] eKLR** and **Re Global Tours & Travel Ltd HCWC No. 43 of 2000** in **Milimani HCMCA No. 1561 of 2007, Century Oil Trading Company Ltd vs Kenya Shell Ltd**, this court again explained that;-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes when, it appears the possibility is doubtful of the respondent

refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

12. In Shell Ltd vs Kibiru & Another (1986) KLR 410 it was famously postulated that;

“substantial loss in its various forms is the cornerstone of the court’s jurisdiction to grant stay pending appeal. 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.”

The centrality of this factor was also underscored in Rhoda Mukuma V. John Abuoga (1988) KLR.

13. Regarding the burden of proof, the Court of Appeal held in National Industry Credit Limited vs Aquinas Francis Wasike & Another [2006] eKLR that;-

“once an applicant expresses a reasonable fact that a respondent would be unable to pay back

the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

14. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including **Matata & Another vs Rono & Another (Civil Appeal No. E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling)**.
15. The court is required to consider the competing interests of the parties to such an Application with an eye to ensuring that the Appeal is not rendered nugatory and the Respondent also gets consideration having a valid Judgement in his favour (see case law in **Muinde Mulatya & Another (2021) eKLR** and **Kenya Commercial Bank Limited vs Sun City Properties Limited 7 & 5 Others (2012) eKLR** .
16. Based on the affidavit evidence of the parties neither of them has stated their financial position. The Appellant who shoulders the burden of proof has in particular not made out a *prima facie* case of the respondent's inability to

pay back any decretal sum to warrant the Respondent to debunk the claim.

17. In the particular circumstances of this case, therefore, the Appellant has not complied with all the legal conditions for stay of execution pending hearing and determination of the Appeal. The onus was on the Appellant to meet all the conditions stipulated hereinabove.

18. The Application is accordingly dismissed in its entirety with costs to the Respondent.

J. M. NANG'EA, JUDGE.

Ruling delivered virtually this 27th day of April, 2026.

In the presence of:

The Advocate for the Appellant, Ms Mbirwe.

The Advocate for the Respondent, Ms Jeptanui for Ms Chelang'at.

Court Assistant, Jeniffer.

J. M. NANG'EA, JUDGE.