REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. E175 OF 2025

JOHN MATU MURIMI.....APPELLANT/APPLICANT

VERSUS

JASAN KAMAU GIKONYO..... RESPONDENT

R U L I N G

Brief facts

1. The application for determination dated 3rd July 2025 seeks for orders of stay of execution in respect of the consent judgment entered on 10th December 2024 which parties had set aside by dint of the consent dated 29th January 2025 and which consent the court declined to adopt in its ruling dated 12th June 2025, pending the hearing and determination of the appeal.

2. In opposition to the application, the respondent filed a Replying Affidavit dated 22nd July 2025.

Applicant's Case

3. The applicant states that the respondent instituted Thika CMCC No. E403 of 2023 in pursuit of compensatory

damages premised on a disputed road traffic accident. The matter was partially heard and

parties recorded a consent on 10th December 2024 on liability which was adopted by the court. Subsequently, the parties engaged and entered into an agreement on 20th January 2025 setting aside the said consent judgment. The applicant state that the consent dated 20th January 2025 was filed but the trial court declined to adopt the same on account of not having the jurisdiction to adopt the consent setting aide the judgment. Consequently, the lower court in its ruling dated 12th June 2025 declined to adopt the consent dated 20th January 2025.

4. The applicant states that following the trial court's decline to adopt the consent setting aside the consent judgment, the respondent has threatened to levy execution which process shall render the appeal otiose thus necessitating the issuance of orders preserving the substratum of the appeal.

5. The applicant avers that the application has been filed timeously as the ruling was delivered on 12th June 2025. Further, the applicant avers that no prejudice shall be visited upon the respondent as he executed the consent dated 20th January 2025. The applicant argues that the instant case is one that would not call for an order of security for the due performance of the decree considering the respondent had executed the consent

dated 20th January 2025 setting aside the consent judgment.

The Respondent's Case

6. The respondent states the deponent of the supporting affidavit is a stranger to the appeal as she was not a party in the primary suit

   and her affidavit offends the law on parties to a suit and swearing of an affidavit thus the affidavit ought to be struck out. Further the deponent to the said affidavit has not attached any letter of authority or instructions to swear the affidavit on behalf of the alleged insurance company and thus the affidavit is incompetent and ought to be struck out.

7. The respondent states that parties recorded a consent on 10th December 2024 and once the consent judgment was recorded and endorsed by the court, it was declared a judgment and the court file closed thus it was the consent judgment that bound all the parties and the lower court became functus officio.

8. The respondent argues that the consent judgment can only be set aside on grounds of fraud or can be reviewed or appealed by the applicant. The respondent further states that in the event the court finds merit in the application, the court should order the applicant to pay half the decretal sum to him and the balance to be deposited in a joint interest earning account in the names of the parties' advocates.

9. Directions were issued that parties put in written submissions and the record shows that the applicant complied by filing his submissions while the respondent elected not to file any written submissions.

The Applicant's Submissions

10. The applicant relies on **Order 42 Rule 6 of the Civil Procedure Rules** and the case of **Butt vs Rent Restriction Tribunal [1982] KLR 417** and submits that he has met the legal parameters for grant of stay of execution pending appeal. The applicant further relies on the cases of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR** and **National Industrial Credit Bank Limited vs Aquinas Francis Wasike & Another [2006] eKLR** and submits that the respondent is a person of unknown means and should execution proceed and the decretal sum is paid, there is no assurance that the respondent would be in a position to refund the same if the appeal succeeds. The applicant further submits that his apprehension remains uncontroverted in the absence of any demonstration by the respondent.

11. The applicant submits that the instant application was filed without unreasonable delay as he moved the court promptly upon delivery of the impugned judgment. The

applicant further submits that the present matter presents peculiar circumstances that disentitle the issue of security from arising at all. The parties herein duly recorded a further consent which expressly set aside the *ex parte* judgment and reinstated the suit for hearing on the merits. Thus the applicant argues that by that subsequent consent the very foundation of execution was removed and there is in effect no subsisting judgment capable of execution. Thus requiring security for the due performance of a decree that no longer exists in operative form would be both illogical and unjust.

12. The applicant argues that he does not seek to delay or obstruct justice but he relies on a mutually agreed position of the parties which restored the matter for hearing. Thus to impose security in such circumstances would be to elevate form over substance and to punish a party who acted in good faith and in reliance on a lawful consent. The applicant relies on the case of **RWW vs EKW [2019] eKLR** and submits that the appeal raises arguable issues deserving of the court's interrogation and to allow execution at this stage would amount to determining the appeal prematurely thereby rendering the appellate process illusory.

The Law

Whether the supporting affidavit dated 3rd July 2025 is defective and ought to be struck out

13. The respondent argues that the supporting affidavit deponed by one Esther Ndung'u ought to be struck out as she was not a party in the lower court suit. I have perused the record and said affidavit dated 3rd July 2025 and noted that Esther Ndung'u is a legal officer of the applicant's insurer namely M/s fidelity Shield General Insurance Limited. The deponent stated in her affidavit that she had authority to swear the supporting affidavit as the insurance company had a contractual obligation to settle the judgment by virtue of its subrogation rights. It is evident that all through the trial the suit motor vehicle registration number KCW 925T owned by the applicant was insured by M/s Fidelity Insurance Company. In fact the respondent before instituting the suit served Fidelity Insurance Company with the notice under Cap 405 of the Laws of Kenya. As such, the deponent is not a stranger to the suit as alleged by the respondent. In the circumstances, the supporting affidavit is properly before the court.

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal

14. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. **Order 42 Rule 6 of the Civil Procedure Rules** stipulates:-

(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 orders set aside.

(2) 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 1st 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.

15. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

    1. Substantial loss may result to him/her unless the order is made;

    2. That the application has been made without unreasonable delay; and

    3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

16. Substantial loss was clearly explained in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-**

    "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. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

17. The applicant argues that he is apprehensive that the respondent shall proceed with execution of the consent judgment at any time rendering the appeal nugatory.

18. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show that execution shall irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. On perusal of the record, the applicant has just stated that there is an imminent risk of execution which would render the appeal an academic exercise and further that the appeal would be rendered nugatory if the execution proceeds. It is only in his submissions the applicant argues that the respondent will be unable to pay back the decretal sum should the appeal succeed. It is trite law that submissions are not pleadings and the applicant ought to have expressed the said sentiments in his affidavit to give a chance to the respondent to respond. The applicant has failed to show how execution shall irreparably affect him and render the appeal

nugatory. It is, therefore, my considered view that the applicant has not demonstrated what substantial loss he stands to suffer.

Has the application has been made without unreasonable delay

19. Judgment by consent was entered on 10th December 2024 and the ruling declining to set aside the consent judgment entered on 10th December 2024 was delivered on 11th June 2025. The applicant filed his memorandum of appeal on 3rd July 2025 together with the instant application. Thus, the application has been filed timeously.

Security of costs

20. The purpose of security was explained in the case of **Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated:-

> **"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 the 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.

21. It is trite that the issue of security is discretionary and it is upon the court to determine the value of such security. The applicant has argued that the instant matter present peculiar circumstances which warrants him not to offer security for the due performance of the decree.

22. Additionally, grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicant's unfettered right to file an appeal to fully ventilate his grievances. This was well stated in the case of **M/s Porteitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997** where the court held:-

That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.

23. Bearing the said balance in mind and considering the provisions of Order 42 Rule 6 of the Civil Procedure Rules, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal. Furthermore, I have perused the grounds of appeal in the memorandum of appeal dated 3rd July 2025

and without going into the merits of the appeal noted that they do not raise arguable points of law.

24.

25. Accordingly, it is my considered view that the application dated 3rd July 2025 lacks merit and is hereby dismissed with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 30TH DAY OF APRIL 2026.

F. MUCHEMI

JUDGE