

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL APPEAL NO. E014 OF 2026**

**NUTRIMATRIX EXTERPISES  
LIMITED....APPELLANT/APPLICANT**

**VERSUS**

**DANIEL MAIGWA GICHOHI T/A  
MAGADI STORES & ELIM FEED NAKURU.....  
RESPONDENT**

**R U L I N G**

**Brief facts**

1. The application dated 26<sup>th</sup> January 2026 seeks for orders of stay of execution in respect of the ruling in Thika CM Court CMCC No. E607 of 2024 delivered on 9<sup>th</sup> January 2026 pending the hearing and determination of the appeal. The applicant further seeks for stay of enforcement of the condition requiring him to pay throw-away costs of Kshs. 20,000/- as well as depositing the full decretal sum of Kshs. 5,742,380/- pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 30<sup>th</sup> January 2026.

## **Applicant's Case**

3. The applicant states that the learned magistrate in CMCC No. E607 of 2024 while setting aside the interlocutory judgment entered on 21<sup>st</sup> January 2025 imposed conditions to pay throw-away costs of Kshs. 20,000/-, deposit the entire decretal sum of Kshs. 5,724,380/- vide a ruling delivered on 9<sup>th</sup> January 2026 and was also directed to comply with orders 7 and 11 of the Civil Procedure Rules within 21 days from the date of the ruling. The applicant argues that the ruling is onerous, punitive and disproportionate. He further states that he is financially unable to comply with the said orders without suffering substantial and irreparable prejudice. Being aggrieved with the said decision, the applicant states that he lodged an appeal.
  
4. The applicant avers that his appeal raises arguable and substantial issues of law and fact. Further his statement of defence denies the alleged debt and raises triable issues that can only be resolved after a full hearing on the merits.
  
5. The applicant argues that the order requiring him to deposit the full decretal sum despite the debt being denied, amounts to compelling him to satisfy a disputed claim prior to the trial thereby occasioning grave injustice. The applicant avers that unless the orders of

stay of execution are granted, he stands to be locked out of the appeal and the appeal shall be rendered nugatory.

6. The applicant avers that the respondent shall not suffer undue prejudice if stay is granted as the decretal sum is capable of being secured through reasonable and proportionate means should the appeal fail. The applicant states that he is ready and willing to comply with such reasonable conditions as the court deems fit save for depositing the full decretal sum.

### **The Respondent's Case**

7. The respondent states that the ruling delivered on 9<sup>th</sup> January 2026 allowed the application to set aside default judgment on condition the applicant deposits the decretal sum of Kshs. 5,742,380/- in a joint interest earning account of the parties' advocates, pays thro away costs of Kshs. 20,000/- and complies with Orders 7 and 11 of the Civil Procedure Rules within 21 days. The respondent states that he is yet to extract the orders thus execution is not imminent.
8. The respondent further states that the applicant ought to have either complied with the said orders or sought for review or variation of the said orders before the lower court. The respondent avers that the applicant has not demonstrated any substantial loss he shall suffer if the

orders sought are not complied with. Further, the requirement to deposit security cannot constitute substantial loss. The respondent further states that the requirement to deposit security in a joint account is not punitive but is intended to secure him while allowing the applicant an opportunity to defend the suit.

9. The respondent argues that the applicant is asking this court to sit on an appeal over discretionary conditions imposed by the trial court and shield it from complying with the said orders. The respondent further states that the applicant cannot ignore the conditions and run to the appellate court seeking to suspend compliance with lawful discretionary orders.

10. The respondent avers that he continues to suffer substantial loss as he supplied goods worth a lot and has waited through default, setting aside, conditional indulgence and continued non compliance from the applicant. The respondent further states that the applicant's defence consists of mere denials. Additionally, the respondent states that the appeal shall not be rendered nugatory if the applicant complies with the conditional orders as the funds will be preserved in a joint interest earning account.

11. The respondent avers that the suit herein is purely a monetary claim and the applicant has not demonstrated how payment would occasion substantial loss nor has it shown that he is incapable of refunding the amount should the appeal succeed. The respondent further states

that the applicant has not explained the inordinate delay in filing the instant application.

12. Parties disposed of the application by way of written submissions.

### **The Applicant's Submissions**

13. The applicant relies on **Order 42 Rule 6 of the Civil Procedure Rules** and the case of **Kenya Shell Limited vs Benjamin Karuga**

**Kibiru & Another [1986] eKLR** and submits that the order requiring him to deposit the entire decretal sum of Kshs. 5,742,380/- is excessively burdensome and incapable of compliance without exposing him to grave financial hardship. The applicant further submits that he denies owing the said sum to the respondent but he was not accorded an opportunity to prosecute his case thus the order for deposit for the decretal sum is punitive and tends to determine the matter without allowing him an opportunity to present his case. The applicant argues that unless the orders sought herein are granted, the respondent may proceed to enforce the said orders thereby occasioning it irreparable financial prejudice and rendering the intended appeal nugatory. To support its contentions, the applicant relies on the case of **Butt vs Rent Restriction Tribunal [1982] KLR 417.**

14. Relying on the case of **Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR**, the applicant

submits that appeal raises several legal and factual issues that are pivotal to the determination of the rights and obligations of the parties herein as it seeks to ascertain the existence and extent of the legal rights and obligations of the parties involved. The applicant argues that the intended appeal challenges the sums owed as claimed and further the exercise of discretion to impose conditions when setting aside judgment, that are punitive and disproportionate, particularly the requirement to deposit the entire decretal sum. The applicant argues that by issuing the order for deposit of the decretal sums, the trial court disregarded the draft defence filed whereby he is

disputing the sums. The applicant refers to the case of **Patel vs East Africa Cargo Handling Services Ltd [1974] EA 75** and submits that the intended appeal raises serious questions deserving consideration by the appellate court.

15. The applicant refers to the cases of **Consolidated Marine vs Nampijja & Another Civil App. 93 of 1989 (Nairobi); Kenya Power & Lighting Co. Ltd vs Esther Wanjiru Wokabi [2014] eKLR** and **Antoine Ndiaye vs African Virtual University [2015] eKLR** and submits that the application was made promptly and reflects its diligence and genuine concern about the imminent risk of execution.

### **The Respondent's Submissions**

16. The respondent relies on **Order 10 Rule 11 of the Civil Procedure Rules** and the case of **Mbogo & Another vs Shah [1968] EA 93** and submits that the lower court was justified in requiring the applicant to deposit security as he had already failed to file a defence previously. The respondent further relies on the case of **Kenya Shell Ltd vs Benjamin Karuga Kibiru & another [1986] eKLR** and submits that the applicant has failed to show what substantial loss would be occasioned to him. Further, the lower court ordered the money to be deposited in a joint interest earning account in the names of both parties' advocates and thus the applicant shall not suffer any substantial loss. The respondent argues that the subject matter of the appeal is preserved and therefore the appeal shall not be rendered nugatory.
17. The respondent submits that the applicant filed the application after 21 days which signals delay rather than a genuine inability to pay. Further, the applicant has failed to pay the minor throw away costs of Kshs. 20,000/-, thus acting in bad faith.

### **The Law**

### **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**

18. 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 1<sup>st</sup> 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.**

19. 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.

20. 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.**

21. The applicant argues that he stands to suffer substantial loss as the order requiring him to deposit the entire decretal sum of Kshs. 5,742,380/- is excessively burdensome and incapable of compliance without exposing him to grave financial hardship. The applicant further argues that the said order is punitive as it determines the matter without allowing him an opportunity to present his case. Additionally, the applicant submits that the respondent may enforce the said orders rendering the appeal nugatory.

22. Vide an application dated 21<sup>st</sup> January 2025, the applicant herein sought in CMCC No. E607 of 2024 setting aside of the *ex parte* judgment entered on 21<sup>st</sup> January 2025 and it be granted leave to

file and serve its statement of defence out of the prescribed time. The lower court set aside the *ex parte* judgment on condition that the applicant pays throw away costs of Kshs. 20,000/-, deposit the entire decretal sum in a joint interest earning account in the names of both parties advocates within 21 days of the ruling and comply with orders 7 and 11 of the Civil Procedure Rules. The applicant did not comply with any of the said orders but filed the instant application. The applicant argues that by depositing the entire decretal sum in a joint interest account, the matter has already been determined by the court yet he disputes the said sum and he was not afforded an opportunity to be heard. It is clear from the court record that the applicant is the one who was not keen to be heard as can be deduced from his conduct. There is no evidence that the applicant was locked from the hearing. It was the indolence of the applicant that led to the orders made. The lower court exercised its discretion judiciously to make sure that the applicant was serious about attending the hearing upon setting aside the *ex parte* judgment. In that regard, the applicant has not demonstrated that complying with the said orders of the court will occasion him substantial loss as he was the indolent party in the proceedings. 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 it or will alter the status quo to its detriment thus rendering the appeal nugatory. On perusal of the record, the applicant has just

stated that unless the orders sought are granted, the respondent shall execute the same. The applicant has failed to show that execution shall irreparably affect it and render the appeal nugatory. In fact by depositing the decretal sum in a joint interest earning account will preserve the subject matter of the appeal. It is therefore my considered view that the applicant has not demonstrated that he stands to suffer substantial loss.

**Has the application has been made without unreasonable delay**

23. The ruling was delivered on 9<sup>th</sup> January 2026 and the applicant filed the instant application on 26<sup>th</sup> January 2026 and the memorandum of Appeal on 16<sup>th</sup> January 2026, thus the application has been filed timeously.

**Security of costs.**

24. 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.**

25. Evidently, the issue of security is discretionary and it is upon the court to determine the amount or value of such security. The applicant has not offered any form of security in this application which is a requirement of the law under Order 42 Rule 6 of the Civil Procedure Rules.

26. 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.**

27. Bearing the said balance of the parties rights 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. The orders complained of herein ought to have been presented for review before. That approach would have saved the parties time and costs of an appeal unless the applicant intends to buy time. Order 42 Rule 6 provides for deposit of security as a requirement in an application for stay of execution. Such security is normally set by the court depending on the circumstances of the case. As such, the applicant would require to prove the allegations he has raised in the appeal that the orders were punitive, oppressive and disproportionate.

28. I am of the considered view that the applicant has failed to establish the requirements of Order 42 Rule 6 of the Civil Procedure Rules.

29. Accordingly, it is my considered view that the application dated 26<sup>th</sup> January 2026 lacks merit and is hereby dismissed with costs.

30. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED  
AT THIKA THIS 24<sup>TH</sup> DAY OF APRIL 2026.***

**F. MUCHEMI**  
**JUDGE**

