

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E286 OF 2025

RAHAB WANGARI.....1ST
APPELLANT/APPLICANT
TRANGUIN TREVOR KANYI
NDIRANGU.....2ND
APPELLANT/APPLICANT

VERSUS

MARGARET WAMBUI MUCHIRI.....
RESPONDENT

R U L I N G

Brief facts

1. The application for determination dated and amended on 27th November 2025 seeks for orders of stay of execution in respect of the default judgment issued on 26th August 2025 at the Small Claims Court Ruiru in SCCCOMM E812 of 2025 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 16th December 2025.

Applicants' Case

3. The applicants state that the Small Claims Court in Ruiru SCCCOMM E812 of 2025 delivered a ruling on 27th October 2025 dismissing their application to set aside the default judgment

entered on 26th August 2025. Being aggrieved with the decision of the lower court, the applicants state that they have filed an appeal seeking for stay of execution to prevent incurring loss or damage likely to be caused by the execution process. The applicants aver that the appeal raises highly triable issues and has overwhelming chances of success.

4. The applicants state that their advocates upon receiving instructions, prepared, served and uploaded in the judiciary e-filing system the memorandum of appearance however there was an issue in the part of payment and the same was not uploaded in the system which their advocates later realized. The applicants further state that their advocates attended court at all times and on the date of the hearing they had not filed a substantive response due to lack of availability of one of the witnesses and when they requested for time to regularize the same the learned magistrate denied the request and proceeded to issue a judgment in default.

5. The applicants argue that there is an imminent risk of execution which would render the appeal an academic exercise. The applicants further argue that the mistake of

their counsel should not be visited upon them as they have been condemned unheard.

The Respondent's Case

6. The respondent states the application lacks merit as it seeks to stay judgment entered in default on 26th August 2025 by the lower court

as the applicants failed to file a response to the statement of claim within the stipulated time. The applicants' counsel attended court on 11th July 2025 and was granted 15 days to file and serve a response to the claim and a hearing date was set for 26/8/2025. By the said date, the applicants had not filed response and they did not have a justifiable reason for such failure was given leading to the court entering of default judgment. The respondent avers that the appeal has no chances of success as no error was committed by the learned adjudicator against the applicants. The respondent further states that the allegation that judgment was entered *ex parte* is false as counsel for the applicants was present during all the proceedings in the matter and as such, the applicants were not condemned unheard as they claim.

7. The respondent states that the draft response intended to be filed does not controvert the fact that the 2nd applicant signed a two year contract of employment within UAE

with Lattafa Perfumes Industries Ltd hence her response is a sham and a waste of the court's time.

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

The Applicants' Submissions

9. The applicants rely on **Order 42 Rule 6 of the Civil Procedure Rules** and the case of **RWW vs EKW [2019] KEHC 6523 (KLR)** and submit that if stay of execution is not granted and default judgement executed, they shall suffer irreparable loss and damage

thereby rendering the appeal nugatory. Further the applicants contend that they were condemned unheard contrary to Article 50(1) of the Constitution.

10. The applicants submit that the ruling was delivered on 27th October 2025. It is noted that the learned adjudicator did not release the ruling until 26th November 2025 following orders of release by the court. The applicants state that they then filed the instant application promptly on 27th November 2025, thus there was no delay. The applicants refer to the case of **G.N. Wahome vs HKM (Minor suing through her next friend and mother MMN) & Another [2018] eKLR** and submit that the respondent does not stand to suffer any loss or prejudice should the orders of stay be granted.

The Respondent's Submissions

11. The respondent relies on **Order 42 Rule 6 of the Civil Procedure Rules** and the cases of **Masisi Mwita vs Damaris Wanjiku Njeri [2016] eKLR** and Kenya Hotel Properties Ltd vs Willesden Properties Ltd (no citation given) and submits that the applicants have not demonstrated that they will suffer substantial loss they shall suffer if the orders sought are not granted. The respondent further relies on the cases of **John Odongo vs Joyce Irungu Muhatia [2015] KEHC 3008 (KLR)** and **Focin Motorcycle Co. Limited vs Ann Wambui Wangui & Another (2018) eKLR** and submits that applicants did not offer any form of security for the

due performance of the decree. The respondent argues that the applicants intend to deprive her of her right to enjoy the fruits of her judgment.

12. The respondent submits that the applicants have not raised any triable issue with a chance of success in their draft memorandum of appeal as they claim facts that were not considered which ousts the jurisdiction of the court to warrant them stay of execution. Further, their attached draft memorandum of appeal has raised issues of fact and not matters of law thereby contravening Section 38 of the Small Claims Court Act.

The Law

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

13. 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.

14. 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.

15. 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.

16. The applicants argue that they are apprehensive that the respondent shall proceed with execution of the default judgment at any time rendering the appeal nugatory.

17. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The

applicants are required to show that execution if carried out shall irreparably affect them or will alter the status quo to their detriment, thereby rendering the appeal nugatory. On perusal of the record, the applicants have 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. The applicants have failed to show that execution shall irreparably affect them and render the appeal nugatory. It is therefore my considered view that the applicants have not demonstrated that they will suffer substantial loss should the orders be denied.

Has the application has been made without unreasonable delay.

18. The ruling was delivered on 27th October 2025 and the applicants filed the instant application on 25th November 2025 and amended it on 27th November 2025 and the memorandum of Appeal on 28th October 2025, thus the application has been filed timeously.

Security of costs

19. 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.

20. It is trite, that the issue of security is discretionary and it is upon the court to determine the value of the security to be provided based on the circumstances of the case. The applicants herein have not offered any form of security.

21. Additionally, grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicants' unfettered right to file an appeal to fully ventilate their 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.

22. 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 applicants have not met the threshold of granting stay of execution pending appeal. I have perused the grounds of appeal in the memorandum of appeal dated 28th October 2025 and without going into the merits of the appeal noted that they do not raise arguable points of law.

23. Accordingly, it is my considered view that the application dated and amended on 27th November 2025 lacks merit and is hereby dismissed with costs.

24. It is hereby so ordered.

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

**F. MUCHEMI
JUDGE**

