



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

COUNTY COURT NAME: MAKUENI HIGH COURT

CASE NUMBER: HCCA/E062/2025

CO-OP BANK FLEET AFRICA LEASING LIMITED AND COLLINS MUSYOKA VS
TABITHA WANJIRU KARIUKI

RULING

REPUBLIC OF KENYA
IN THE HIGH COURT AT
MAKUENI CIVIL APPEAL NO.
E062 OF 2025

CO-OP BANK FLEET AFRICA LEASING LTD.....1 ST
APPLICANT/APPELLANT

COLLINS MUSYOKA.....2 ND
APPLICANT/APPELLANT

-VERSUS

TABITHA WANJIKU KARIUKI.....RESPONDENT

RULING

1. The Appellants/Applicants have moved this court vide an application under certificate of urgency dated 30th September,2025 brought under the provisions of Section 3A, 79G and 95 of the Civil Procedure Act (Cap 21), Order 72 rule 22, Order 42 Rule 6, Order 50 rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure



Rules, 2010, seeking the following orders:-

a. Spent.

b. Spent.

c. THAT this Honourable Court be pleased to stay the Execution of the Judgment/ Decree delivered on 14th August, 2025 by Honourable S. Jalango - (SPM) sitting at Tawa in Civil Suit No. E121 of 2024 pending the hearing and determination of the Appellant's Appeal filed at the High Court of Kenya at Makueni.

d. THAT this Honourable Court allow the Applicant to furnish the Court with security in the form of court deposit of the decretal sum pending the full hearing and determination of this Appeal.

e. THAT the firm of KRK ADVOCATES LLP be granted leave to come on record for the firm of KAIRU & MCCOURT CO. ADVOCATES for the Applicant.

f. THAT the Application be heard inter partes on such date and time as this Honourable Court may direct.

g. THAT the costs of this Application abide the outcome of the Appeal.

2. The application is founded on the grounds that the Honourable court entered judgment against the appellant in favour of the respondent and held the appellants 100% and the Respondent was awarded General Damages Kshs. 300,000/= ; Special Damages Kshs. 8,400/=plus costs and interest at court rates.



3. The Appellant/Applicant, dissatisfied with the Honourable Court's Judgment instructed his Advocates on record to lodge an Appeal against the said Judgment.



4. The Appellant/Applicant have since exercised the right to Appeal and filed their Memorandum of Appeal and they have preferred an Appeal on quantum vide Memorandum of Appeal herein.

5. That the Appellant's/Applicant's appeal is merited, arguable and it raises pertinent points of law and facts thus it has overwhelming chance of success.

6. The Appellant/Applicant is reasonably apprehensive that the Respondent, as Decree Holder, may proceed and levy execution against them should the 30 days stay period granted by the trial court Lapse and unless Stay of Execution is granted, the Respondent will execute the said judgment of 14th August, 2025 and the Appellant's appeal will be rendered nugatory and the Appellant/Applicant will suffer irreparable loss and damage.

7. That the judgment is of substantial amount and the Appellant/Applicant is apprehensive that if the Respondent is paid he may deal with the same in a manner prejudicial to the Appellant/ Applicant and if the appeal is successful, he might not be able to recover the same from the Respondent.

8. That the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing.

9. The Appellant's/Applicant's Insurer is ready, willing and able to furnish the Court with security in the form of court deposit of the decretal sum.

10. The Applicants/Appellants stand to suffer substantial and



irreparable loss and damage as there is a likelihood that the Applicants/Appellants will be unable to recover the decretal sum together with costs awarded herein from the Respondent and unless this Application is heard urgently and orders sought herein granted, the Appellant Appeal if successful, will be rendered nugatory and a mere academic exercise and the Applicant stand to suffer great prejudice.



11. The application is supported by an affidavit sworn by EPHANTUS MUTHAMA the manager of the registered owner of Motor Vehicle Registration Number KDB 628Y insured by Directline Assurance at the time of the accident and at whose instance the suit Tawa in Civil Suit No. 121 of 2024 was defended.

12. He reiterates the grounds on the face of the application .

13. The application is opposed by the Respondent vide a replying affidavit sworn by DOMINIC MULYUNGI the advocate in conduct of this appeal for the respondent

14. He avers that he is of the opinion that the application herein is made

in bad faith, an afterthought, purely malicious and unmeritorious, an abuse of the court process both here and at the court below and fatally defective and incompetent.

15. That the application fails to meet the minimum threshold as established by law to enable the Honourable court exercise its discretionary powers of granting stay of execution pending appeal in favour of the applicants and avail them the orders sought.

16. He avers further that the application is premature as there is no decree or warrant of attachment extracted or a manifestation of intention by the respondent to execute and there is therefore no impending danger of execution.

17. He contends that the respondent is a successful litigant entitled to enjoy the fruits of her judgment and the application by the appellants is a delay tactic aimed at frustrating the respondent's ability to enjoy the fruits of her judgment.



18. That a cursory perusal of the memorandum of Appeal indicates that the appeal has very low chances of success as there is a myriad of binding and recent authorities where a similar amount was awarded for comparable injuries.



19. He contends that the applicants have not satisfied this court that they stand to suffer substantial loss if the application is not granted and in

this regard, it is not enough for the applicants to merely put forward mere assertions of substantial loss without empirical or documentary evidence to support such contention.

20. That without prejudice to the foregoing, and in view of the fact that liability is not contested, should the court find merit in the application, the same should only be allowed on condition that at least Ksh. 200,000/ = plus costs in the lower court be released to the respondent forthwith and the balance to be deposited in a joint interest earning account in the names of counsel within 21 days of its ruling.

21. He avers that the respondent is a woman of means and will be able to repay the decretal sum if the appeal is successful and the appeal will therefore not be rendered nugatory and that the court is called upon to balance the right of the applicants to prefer an appeal and the equally important right of the respondent to enjoy the fruits of her judgment which was crystallized by delivery of judgment in her favour.

22. The application is canvassed by way of written submissions.

23. The applicant on their part submits that the Memorandum of Appeal annexed to the present Application sets out precisely the grounds upon which the Applicant intends to appeal the decision of the lower court. That the main ground being that conventional awards are given for similar injuries.

24.



25. That in an application for stay pending Appeal in the subordinate courts it is not a requirement to show that the Appeal has high chances of success, the Applicant only needs to show he has an arguable appeal. The court is referred to

Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR the court held as follows:



*“This court has pronounced itself in several decisions that under Order 42 Rule 6 (2) of the Civil Procedure Rules, the applicant in seeking orders of stay pending appeal from the subordinate court to the High Court, the applicant is not required to prove that they have an arguable appeal, unlike if it was an application before the Court of Appeal seeking stay of execution of decree of the High Court pending appeal to the Court of Appeal. This is exemplified in several decisions including **Nakuru HCCC 211/98-Maritha Njeri Wanyoike & 3 others vs. Peter Machewa Mwangi & 5 others** and the appellant’s own authorities cited in support of this application namely, *Equity Bank Ltd vs. West Link Mbo Ltd (supra)*.”* discretion given it by the rules.

Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

26. They rely on **Esther Wamaita Njihia & 2 others vs. Safaricom Limited [2014] eKLR** for the principles governing the exercise of court’s discretion.

27. On stay of execution, they submit that order 42 Rule 6 of the Civil Procedure Rules (CPR) is the foundation of the jurisdiction of the court in granting stay of execution orders and the said provision specifies the circumstances and/or conditions under which either the trial court or an appellate court may order stay of execution of a decree or order pending an appeal.

28. That the conditions which the Applicant must satisfy in order to be granted the orders of stay of execution pending appeal are stated under Order 42 Rule 6 (2) of the CPR.

29. That further, Order 22 Rule 22(1) of the CPR also states that:



22(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to



enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

30. In **Tabro Transporters Ltd vs. Absalom Dova Lumbasi [2012] eKLR**, Gikonyo J. ruled as follows;

“Sufficient cause is established when the Applicant proves the following conditions on a balance of probabilities that: Substantial loss may result to the applicant unless the order is made, The application has been made without unreasonable delay, and Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”

31. That these conditions are the essence of Order 42 Rule 6 CPR. They however share an inextricable bond such that, if one is absent, it will affect the exercise of the discretion of the court in granting stay of execution. That the Court of Appeal in **Mukuma vs. Abuoga (1988) KLR 645** reinforced this position.

32. It is the Appellants submission that the following are the pertinent questions for determination in an Application for stay of execution: *whether the Defendants/Applicants have demonstrated that substantial loss will occur unless stay is granted; whether the Application has been made without unreasonable delay; and whether the Defendants/Applicants are ready to furnish such security as shall be sufficient to satisfy any decree that might ultimately be binding on the Applicant?*

33. On Substantial loss will occur, they submit that in support of the present Application Ephantus Muthama in his Affidavit filed, in paragraph 9 herein specifically stated that his insurer is ready and willing to issue security in the form of Court deposit of



the decretal sum for the Judgment amount to be held by this Honourable Court pending the determination of the Appeal to enable the Applicants pursue their Appeal. That the insurer went ahead and provided the



Bank Guarantee.

34. They submit that the Respondent has not disclosed his financial status and thus his means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicants' Appeal succeeds since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing.

35. They submit that Respondent herein is the only one who can specifically show that he has means to repay the decretal amount if the court allows the filing of the Memorandum of Appeal and the said appeal succeeds. They place reliance on **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR.**

36. That in the case of **Tabro Transporters Ltd vs. Absalom Dova Lumbasi [2012] eKLR** Gikonyo J. stated as follows:

The Court of Appeal reinforced the centrality of substantial loss in the case of Mukuma V Abuoga where it termed substantial loss as being the cornerstone of the discretion by the High Court in the granting stay of execution under Order 42 of the CPR, when it stated that; "...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."

37. They submit that a frivolous appeal cannot be rendered nugatory. That the only caution however, is that the High Court should not base the exercise of its discretion under Order 42 Rule 6 of the CPR only on the chances of the success of the appeal and that it must consider factors that constitute substantial loss. Much more is therefore needed in order to pass the test I have set out above. They submit that the Applicants in their Memorandum of Appeal have queried the amount of damages as being excessive and the issues raised are not frivolous and the question is;



whether the Applicants have demonstrated that substantial loss will occur unless an order for stay of execution is issued?

38. They submit that Judgment in this case was delivered in favour of the



Respondents against the Applicant for the decretal sum plus costs and interest as of the date of the Judgment against the defendant is challenged in the memorandum of appeal. It is their submission that this is a

substantial sum and in the event that the Respondent is unable to repay the decretal sum, the Appeal will have been rendered nugatory and the Applicant exposed to irreparable damage. In the circumstances, this is a suitable case where this court should exercise its discretion and order stay of execution.

39. On the issue of no delay in filing Application, they submit that there has been no inordinate delay on the part of the Applicant

40. They submit that the Applicant ready and willing to furnish security, they submit that the Applicant's insurer is ready and willing to provide security in the form of court deposit of the decretal sum as a security for stay of execution pending Appeal as stated in the Supporting Affidavit paragraph 9. They place reliance in

Empower Installations Limited v Eswari Electricals (Pvt) Limited Interested

Party Kenya Electricity Generating Co. Ltd [2016] eKLR where parties were

allowed to issue a Bank Guarantee from a reputable Bank as ordered by the court through its ruling within 30 days from the date of the ruling herein.

41. That the Applicants having satisfied all the conditions set out in Order 42 Rule 6, pray that they be granted an order of stay of execution pending the hearing and determination of aforesaid the Appeal.

42. The respondent on their part contends that the application is brought rather prematurely as the respondent has not obtained a decree or extracted warrants of attachment or in any other way manifested her intention to execute. That there is therefore no



impending danger of execution and the application is therefore unnecessary.

43. They submit that the principles that guide the courts in granting stay of execution pending appeal are laid out in Order 42 rule 6(2) of The Civil Procedure Rules.



44. That the discretion of the court in granting stay is therefore fettered by the above conditions and what then follows from these explicit provisions is that there are three issues for determination before this honourable court. These are:

- a. Whether the applicants have established a sufficient cause as against the respondent?
- b. Whether substantial loss may result to the applicant?
- c. Whether the applicant is ready and willing to furnish sufficient security?

45. On whether the applicants have established a sufficient cause as against the respondent, they submit that although the merits of the appeal cannot be considered at this stage, the attention of the Honourable court is nevertheless drawn to the memorandum of Appeal filed on behalf of the appellants and the applicants herein. They submit that they appeal against the quantum of damages awarded to the plaintiff in the lower court, however there are a myriad of binding and quite recent authorities where the same amount was awarded in comparable injuries and therefore the appeal clearly has very low chances of success.

46. They submit that the respondent was a successful litigant in Tara SRMCC E119 OF 2024 where judgment was delivered in her favour and was awarded damages and by virtue of this fact, the rights of the plaintiff, the respondent herein crystallized and she automatically became entitled to the fruits of her judgment. That the judgment conclusively defined her right, they place on **SAMVIR**

TRUSTEE LD V GUARDIAN BANK LTD NAIROBI HCCC 795 OF 1997: ...a

successful party is prima facie entitled to the fruits of his judgment, hence the consequence of a judgment is that it has defined the rights of a party with a definitive conclusion.



47. That from the foregoing, the court is called upon to balance two equal and competing rights that is of the applicant to appeal and to ensure his appeal is not rendered nugatory and the equally important and fundamental right of a successful litigant to enjoy the fruits of her judgment.



48. They submit that the court ought not to deny a successful litigant of the fruits of his judgment. They are fortified by the finding of the court in **MACHIRA T/A MACHIRA & CO ADVOCATES VS EAST AFRICAN STANDARD (2002) KLR 63.**

49. That from the foregoing, there is no sufficient cause disclosed by the applicants for granting their application in total disregard of the respondent's rights.

50. On whether substantial loss may result to the applicant if the application is not granted, they submit that the applicants must show that they will be totally prejudiced if they release the decretal sum to the respondent. That whether there will be substantial loss is the cornerstone for granting stay of execution and without evidence of substantial loss, it is difficult to see why a successful litigant should be kept away from her fruits of judgment.

51. They submit that in the grounds in support of their application, the applicants merely state that they are apprehensive that if stay of execution is not granted, the respondents will proceed to execute and the applicants will suffer irreparable loss and damage.

52. They argue that they do not substantiate or prove the kind of loss they are likely to suffer and in addition the applicants herein are insured owners of the suit motor vehicle and needless to say, the burden of settling the decretal sum is upon the insurance company. That it is highly unlikely that any prejudice or loss will be occasioned if the application is not granted and in any case the same is not substantiated. They place reliance on the enduring authority of **KENYA SHELL LTD V KIBIRU AND ANOTHER CA 97 OF 1986** where the court held

"The application for stay made before the High Court failed because the fruits of the



two conditions were not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose money if payment was made since the respondents would be unable to pay the money."



53. That similarly, it is highly unlikely that the Insurance Company will be unable to pay the money or would lose the money and most importantly, the respondent is a woman of means and if the appeal succeeds she would have no difficulty in repaying the money.

54. They submit that the applicants in their application also contend that if the respondent is paid, she may deal with the same in a prejudicial manner and if the appeal is not successful they might not be able to recover from the respondent which are unsubstantiated allegations and the applicants have no prove whatsoever despite the clarity of the law that he who alleges must prove in support of this they

rely in the case of **ANTOINE NDIAYE V AFRICAN VIRTUAL UNIVERSITY**

NAIROBI CC 422 OF 2006 where the court dealing with the same issue held:

the applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the respondent. substantial loss lies in the ability of the respondent to refund the decretal sum should the appeal succeed. The onus of proving substantial loss and in effect that the respondent cannot repay the decretal sum if the appeal is successful lies with the applicant.

55. They submit that the applicants have not discharged their burden of proof in that they have not shown that they will suffer substantial loss if the application is not allowed. It is their considered opinion that they will not suffer any loss and if the appeal succeeds, the respondent will be able to repay the decretal sum as she is a woman of means.

56. On whether the applicants are ready and willing to deposit security, they submit that in granting an application for stay of execution, security for due performance has to be given. That



the objective of this condition is to ensure that in the event that the appeal does not succeed, the execution of the decree is not delayed unreasonably.

57. That in this case, the applicants state that they are ready, willing and able to furnish the court with security in the form of a bank deposit through



their insurer. That taking cognizance of the need to balance the rights of the applicant and the respondent, they propose that in the event the court finds merit in the applicant's application, the same be allowed only on condition that at least Ksh. 200,000/= as proposed in the Replying Affidavit be released to the respondent forthwith and the balance to be deposited in a joint interest earning

account in the names of counsels. They place reliance in the case of **PAUL**

NDERITU & ANOTHER V JACINTER MBETE MUTISYA & ANO (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF WILLIAM MUSONZO

(DECEASED) [2018] eKLR where this court in granting stay of execution,

imposed a condition that the applicants remit to the respondent half of the decretal sum and deposits the other half in a joint interest earning account in the names of the advocates for the parties within 30 days. They further place reliance in

MBUKONI SERVICES LIMITED & ANOTHER V REUBEN NZILI & OTHERS

MISC APPLICATION NO. 77 OF 2021.

Analysis and determination

58. I have considered the application, the rival affidavits and the submissions by the parties herein. The issue for determination is whether this court should enlarge time to allow the Appellant appeal out of time, and whether there should be stay of execution pending the hearing and determination of that appeal.

59. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

“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 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.”



60. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417

gave guidance on how a court should exercise discretion and held that:-

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2 The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

61. Substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. The applicant has not demonstrated the substantial loss he will suffer should the court disallow his prayer for stay. In

Machira T/A Machira & Co. Advocates vs East Africa Standard [2002]

eKLR the court was of the view that the ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful it will be rendered nugatory.



62. The court here must balance the loss the applicant might incur and the fact that the respondent has a regular judgment in their favour.

63. Order 42 rule 6 requires the provision of security as a precondition for allowing a request to stay execution. The applicant proposes to furnish Court with



security in the form of court deposit of the decretal sum. The Respondent proposes that the condition that at least Ksh. 200,000/= be released to the respondent forthwith and the balance to be deposited in a joint interest earning account in the names of counsel in order to balance the competing interests of both parties in this matter.

64. I find that the balance requires that the applicants gets a chance on appeal and the respondent part of the decretal sum. I allow the application dated 30th September,2025 in the following terms:-

i. An order of stay of execution of the Judgment/decreet in Tawa MCC Civil Suit No. E121 of 2024 be and is hereby issued pending the hearing and determination of the appeal.

ii. The stay is on condition that half the decretal sum be released to the respondent and the other half be deposited in a joint interest earning account in the names of both counsel within thirty (30) days with effect from 11th May 2026

iii. In default of complying with order (ii), the orders staying execution shall lapse and the respondent shall be at liberty to execute.

iv. Costs of this application to abide the appeal.

RULING dated, signed and delivered virtually on
8th May 2026 Mumbua T Matheka

Judge

CA Chrispol



Ms. Langat for Ms. Wanjiku for the
appellant Ms. Omari for Mr. Mulyungi
for the Respondent



SIGNED BY/FOR:
LADY JUSTICE MATHEKA, TERESIA MUMBUA



★ THE JUDICIARY OF KENYA ★
LADY JUSTICE
MATHEKA, TERESIA
MUMBUA
Makueni High Court
High Court Div Date: 2026-05-08
18:33:21

