

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARSEN**  
**CIVIL APPEAL NO. E017 OF 2025**

**KENYA POWER & LIGHTING COMPANY LIMITED..... APPELLANT/APPLICANT**

**-VERSUS-**

**RALIA NURIA OSMAN (Suing as the administrator  
of the Estate of the late Osman Gwiyo Malibe) .....RESPONDENT**

**RULING**

1. The Appellant/Applicant has filed an application dated 28<sup>th</sup> September 2025 seeking for orders that:
  - 1) Spent
  - 2) Spent
  - 3) That there be a stay of execution of the judgment and decree delivered on 5<sup>th</sup> June, 2025 in Hola Civil Case No. MCCC/E001/2025 by Honorable E. Too, PM pending the hearing and determination of the appeal filed herein.
  - 4) That costs of this application be provided for.
2. The application is based on grounds stated on the face of the application and supported by the affidavit of Michael Ochieng, an officer of the Applicant sworn on 28<sup>th</sup> September 2025.
3. The Applicant's case is
4. that they were dissatisfied with the judgment of the trial court dated 5<sup>th</sup> June, 2025 where the Respondent was awarded the sum of Kshs. 3,413,050/= as damages arising from an alleged electrocution incident. That

the decretal sum is substantial and execution is likely to cause significant financial strain to the Applicant's operations within the region and beyond. That the application is meritorious and arguable and they are willing to deposit such reasonable security for the due performance of the decree as may be ordered by the court. That the application has been brought without undue delay and that it is just, fair and equitable that the status quo be preserved by staying execution pending appeal so as to allow the Applicant exercise its constitutional right to be heard on appeal.

5. The application was opposed by the Respondent through his replying affidavit sworn on 28<sup>th</sup> October 2025 in which he avers that the appellant has not demonstrated any sufficient cause or substantial loss that would be occasioned if the decree is executed, and therefore does not meet the threshold for grant of stay. He asserts that this is a deliberate intention to delay and deny the Respondent the fruits of his judgment. He further avers that the appellant's intended appeal lacks merit and has no realistic chances of success as it is grounded on issues that were properly adjudicated and determined by the trial court.
6. The application was canvassed by way of written submissions

### **Submissions**

7. The Applicant submitted that the application meets the threshold for grant of orders for stay of execution under Order 42 Rule 6[2] of the Civil Procedure Rules, which are that substantial loss may result to the applicant unless the orders sought are not granted; that the application has been made without unreasonable delay and that the applicant has given security as the court orders for due performance of the decree or order as may ultimately be binding on him.

8. On the first issue the Applicant submitted that it will suffer substantial loss if the orders sought are not granted as the Respondent has already instructed an auctioneer who have issued a proclamation notice for the attachment of the applicant's operational vehicles. That seizure of service vehicles will paralyze emergency responses and maintenance within the county causing a crisis in public service delivery.
9. The applicant submitted that there has been no inordinate delay in bring the present application which was filed immediately following the threat of execution. It further submitted that the balance of convenience tilts in its favor and that staying execution preserves the status quo and ensures that the fruits of the appeal are not lost while the Respondent is protected by the provision of security.
10. The Respondent on the other hand submitted that the applicant has failed to demonstrate any substantial loss that would arise if execution proceeds. That mere allegations that execution may cause hardship do not meet the legal threshold. He submitted that the estate of the deceased stands to suffer continued prejudice, hardship and denial of justice if stay is granted without strict safeguards. It was submitted that the intended appeal lacks realistic chances of success.

### **Analysis and determination**

11. The application for stay of execution pending appeal is brought pursuant to the provisions of Order 42 Rule 6[2] of the Civil Procedure Rules consequent to which the applicant was required to satisfy the following conditions;

- 1) That the application was brought without unreasonable delay.

- 2) That the Applicant will suffer substantial loss unless the orders sought are granted.
  - 3) That the Applicant has given security for due performance of the decree as may be binding on them.
12. It is trite that a stay of execution should only be granted where sufficient cause is shown. In **Antoine Ndiaye v African Virtual University (2015) eKLR** Gikonyo J. opined that -
- “....stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...”**
13. The judgment that is being challenged in this appeal was delivered on 5<sup>th</sup> June 2025. The memorandum of appeal was filed on 19<sup>th</sup> June 2025 and the application herein filed on 28<sup>th</sup> September 2025. The delay in filing the application was not explained by the applicant.
14. On the second condition, an applicant is required to demonstrate that it will suffer substantial loss if the orders sought are not granted. The applicant states that the decretal sum is substantial and the Respondent has not demonstrated ability to refund the same if paid out and the appeal subsequently succeeds.
15. I have noted that the decree sought to be executed is for the sum of Ksh. 3,663,050/=. This is by any standard a substantial amount of money. The Respondent in this case has not demonstrated the financial capacity to refund the decretal sum in the event that the appeal is successful. It was the duty of the Respondent, once challenged by the Applicant, to show that he is in a position to refund the money. In the absence of such evidence this court

is inclined to find that the Applicant may not be in a position to recover the money if the same is paid to the Respondent pending the hearing and determination of the appeal. The Applicant may have difficulties in recovering the money which will occasion it substantial loss.

16. The third condition for grant of stay of execution pending appeal is that the Applicant has to offer security for the due performance of the decree. The Applicant asserts that they are willing to deposit a reasonable security for the due performance of the decree as may be directed by the Honorable Court, including but not limited to a bank guarantee or deposit into court of a portion of the decretal amount.
17. The Respondent on the other hand suggests that the application be granted on condition that the appellant deposits the entire decretal amount in court or the amount be held in a joint interest earning account within a specified period as security for due performance of the decree.
18. The purpose of deposit of security is meant to give the Respondent something to fall back to in the event that the appeal is not successful. In **Arun C. Sharm Vs. Ashana Raikundalia T/A Rairundalia & 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 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.”**

19. The fact that the Applicant is willing to deposit security is prove that they are serious with the appeal and that the same is not merely meant to delay the execution of the decree.

20. The court is cognizant of the position that in an application of this nature, it is required to balance the competing interests of the two parties where one party is exercising its undeniable right of appeal and the other which has a judgment in its favour and who should not be deprived the fruits of the judgment without just cause. This position was aptly articulated in the case of **Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 Others [2012] eKLR** where it was held:

**“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.”**

21. In balancing the interests of the two parties herein and considering that the Applicant is willing to deposit security, I am of the view that I should allow the application on condition that the Applicant deposits security for due performance of the decree. I thereby make the following orders:

**(1) Stay of execution is hereby granted in terms of Prayer 3 of the Notice of Motion dated 28<sup>th</sup> September 2025 pending the hearing and determination of the appeal herein.**

**(2) That the stay is granted on condition that the Applicant shall, within 31 days from the date hereof, deposit the whole of the decretal sum in an interest-earning account to be opened in the joint names of the advocates representing the parties herein, failing which (if the fault is attributed on the part of the Applicant), the stay orders shall stand vacated.**

**(3) The costs of the application shall abide by the outcome of the appeal.**

Orders accordingly

**Delivered, dated and signed at GARSEN this 7<sup>th</sup> day of May 2026.**

**J. N. NJAGI**

**JUDGE**

**In the presence of;**

Mr. Abdullahi Dido for Appellant/Applicant

N/a for Respondent

Court Assistant – Mwero