

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A. C. Mrima, J.)
HCCSCCC APPEAL NO. E145 OF 2025

-between-

FRANCIS KAIRU
NJORO.....APPLICANT/APPELLANT

-versus-

MYWAGEPAY LIMITED.....
.....RESPONDENT

RULING

Background:

1. *Mywagepay Limited*, the Respondent herein, sued *Francis Kairu Njoro*, the Applicant herein, in *Small Claims Court Commercial Case No. E29334 of 2024* (hereinafter referred to as '**the suit**'). He sought to recover Kshs. 421,950/- arising from a loan of Kshs. 250,000/-
2. The Applicant admitted receiving the loan but contended that he had repaid Kshs. 246,000/-, leaving a balance of only Kshs. 3,900/-. Upon hearing the case, the trial Court entered judgment on 3rd July 2025 for the Respondent in the sum of Kshs. 275,120/- plus costs.
3. Aggrieved, the Applicant filed a Memorandum of Appeal on the 17th July 2025 and subsequently moved this Court for a stay of execution. The application for stay was heard by way of written submissions and is the subject of this Ruling.

The Application:

4. The application was by way of Notice of Motion dated 2nd September 2025, and as stated above, sought to stay the execution of the impugned judgment and decree of the trial

Court delivered on 3rd July 2025 and that the costs of this application abide the outcome of the appeal.

5. The Application was supported by the affidavit of the Applicant deposed to on 2nd September 2025. It was his case that the Respondent filed a Notice to Show Cause why execution should not issue and that on the 28th of August 2025, warrants of arrest were issued in execution. He contended that unless a stay is granted, his appeal, which he believes has high chances of success, will be rendered nugatory, causing him substantial loss.

The Submissions

6. The Applicant urged his case further through written submissions dated 23rd March 2026. He argued that the trial Court reached wrong conclusions regarding the appropriation of Kshs. 185,000/- leading to a decree that unjustly enriches the Respondent when he had already paid the debt. He further argued that he will suffer substantial loss if condemned to pay funds he has already remitted. He referred to the case of *Johnson Mwiruti Mburu -vs- Samuel Macharia Ngure* [2003] (Civil Appeal No. 716 of 2003), where the Court granted a stay of execution for a money decree on the condition that security for the decretal sum be deposited into an interest-earning joint account.

The Respondent's case:

7. *Mywagepay Limited* opposed the application through Grounds of Opposition and a Replying Affidavit sworn by *Beth Wambui Mwangi* on 1st October 2025. It was its case that the application is an abuse of the Court process since it was filed only as a reaction to lawful execution proceedings after the 30-day stay granted by the trial Court had lapsed on 3rd August 2025.
8. Further, it was its case that there was inordinate and unexplained delay in filing the application and that the Applicant had failed to demonstrate substantial loss, required by law. To that end, it drew support from the case of *Kenya Shell Ltd -vs- Kibiru & Another* [1986] KLR 410. The Respondent further

asserted that the Applicant had not offered or furnished any security for the due performance of the decree, which is a mandatory requirement under Order 42 Rule 6(2)(b). The Respondent denied that warrants of arrest were issued on 28th August 2025. It clarified that the Court only directed personal service of the Notice to Show Cause and extended it to 17th September 2025.

The submissions:

9. In its submissions dated 31st October 2025, the Respondent emphasized that the burden of proving the elements for a stay lied squarely on the Applicant and that failure to satisfy even one limb was fatal.
10. On substantial loss, the Respondent argued that the mere initiation of execution did not constitute loss. He referred to the case of *James Wangalwa & Another -vs- Agnes Naliaka Cheseto* [2012] eKLR, which held that execution is a lawful process. The Respondent further asserted that it is a solvent company capable of refunding the decretal sum if the appeal succeeds. Regarding security, the Respondent called to its aid the decision in *Arun C. Sharma -vs- Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, to advance the argument that its purpose is to guarantee the performance of the decree and protect the interests of the successful litigant.
11. In conclusion, the Respondent argued that the appeal merely challenged findings of fact and lacked overwhelming chances of success.

Analysis:

12. The singular issue for determination is whether the application satisfies the mandatory conditions for the grant of a stay of execution pending appeal. Order 42 Rule 6(2) of the Civil Procedure Rules provides for stay of execution and attaches three conditions thereto. They are proof of substantial loss to the Applicant, that the application be made without any undue delay and lastly, that 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.

13. In Civil Application Nai 6 of 1979, *Butt -vs- Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal crystallized the conditions for grant of stay as hereunder: -

- a. *The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.*
- b. *Secondly, 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 the appeal court reverse the judge's discretion.*
- c. *Thirdly, 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.*
- d. *Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.*

14. This Court will now consider the above stated requirements in turn.

a) Delay:

15. The Applicant filed for stay approximately one month after the trial Court's stay had expired, and only after execution proceedings had commenced. While the delay appears to have been prompted by the execution proceedings, it is not inordinate.

b) Substantial loss:

16. While the Applicant claimed substantial loss based on the merits of the underlying debt dispute, the Respondent correctly pointed out that for a money decree, substantial loss is generally demonstrated by showing that the Respondent would be unable to refund the money if the appeal succeeded. In the case of *National Industrial Credit Bank Ltd -vs- Aquinas Francis Wasike & Another* (2006) eKLR the Court of Appeal held thus;

.... Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.

17. The Applicant herein did not express any doubt that the Respondent would not be able to pay the decretal sum. In fact, the Respondent stated that it was solvent. A position the Applicant did not controvert. Its ability to make a refund, therefore, in the event the appeal was successful, was not put to question. In the premise, whereas this Court is inclined to taking the position that the Applicant is not likely to suffer any substantial loss, its attention is further drawn to the fact that the appeal revolves around the aspect of interest chargeable in a loan transaction. Whereas the loan was for Kshs. 250,000/-, the Applicant stated that he made a repayment of Kshs. 246,000/-, which amount is below the principal loan excluding the necessary attendant costs and charges. As stated, since the Respondent has demonstrated the ability to make a refund if called upon to do so, the Applicant has failed to satisfy this condition.

c) Security:

18. Having found that the Applicant has failed to demonstrate any substantial loss, it is only fair to allow the Respondent access the judgment sum rather than calling upon for security in lieu of the payment. Needless to say, had the Applicant proved loss, this Court would have definitely considered the requisite security, if any, to be rendered.

Disposition:

19. Flowing from the above, the application falls short of the requirements for grant of an order for stay of execution. Consequently, the following orders hereby issue: -

[a] The Notice of Motion dated 2nd September 2025 is hereby dismissed.

[b] The Applicant to bear the costs of this application.

[c] The trial Court file be availed for directions on the main appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 15th day of May, 2026.

**A.C. MRIMA
JUDGE**

Ruling virtually delivered in the presence of:

Miss Kamau, Learned Counsel for the Respondent.

No appearance for the Applicant.

Amina - Court Assistant.