



REPUBLIC OF KENYA



**Chepkoech v Rogony (Commercial Appeal E006 of 2024)  
[2025] KEHC 485 (KLR) (27 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 485 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
COMMERCIAL APPEAL E006 OF 2024**

**JM NANG'EA, J  
JANUARY 27, 2025**

**BETWEEN**

**LILY CHEPKOECH ..... APPELLANT**

**AND**

**WELDON KIPKORIR ROGONY ..... RESPONDENT**

**RULING**

1. By Notice of Motion dated 3/6/2024 brought under Certificate of Urgency, the Appellant now prays for stay of execution of judgement and/or decree of the lower court pending hearing and determination of the appeal and that the costs of the Motion be in the cause. There were other prayers in the application which are now spent.
2. The Appellant laments that the trial court dismissed her claim before it with costs, thus provoking this appeal. The Respondent subsequently moved to levy execution by means of committal of the Appellant to civil jail. The Appellant therefore avers inter alia that the appeal would be rendered nugatory if execution of the decree is not stayed.
3. The Respondent reacted vide affidavit evidence contending that the appeal lacks in merit and therefore the Appellant should pay the costs of the trial in the lower court as directed by the Court. According to the Respondent the trial court properly and fairly adjudicated the dispute and so the appeal is frivolous.
4. The Appellant felt the need to file a Supplementary Affidavit in answer to the Respondent's averments. She dismissed the Respondent's claims as malicious, adding inter alia that no prejudice would be occasioned to him if stay of execution is ordered.
5. Learned Counsel for the parties filed Written Submissions. Counsel for the Appellant submit that their client has satisfied the conditions for grant of stay of execution pending appeal stipulated under order 42 rule 6 of the *Civil Procedure Rules* 2010. The legal provisions require the Applicant to demonstrate *inter alia* that substantial loss may result if the relief is not allowed and further show that



the application was made without unreasonable delay. Reference is made *inter alia* for the judicial determination in *MFI Document Solutions Ltd. v Paretto Printing Works Ltd* (2021) eKLR which requires the court in exercising its discretionary power to be guided by the general principle that;

“If there is no other overwhelming hindrance, stay must be granted so that an appeal may not be rendered nugatory.”

should the appeal court reverse the lower court’s decision.

6. Further reliance is placed on the case of *RWW v EKW* [2019] eKLR in which the court explained that;

“The purpose of an application for stay of execution pending appeal is to pressure the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal, if successful, is not rendered nugatory. However, in so doing the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

7. The Appellant’s Advocate also pitch tent on the Court of Appeal’s observation in *Kenya Shell Limited v Kibiru* [1986] KLR 410 that substantial loss in its various forms is the cornerstone of the court’s jurisdiction for granting stay and it is what has to be prevented.

8. The Appellant’s advocate conclude that in the circumstance of this matter, stay of execution is warranted.

9. The Respondent’s Counsel retort that the application is unmerited and/or defective. It is contended that only a positive order as opposed to a negative order such as the impugned one that dismissed the suit, is capable of being stayed. According to Counsel, an exception is only where the appeal is in respect of costs only (see Case Law in *Crown Bus Services limited v Mukani* [2023] KEHC cited and relied upon by Counsel). Counsel point out that in the instant matter the Appellant has not appealed the costs granted to the Respondent.

10. The Application is further attacked for infringing order 42 rule 6(2) (b) of the *Civil Procedure Rules* 2010 which requires the Appellant to provide security for costs in respect of a decree which may ultimately be binding upon her. The application is therefore dismissed as a non-starter for alleged breach of this mandatory condition.

11. Having perused Counsel Submissions, the rival affidavit evidence and record, it is noted that the Appellant’s Claim against the Respondent in the lower court, was refund of a sum of Kshs. 320,000/= she allegedly advanced to the latter together with interest thereon and the costs of the suit. After a full hearing the claim was dismissed with costs. The costs were later assessed in the sum of Kshs. 63,200/= as per Certificate of Costs issued on 14/5/2024.

12. As correctly submitted by both Counsel, Order 42 Rule 6 of the *Civil Procedure Rules* 2010 governs an application for stay of execution pending appeal such as the one before me. The stated conditions precedent to grant of the relief is demonstration of any substantial loss that may be caused to the Applicant if stay of execution is not ordered; the Applicant must also express willingness and readiness to deposit security for due performance of any decree that may ultimately be binding on him/her and, lastly, it should be shown that the application was brought without unreasonable delay.

13. The impugned judgment was delivered on 6/5/2020 and this application was filed on 4<sup>th</sup> June 2024 or thereabouts. This is a delay of about a month or thereabouts which has been explained. It is trite law that even delay of one day is bad enough if unexplained.



14. Contrary to the Respondent's averments and/or submissions, the Appellant has expressed his willingness to provide the necessary security for costs (see paragraph 9 of her affidavit in support of the application).
15. The court will therefore consider the main factor guiding the court's discretion to wit, the question of substantial loss. Before determining whether or not the Appellant has satisfied this condition, however, I will consider if the application is fatally defective in light of the Respondent's Submissions to this effect.
16. Indeed the trial court dismissed the Appellant's suit with costs to the Respondent. As per copy of Memorandum of Appeal annexed to the application, the Appellant appeals "the said judgment" on stated grounds. All the grounds of appeal, however, relate to and challenge the main claim. The award of costs is not expressly challenged. I concur with the Respondent's Counsel that there can be no stay of execution pending appeal of a negative order such as the one dismissing the suit before the lower court. Although such stay order in respect of costs may be given, the Appellant is not appealing the award of costs. The application may not therefore be considered on merits.
17. In the end, I find that this application is defective and is struck out with costs to the Respondent.

**RULING DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF JANUARY, 2025 IN THE PRESENCE OF:**

**J. M. NANG'EA - JUDGE**

The Appellant's Advocate, Mr Nandi

The Respondent's Advocate, Ms Amaya

Court Assistant, Jeniffer

**J. M. NANG'EA - JUDGE**

