



In re ING (Petition E007 of 2022) [2025] KEHC 1673 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI**

PETITION E007 OF 2022

MA ODERO, J

FEBRUARY 28, 2025

**IN THE MATTER OF APPLICATION BY MBW TO BE APPOINTED
MANAGER OF THE ESTATE AND GURDIAN OF THE SAID ING**

BETWEEN

MBW PETITIONER

AND

PWB RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion Application dated 10th July 2024 by which the Applicant Phoebe Wanja Boore seeks the following orders
 - “1. Spent
 2. Spent
 3. That the Honourable Court be pleased to grant an order of stay of Execution of the Judgment delivered by the Honourable Court on 28th June 2024 pending hearing and determination of the appeal in the Court of Appeal, Nyeri.
 4. That costs be provided for.”
2. The application was premised upon Order 42 Rule 6 of the Civil Procedure Rules and was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent MBW opposed the application through her Replying Affidavit dated 22nd July 2024. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated 19th December 2024 whilst the Respondent relied upon her written submissions also dated 19th December 2024.



Background

4. The genesis of this application for stay is the judgment which was delivered by Hon. Lady Justice Muchemi on 28th June 2024.
5. In said judgment the court made the following orders:-
 - “(a) That the subject I.N.G is hereby adjudged as a person suffering from mental and physical disorder pursuant to Section 26 of the *Mental Health Act*.
 - (b) That the Petitioner MBW is hereby appointed as the legal guardian of the subject IN to take care of him and to manage his personal property and legal affairs, if any.
 - (c) That the Cross-Petition is dismissed.
 - (d) That this being a family matter there shall be no orders as to costs.”
6. Being aggrieved by this judgment the Applicant filed the Notice of Appeal dated 28th June 2024. The Applicant also filed this present application seeking a stay of execution of the judgment delivered on 28th June 2024 pending hearing and determination of the Appeal.
7. The Applicant avers that if no stay is granted then the Respondent may proceed to execute the judgment and her intended appeal may be rendered nugatory. That if the orders of stay are not granted then the Applicant stands to suffer substantial loss and damage.
8. As stated earlier the application for stay was vehemently opposed. The Respondent expressed her sadness at the filing of this application for stay which portrays the subject (who is the nephew of both parties) as a commodity or item to be preserved pending determination of the Appeal.
9. The Respondent urged that the subject was a human being who requires proper care, medical attention and therapy which the Applicant has failed to provide and that a stay may put the very life of the subject at risk.
10. The Respondent further states that she undertakes to comply with any decision of the Court of Appeal. That the application for stay was filed due to ulterior motives of the Applicant. That no substantial loss will be suffered by the Applicant if the stay is not granted.

Analysis And Determination

11. I have carefully considered this application, the reply filed thereto as well as the written submissions filed by both parties.
12. Order 42 Rule 6 which sets out the principles for stay of execution provides as follows;-
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appeal 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 persona aggrieved by an order of stay made by the court from whose decision to appeal is preferred may apply to the appellate court to have such order set aside. 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 my ultimately be binding on him has been given by the applicant.
 - (c)
13. The grant of stay orders is not a right. The same is an equitable remedy available to a deserving party and which is determined on the basis of the Court’s discretion. This position was set out by the Court in the case of *Butt v Rent Restrictions Tribunal* 1982 KLR 417 where it was held that:
- “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.
- Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrances, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
- 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.
- 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..” [own emphasis]
14. Therefore in order to merit the orders being sought the applicants must satisfy the court.
- a. That the application for stay was filed without unreasonable delay.
 - b. That they stand to suffer substantial loss unless the stay order is granted.
 - c. That security for the performance of the decree or order has been given by the Applicants.
15. In this case the judgment in question was delivered on 28th June 2024.
- This application was filed on 10th July 2024 barely two (2) weeks after delivery of the judgment. In my view this application for stay was filed in a timely manner.
16. It is not the duty of this court to comment of the merits or otherwise of the intended appeal. The duty of this court is limited to determining whether the application for stay of execution has merit.
17. The Applicant submits that her appeal may be rendered nugatory if the stay she has prayed for is not granted.



18. The word nugatory was described by the Court of Appeal, in the case *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR, as follows:

“(x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.

(xi) Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim.” [own emphasis]

19. The question of whether or not the appeal may be rendered nugatory is a subjective one. Ordinarily this would refer to a particular event having taken place or that the Respondent may not be in a position to refund the decretal sum.

20. In this case I cannot for see how the failure to grant a stay will render the appeal nugatory. The Applicant did not attach to her application a Draft Memorandum of Appeal and as such this court cannot make a determination as to whether the intended appeal raises triable issues.

In any event it is expected that the Applicant will prosecute her appeal and if the appeal is decided in her favour then the Respondent has indicated that she would be ready and willing to return the subject to the custody of the Applicant.

21. The subject herein is not a commodity or some prize to be claimed.

He is a human being adjudged to have physical and mental incapacity, who requires proper care. There is nothing to show that this human being will be rendered incapable of return by the Respondent if the appeal is eventually decided in the Applicants favour.

22. The Applicant submits that she stands to suffer substantial loss and damages if the stay is not granted. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the meaning of the term ‘substantial loss’ was explained as follows:-

“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 Civil Procedure Rules. 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.” [own emphasis]

23. Similarly in the case of *Tropical Commodities Suppliers Ltd & Others v International Credit Bank (in liquidation)* [2004] 2 E.A 33], the court stated that

“Substantial loss does not represent any particular mathematical formula. Rather it is a qualitative concept. It refers to any loss great or small, that is of real worth or value as distinguished from a loss without value or loss that is merely nominal.”



24. I cannot for the life of me see what loss the Applicant is likely to suffer if the subject is taken care of by his aunt. The applicant has not demonstrated that the Respondent is incapable of taking care of the subject. The Applicant has failed to demonstrate the nature of loss or damage she is likely suffer if no stay is granted.
25. In the case of *Machira C/A Machira & Co. Advocates v East African Standard* [2002] eKLR the court stated as follows:-
- “If the applicant cites as a ground substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given.....where no pecuniary or tangible loss is shown to the satisfaction of the court the court will not grant a stay merely on the ground of annoyance to feelings. Indeed remote contingencies would not warrant the courts interference with the ordinary course of justice and the process law. Moreover a court will not order a stay upon a mere vague speculation, there must be the clearest ground of necessity disclosed on evidence.....” [own emphasis]
26. Finally it must be noted that this is a case involving special circumstances. The subject is a vulnerable person. He is entitled to human dignity as guaranteed by Article 28 of *the Constitution* of Kenya. The court must give priority to the rights and well-being of the subject not to the litigants who to all intents and purposes appear unfortunately to view the subject as a cash cow or some prize to be fought over.
27. A court of competent jurisdiction has made a determination that the subject’s best interests require that he be placed in the legal custody and care of the Respondent. That judgment ought not be interfered with save on very pressing grounds. The Applicant has not advanced any persuasive grounds to warrant a stay of execution of that judgment.
28. Finally I find no merit in this application. The Notice of Motion dated 10th July 2024 is hereby dismissed in its entirety. Costs will be met by the Appellant/Applicant.

DATED IN NYERI THIS 28TH DAY OF FEBRUARY, 2025.

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MAUREEN A. ODERO
JUDGE

