



REPUBLIC OF KENYA



**Awuor v Miano (Civil Appeal E009 of 2025) [2025] KEHC 5373 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 5373 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E009 OF 2025  
DO CHEPKWONY, J  
MARCH 27, 2025**

**BETWEEN**

**JOHN ONYANGO AWUOR ..... APPELLANT**

**AND**

**ESTHER WANJA MIANO ..... RESPONDENT**

**RULING**

1. For determination before this Court is the Notice of Motion application dated 24<sup>th</sup> January, 2025 in which the Applicant seeks the following orders:
  - a. Spent.
  - b. Spent.
  - c. This Honourable Court be pleased to stay execution of the judgment and orders of Hon. L.L Gicheha, (CM) in Kikuyu CMC Case No. 29 of 2017 Esther Wanja Miano –vs- John Onyango Awuor delivered on 11<sup>th</sup> December, 2024, pending the hearing and determination of the Appeal herein.
  - d. That This Honourable Court be pleased to make such other order as the interest of justice may demand in the circumstances.
  - e. The costs of this application be provided for.
2. The Application is based on the grounds as set out on its face and the Supporting Affidavit of John Onyango Awuor sworn on the instant date. It is the Applicant’s case that a suit was filed against him before the trial court where he entered appearance, filed a Defence and Witness statements but the hearing proceeded without the Respondent. That the trial court then proceeded and delivered a Judgment on 11<sup>th</sup> December, 2024. He applied for certified copies of the proceedings and Judgment on 20<sup>th</sup> December, 2024 and the same were uploaded on 17<sup>th</sup> January, 2025.



3. According to the Applicant, upon delivery of the Judgment, the trial court issued a 45 days stay of execution which lapsed on 29<sup>th</sup> January, 2025. The Applicant states that he is aggrieved with the Judgment and has lodged the present appeal on grounds which he believes that he has high chances of success. The Applicant contends that he stands to suffer substantial loss if the order for stay of execution sought are not granted since the Respondent never testified in court, hence the balance of convenience tilts in his favour. He also states that the application has been brought without delay and it would be in the interest of justice that the same is allowed.
4. The Application was served upon the Respondent and there is an Affidavit of Service sworn on 23<sup>rd</sup> March, 2025 by Calystus Juma Kisaka which confirms service was indeed effected. However, the Respondent did not file a response to the same.

### **Determination**

5. This Court has read through the application and although the same is unopposed, it is still obligated to consider the merits of the same in terms of the legal principles upon which it is premised.
6. The law of stay of execution is enshrined under Order 42 Rule 6 of the Civil Procedure Rules which provides as follows:

Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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”

7. The court in the case of RWW –vs- EKW [2019] eKLR, had this to say on the purpose of an application for stay of execution pending appeal:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, 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.

8. Pursuant to the provisions under Order 42 Rule 6, it is now trite law that for a court to grant stay of execution order, three conditions must be met. A party is required to demonstrate that:-
  - a. The application has been made without unreasonable delay.
  - b. The Applicant will suffer Substantial loss if stay of declined.
  - c. The Applicant has offered security for due performance of the decree.



9. With regard to the first condition, this Court notes that the Judgment herein was delivered on 17<sup>th</sup> January, 2025 and the present application filed on 26<sup>th</sup> January, 2025, which was timely hence this condition has been fulfilled.

10. On the second condition of substantial loss that the Applicant is likely to suffer if stay of execution is not granted, the applicant has only stated that he is likely to suffer substantial loss but has not substantiated the position, which courts have found that it is not enough to simply state that. In the case of Kenya Shell Limited –vs- Benjamin Karuga Kibiru & Another [1986] eKLR, the Court held that:-

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

11. While this Court agrees with the decision in the case of Kenya Shell (supra) that without the evidence of the substantial loss, it is difficult to grant the stay orders as there is no reason why the Respondent should be kept away from its Judgment, it is worth-noting that the purpose of an application for stay of execution is to preserve the subject matter of a suit so as not to render an intended appeal nugatory and or deny the Applicant the right of appeal which is anchored on the right to fair trial.

12. This then takes this Court to the issue of security for the due performance, where it is found that in his affidavit, the Applicant has not offered any security to fulfil this condition. He has only stated that his appeal has a high chance of success. The issue of security for due performance was discussed in the case of Gianfranco Manenthi & Another –vs- Africa Merchant Assurance Company Ltd [2019]eKLR, held:-

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his Judgment in case the appeal fails...”

13. From the analysis of the Applicant’s pleadings, this Court finds that the Applicant in this case has only fulfilled one out of the three conditions required for the stay of execution orders to issue. However, at this juncture, the court is not required to consider the merits of the appeal to determine whether it will succeed or not, it finds that the grounds raised therein, particularly the claim that the Respondent failed to testified in the matter and that judgment was entered in favour of an unknown and unidentifiable party which the subordinate court failed to consider, is an arguable appeal which warrants the court’s protection before it is determined. The Court of Appeal in Joseph Gitahi Gachau & Another –vs- Pioneer Holdings (A) Limited & 2 Others [2009]eKLR on arguable appeals held:-

“...On our part, after considering the rival submissions by the parties, the ruling of the learned Judge below together with pleadings we are satisfied that the appeal is indeed arguable. This, in essence, does not mean an appeal which must necessarily succeed, but of course, one which ought to be argued fully before the Court.”

14. Therefore, this Court having found that the appeal is an arguable one, and the order sought requiring its exercise of discretion of powers, to avoid the appeal being rendered nugatory, this Court finds there



is need to issue stay of execution orders as prayed for. In the circumstances, the court hereby allows the Notice of Motion application dated 24<sup>th</sup> January, 2025 and issues the following orders:-

- a. That there be a stay execution of the Judgment and Orders of Hon. L. L Gicheha, CM in Kikuyu CMC Case No.29 of 2017, Esther Wanja Miano –vs- John Onyango Awuor delivered on 11<sup>th</sup> December, 2024 pending the hearing and determination of the Appeal herein.
- b. That the Applicant/Appellant to file and serve a Record of Appeal within thirty (30) days from the date of this ruling.
- c. Mention on 6<sup>th</sup> May, 2025 for parties to confirm directions and hearing of the appeal. Directions and Notice to be served upon the Respondent and his counsel.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27<sup>TH</sup> DAY OF MARCH, 2025.**

**D. O. CHEPKWONY**

**JUDGE**

