



REPUBLIC OF KENYA



KENYA LAW
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**David v Nechesa & 2 others (Civil Appeal 51 of 2023)
[2025] KEHC 5432 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5432 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 51 OF 2023
SC CHIRCHIR, J
APRIL 29, 2025**

BETWEEN

WEKESA DAVID APPELLANT

AND

FLORENCE NECHESA 1ST RESPONDENT

NORAH KHALWALI 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The Applicant's Notice of Motion dated 13th April, 2023 seeks orders as follows:
 - a. Spent
 - b. That the honorable court be pleased to stay the execution of the judgment of this honorable court delivered on 14/3/2023 and all consequential orders pending the hearing and determination of this application inter parties.
 - c. That the honorable court be pleased to stay the execution of the judgment of this honorable court delivered on 14/3/2023 and all consequential orders pending the hearing and determination of the appeal
 - d. The costs of the application to be in the cause.

The Applicant's case

2. The application is supported by the affidavit of David Wekesa, wherein he avers that his appeal has a high chance of success and the orders sought are necessary to preserve the substratum of the appeal ;



He avers that he will suffer irreparable loss and damage should execution proceed. that he is ready to abide by any conditions to be set by the honorable court in granting the orders sought.

The 1st respondent's case

3. The Application is opposed by the 1st respondent. In her replying affidavit dated 2nd May, 2023 wherein she states that the application does not meet the threshold set out in Order 42 Rule 6 of the [Civil Procedure Rules](#).
4. She further avers that the application ought to have been made in the first instance at the lower court and that the appeal herein is frivolous.
5. The Appellant has filed submissions which I have considered while the respondent has not filed any.

Determination

6. Stay of Execution pending appeal is founded on Order 42, Rule 6 of the [Civil Procedure Rules, 2010](#). It sets out the conditions of stay as follows:
 1. The court must be satisfied that substantial loss would result unless stay is granted.
 2. The application for stay has been made without unreasonable delay.
 3. Security of due performance of the decree must be given by the applicant,
7. Further it is trite law that the applicant must also demonstrate that the appeal is arguable.
8. On substantial loss it is trite law that the onus is on the respondents to demonstrate their ability to refund the decretal sum in the event that the appeal succeeds (see [Victory construction v BM\(a minor suing through next friend PMM\)](#) [2019] eKLR. The respondent reply is silent on this. She has merely stated that the application does not meet the threshold governed under Order 42, Rule 6 of the [Civil Procedure Rules, 2010](#) and that the appeal is frivolous.
9. Is the Appeal arguable? In the case of [Stantely Kangethe kinyanjui v Tony Keter & 5 others](#) [2013] eKLR, It was held: an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before court. From a copy of the lower court's judgment I can decipher that the suit was in the nature of a claim for damages for malicious prosecution. The court found in favour of the respondents and awarded them ksh. 200,000 in damages. The question of whether the award was too excessive has been taken up as one of the grounds of Appeal. I have perused the memorandum of appeal and I am satisfied that the grounds set out are not frivolous. I will say no more on the grounds lest I jeopardize the Appeal. The appellant should therefore be allowed to ventilate the same on appeal.
10. I am equally satisfied that there was no delay in filing the present application. Judgement was delivered on 14th March 2023 and the application herein was filed on 13th April, 2023. In the circumstances which have been explained, the delay cannot be said to be inordinate.
11. On security, the applicant has offered to be bound by any conditions set by the honorable court.
12. I find that the Application is merited, and I hereby make orders as follows:
 - a. There shall be a stay of execution of the judgment in *Butali CMCC No. 57 of 2018*, pending the hearing and determination of the present appeal.
 - b. The stay is conditional upon the Applicant depositing ksh. Two hundred thousand (Ksh. 200,000) in court within the next 45 days.



c. In default of (b) above , the stay orders will automatically lapse.

DATED, SIGNED AND DELIVERED VIRTUALLY, AT ISIOLO, THIS 29TH DAY OF APRIL 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant

Mr. Mondia for the respondent.

