



REPUBLIC OF KENYA



KENYA LAW
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**Karega v Kenindia Assurance Company Limited (Civil Suit
88 of 2014) [2025] KEHC 5300 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 88 OF 2014**

**HI ONG'UDI, J
APRIL 29, 2025**

BETWEEN

NGURE EDWARD KAREGA PLAINTIFF

AND

KENINDIA ASSURANCE COMPANY LIMITED DEFENDANT

RULING

1. The Notice of motion application dated 12th November 2024 by the defendant prays for the following orders;
 - i. & ii Spent.
 - iii. There be a stay of execution of the judgment dated 15th June 2023 and decree arising therefrom pending the hearing and determination of the intended appeal to the Court of Appeal.
 - iv. The costs of this application be provided for.
2. The application is based on the grounds on its face and the applicant's Chief Operating Officer's affidavit sworn on even date. She deponed that the execution process was commenced without the respondent submitting a draft decree for approval pursuant to Order 21, rule 8 of the [Civil Procedure Rules](#) or Notice of demand for settlement being served upon the applicant's Advocates. Further, that the intended Appeal against the declaratory suit Judgment delivered on 15th June 2023 is arguable as it challenges the learned Judge's decision to disregard the statutory cap on liability for third party claims under section 5 (b) (iv) of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#) Cap 405, Laws of Kenya by condemning the applicant to settle a decretal sum that exceeded the statutory limit of KES. 3,000,000/=.
3. She deponed further that the applicant was ready and willing to deposit security of KES. 5,000,000/= into a joint interest earning account in the name of the parties' advocates so that no party was prejudiced



upon conclusion of the appeal. She urged the court to allow their application since the applicant feared that the respondent would proceed with execution thereby occasioning it to suffer irreparable harm should this court not intervene. She added that if an order of stay of execution is not granted, the applicant stood to suffer substantial and irreparable loss of KES. 63,535,624/= . Further, that loss would arise from the respondent's inability to re-pay the said sum should the applicant eventually succeed on its intended appeal, further rendering the said appeal nugatory.

4. The respondent filed a replying affidavit sworn on 25th November 2024. He averred that though the declaratory suit was heard and determined in his favour on 15th June, 2023 the applicant still failed to satisfy the decretal sum. That the applicant's application had been brought in bad faith, was an afterthought and vexatious since litigation must come to an end. Further, that this matter had been in court for 14 years now and he was yet to enjoy the fruits of his judgment. He urged the court to dismiss the applicant's application with costs in his favour and that in the event it finds the said application to be merited then the court should order that the applicant pays him $\frac{3}{4}$ of the decretal amount.
5. The applicant filed a further affidavit sworn by its Chief Operating Officer on 10th December 2024 where it denied the contents of the respondent's replying affidavit and reiterated the contents of the affidavit in support of the application.
6. The application was canvassed by way of written submissions.

Defendant/applicant's submissions

7. These were filed by Oraro & Company Advocates and are dated 13th December, 2024. Counsel gave a brief background of the application and cited Order 42 rule 6 (2) of the [Civil Procedure Rules, 2010](#) which provides for the conditions to be met for grant of an order of stay of execution. He also placed reliance on the decision in [Butt v Rent Restriction Tribunal](#) [1982] KLR 419.
8. On the first condition on whether substantial loss may be incurred by the applicant if the order is not made, counsel submitted that the applicant would suffer substantial and irreparable loss by being called upon to pay the sum of kshs. 63,535,624/= which was an astronomical amount by any measure. Further that the defendant/applicant feared that if execution was successful and the respondent receives the decretal sum, it would not be able to recover any sums back thereby rendering the intended appeal nugatory.
9. In support of his argument he placed reliance on the decision in [Sarah N. Sakwa v. Elizabeth Wamwanyi t/a Namukhosi Ltd & Another](#) [2017] eKLR the Court cited with approval to the case of [Mukuna v. Abuoga](#) [1988] KLR 645, where the Court of Appeal referring to the exercise of discretion by the High Court and the Court of Appeal in granting stay of execution under Order 42 of the [Civil Procedure Rules](#) and Rule 5(2)(b) of the [Court of Appeal Rules](#) respectively, emphasized the centrality of substantial loss. The Court of Appeal stated as follows;

 “...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”

 See also;
 - i. [Mateine Ole Kilelu & 19 Others v Moses K. Nailole](#) [2009] eKLR
10. On whether the application has been made without undue delay, counsel submitted that the application had been made without unreasonable delay within the context of execution of proceedings. He placed reliance on the decision in [Hon. Mr. Justice Martin Mati Muya v. Tribunal Appointed to](#)



Investigate the Conduct of Hon. Mr. Justice Martin Mati Muya [2020] eKLR where it was stated as follows;

“Broken down, the authorities stress the points that, whether a delay is inordinate is a question to be determined on a case by case basis and in the peculiar facts and circumstances: that inordinate delay should not be difficult to discern where it occurs it should be apparent, self-evident and obvious. The focus should not be on the length of the delay per se, but also on the justification and reasons, which in turn must be rational and plausible; that where the delay is prolonged, it is in the discretion of the court to consider, whether justice can still be done despite the delay. In addition, the prejudice likely to be occasioned to any party is equally an important consideration.” (Emphasis added)

11. Counsel submitted further that this being a declaratory suit, there were no orders capable of being executed and/or consequently stayed at the point of delivery of Judgment. However, upon being served with a Notice of Proclamation of Movable Property on 8th November 2024 the defendant/ applicant was prompted to file the instant application. He placed reliance on the decision in *Faith Homes of Kenya v. Robert Cherukwo* [2021] eKLR wherein the court observed as follows;

“This court having found that the orders issued are of a declaratory nature and injunctive ones, there is, in my view nothing the plaintiff shall execute at this stage as against the Applicant. I find no reason to grant orders of stay of execution for the state of affairs remains as it was. There is nothing to be altered on the ground as the plaintiff is the one who was in occupation of the suit land and the court declared that he has rights over the suit land.”

12. The said court also cited the decisions in *Johana Nyokwonyo Buti v. Walter Rasugu Omariba & 2 Others* [2011] eKLR and *Katiba Institute v President of the Republic of Kenya; Judicial Service Commission & 3 others (Interested Parties)* [2020] eKLR.

13. Lastly, on whether the applicant is willing to abide by the court’s order as to security for due performance of the decree, he submitted that by depositing security amounting to kshs. 2,000,000/= the applicant had fulfilled the third condition for the grant of an order of stay and that was concomitant with what was stated in the case of *Joseph Schmaderer v. Serab Njeri Ngene* [2021] eKLR where the court while citing *Focin Motorcycle Co. Limited v. Ann Wambui Wangui & Another* [2018] eKLR stated as follows;

“The offer of security by the applicant is bona fides that the stay application is not a mere exercise to deny the respondent the fruits of its judgments. The offer for security therefore satisfies a ground for stay.” (Emphasis added)

14. In conclusion, he urged the court to grant the orders sought in the applicant’s application.

Plaintiff/respondent’s submissions

15. These were filed by Gekonga & Company Advocates and are dated 14th February, 2024. Counsel gave a brief background of the case and equally cited Order 42 rule 6 of the *Civil Procedure Rules* which provide for the conditions to be satisfied for grant of stay of execution orders.
16. On the first condition on whether the applicant will suffer any loss if the application herein in not allowed, counsel submitted that the applicant had not specified the exact loss it would suffer. In support of that position he placed reliance on the decision in *Mutua Kilonzo v Kioko David Machakos* [2008]



eKLR where the court dismissed an application for stay pending appeal for a monetary decree as the applicant/appellant failed to prove how he would suffer substantial loss.

17. Counsel submitted further that the defendant/applicant's application was based on a money decree and such appeals are never rendered nugatory for one can sue for recovery. He placed reliance on the decision in *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR where the court held as follows;

“It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made”

18. On whether the applicant had given sufficient security, counsel submitted that the court should balance equally the defendant's right of appeal and the weighty right of the plaintiff/respondent to enjoy the fruits of its judgment. That the security deposit of Kshs. 2,000,000/= was an outright abuse of the court process and demeaning to the plaintiff/respondent's judgment which was in the tune of Kshs. 63,535,624/=. He placed reliance on the decision in *Potretitz Maternity v James Karanga Kabia* Civil Appeal No. 63 of 1991 where the court held as follows;

“The right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

see also;

- i. *Amal Hauliers Limited v Abdul Nassir Abukar Hassan* [2017] eklr

19. In conclusion, counsel submitted that the applicant had failed to satisfy all the requirements provided for under Order 42 rule 6 (2) (a)(b) of the *Civil Procedure Rules*. He urged the court to dismiss the defendant/applicant's application with costs to the plaintiff/respondent. He further urged the court to be guided by the decision in *Francis Kaken Muunda v Josephine Mulinge Kiluu & Another* [2019] eKLR in the event it decides to allow the application. The said court held as follows;

“The respondent has not demonstrated that she would be able to refund the decretal amount in the event appeal succeeds after she paid. However, the court notes that the liability apportioned by the trial court is not challenged in appeal thus implying that even if the appeal succeeds, the respondent will still get 60% of the amount arrived at by this court.”

Analysis and determination

20. I have considered the application, affidavits and the submissions by the parties, and find the issue arising for determination to be whether the defendant/applicant has satisfied the ground for issuance of the stay of execution pending appeal.
21. The principles guiding the grant of a stay of execution pending appeal are well settled. The same are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

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.



22. In *RWW vs. EKW* [2019] eKLR, the court addressed the purpose of a stay of execution order pending appeal, in the following words:

“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.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the appellant with those of the respondent.”
23. From the law and the above decision, it is clear that the purpose of stay of execution is to preserve the substratum of a case pending the hearing and determination of an appeal. Further, a successful litigant has a right and expectation to enjoy the fruits of the decision rendered in his or her favour by the court, and at the same time a respondent who has lost a case also has a right of appeal to ventilate his or her displeasure with the said decision of the court. The court has a duty to weigh and balance both situations.
24. Further, in the case of *Regional Institute of Business Management v Lucas Ondong' Otieno* [2020] eKLR the court observed as follows;
- “20. Weighing the applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of the *Constitution of Kenya* and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2)(b) of the *Constitution of Kenya*, this court determined that there would be more injustice and prejudice to be suffered by the applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted”.
25. This a money decree for an amount which has been determined by this court and the intended appeal is challenging the said amount which was awarded to the plaintiff/respondent. It is my view that the defendant/ applicant stands to suffer substantial loss if stay is not granted. On the other hand, the appeal being on the decretal sum awarded, the plaintiff/respondent also stands to suffer prejudice if no amount is paid to him in the meantime.
26. With regard to provision of security by the defendant/ applicants submitted that they were willing to deposit security of kshs.5,000,000/= in a joint interest earning account in the name of parties' advocates. The plaintiff on his part urged the court to order that $\frac{3}{4}$ of the decretal sum plus costs be paid to him in the event it allows the application.
27. The grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of each case. It is my view that this court must balance these rights to ensure that justice is served. I therefore grant stay of execution on condition that the defendant /applicant deposits half of the decretal amount in a joint interest earning account of the parties' advocates within 45 days in default execution shall issue.
28. Each party shall bear its own costs.



29. Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 29TH DAY OF APRIL, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

