



**Patel v Mombasa Hospital (Civil Suit E112 of 2023)  
[2025] KEHC 12122 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12122 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E112 OF 2023  
F WANGARI, J  
MAY 29, 2025**

**BETWEEN**

**MEENA BWAGWANDAS PATEL ..... PLAINTIFF**

**AND**

**MOMBASA HOSPITAL ..... DEFENDANT**

**RULING**

1. This is a Ruling on an Application dated 05/12/2024 seeking for stay of execution of the Judgment of this court delivered on 21/11/2024 pending appeal to Thecourt of Appeal. The Appellant was dissatisfied with the judgment of this court and has already filed a Notice of Appeal dated 02/12/2014 as required by the Court of Appeal Rules.
2. The Application is supported on grounds inter alia that the judgment omitted some important issues raised by the Appellant as the judgment in the lower court failed to address regarding the professional negligence of the Respondent.
3. The Respondent filed its Replying Affidavit dated 14/01/2025 sworn by the counsel for the Respondent stating that the application was a delay tactic and made in bad faith. The application did not meet the threshold for grant of stay orders. The Appellant filed a Further Affidavit dated 16/01/2025. The same was filed without leave of court, and neither did the Appellant seek to have it deemed as properly filed. The same is therefore expunged from the court's record.
4. Parties were directed to file written submissions and they both complied. I have considered the submissions. The Applicant reiterated the contents of her Application and Supporting Affidavit and submitted that the Application was meritorious as the appeal had probability of success.
5. On its part, the Respondent submitted that the application had no merits and ought to be dismissed for failure to satisfy the conditions for grant of stay of execution and it is just denying the Respondent from enjoying the fruits of the judgment.



## Analysis

6. I have analyzed the Application, response and the submissions and authorities filed by the parties in support and opposition to their respective positions. I have to determine whether the Appellant has demonstrated that the order it seeks of stay of execution pending Appeal is merited.
7. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which provides:
  - “No order for stay of execution shall be made under subrule (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.
8. . Further to the grounds on substantial loss and security, I understand that stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay underscores the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*. The court is thus enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
9. . Section 1A (2) of the *Civil Procedure Act* provides that;
  - “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under Section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
10. Therefore, an Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely;
  - a. that substantial loss may result to the applicant unless the order is made
  - b. that the application has been made without unreasonable delay, and
  - c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. (See *Antoine Ndiaye v African Virtual University* [2015] eKLR).
12. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:
  - “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 CPR. 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.”

13. In the instant case, the Applicants aver that she stands to suffer substantial loss, though not in direct terms. She stated that she cannot lose her close kin and also be made to pay for the same.
14. On the other hand, the Respondent contends that the Applicant has not demonstrated how she will suffer irreparable loss and no security had been offered. It was however stated that if the court is inclined to grant the stay order, the Appellant should deposit the decretal sum of Kshs. 1,049,154.70/=
15. In determining this Application, the main objective is to achieve justice for both parties. In *Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others* [2015] eKLR, the Court of Appeal articulated that:

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of *the Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.” (emphasis added).

16. The Court, in *RWW v EKW* [2019] eKLR, considered 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.”
17. There is a pending appeal against the judgment delivered by this court. This court must balance the interest of the Applicant in the event the appeal is determined in her favour. On the other hand, the interests of the Respondent must be considered as it must not be denied the fruits of his judgment. The grant of stay of execution of judgement being discretionary, the court orders as hereunder;



## **Determination**

18. In the circumstances, the Application dated 05/12/2024 is allowed on the following terms;
- a. There be stay of execution of the Judgement dated 21/11/2024 pending the hearing and determination of the Appeal.
  - b. That the stay orders are granted on condition that the principal decretal sum of Kshs. 650,708 be deposited in court within the next 30 days.
  - c. In default of (b) above, the stay orders lapse and the Respondent is at liberty to execute.
  - d. Costs of the Application to abide the outcome of the Appeal.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 29<sup>TH</sup> DAY OF MAY, 2025.**

.....

**F. WANGARI**

**JUDGE**

In the presence of: -

N/A by the Appellant

N/A by the Respondent

M/S Norah, Court Assistant

