



REPUBLIC OF KENYA



KENYA LAW
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**Waithira v Mwangi (Civil Appeal E100 of 2025)
[2025] KEHC 12232 (KLR) (Civ) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E100 OF 2025

TW CHERERE, J

MAY 29, 2025

BETWEEN

FELISTUS WANJIRU WAITHIRA APPELLANT

AND

MOSES NJOROGE MWANGI RESPONDENT

RULING

“Courts exist not only to determine disputes but to preserve the right to be heard — especially where the door to appeal remains open and the effort to enter it is genuine.”

1. This ruling determines the Appellant’s Notice of Motion dated 27th April 2025 brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 Rule 6 of the *Civil Procedure Rules*, seeking variation of this Court’s orders issued on 12th April 2025. The said orders granted a stay of execution on condition that the Appellant deposits the full decretal sum of KES. 756,420 within 21 days.
2. The Appellant now seeks to deposit KES. 300,000 as partial compliance with the condition for stay, citing inability to raise the full amount owing to financial hardship. The application is supported by an affidavit sworn on 27th April 2025. The Respondent opposes the application and raises, among other grounds, the doctrine of *functus officio*.

Issues for Determination

3. Having considered the application in light of the affidavits on record, the following issues arise for determination:



1. Whether the Court is *functus officio* and therefore lacks jurisdiction to entertain the application;
2. Whether the Appellant has established sufficient cause to warrant variation of the conditions imposed on 12th April 2025;

1. Whether the court is functus officio

4. The Respondent argues that the Court is *functus officio*, having already issued a conditional stay on 12th April 2025 which the Appellant has to date not complied with.
5. The doctrine of *functus officio* is rooted in finality that once a court has exercised its jurisdiction and rendered a final decision, it becomes functus officio, incapable of revisiting that decision.
6. However, it is settled law that interlocutory orders, such as conditional stays, may be varied by the same court where circumstances warrant. In [*Telkom Kenya Limited v John Ochanda \(Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd\)*](#) [2014] eKLR, the Court of Appeal stated:

“The doctrine of *functus officio* is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

7. In the present case, the order of 12th April 2025 was conditional and interlocutory, made in aid of securing the appeal. The Court therefore retains jurisdiction to review or vary it under Sections 3A of the [*Civil Procedure Act*](#), which provides that:

“Section 3A: Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

8. Accordingly, the objection that the Court is *functus officio* is without merit.

2. Whether there is sufficient cause to vary the orders issued on 12th April 2025

9. The Appellant deposes that she is a single mother of three and has been unable to raise the entire decretal sum. Appellant has however managed to raise KES. 300,000, which she now seeks to deposit to avoid execution. Appellant further states that her goods have been proclaimed.
10. Under Order 42 Rule 6(2) of the [*Civil Procedure Rules*](#):

“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;
- (b) the application has been made without unreasonable delay; and
- (c) 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.”



11. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike* [2006] eKLR, the Court held:

“The fact that the applicant’s goods are likely to be attached and sold in execution is in itself evidence of substantial loss.”
12. This application was promptly filed within 15 days of the initial order. The proclamation of the Appellant’s household goods evidences imminent execution, and the Court is satisfied that substantial loss may ensue if the stay lapses.
13. The full decretal sum is KES. 756,420. The Appellant proposes to deposit KES 300,000, constituting approximately 40% of the decretal amount.
14. Whereas the Court appreciates that full security is preferable, it must also consider the realistic capacity of a litigant. In *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR, it was held:

“An order for security for the due performance of the decree should not be oppressive. The Court must balance the interests of both parties.”
15. The Court is satisfied that the offer of KES 300,000, while not equal to the full decretal sum, has been made promptly and in good faith, reflecting the Appellant’s bona fide effort to comply with the imposed conditions. Although the law does not prescribe a fixed amount of security, the guiding principle is that it must not create an insurmountable barrier to the Appellant’s right of appeal.
16. Besides, the right of appeal is a constitutional and statutory right, and where a party has demonstrated a credible attempt to comply with a conditional stay order, the Court must be slow to drive them from the seat of justice.
17. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal stated:

“The Court should not refuse a stay if the appeal would be rendered nugatory were the applicant to succeed.”
18. Denying the application would in my respectful view result in execution, thereby rendering the appeal academic and illusory.

Disposition

19. The upshot is that the application dated 27th April 2025 has merit, and it is allowed in the following terms:
 1. The orders made on 12th April 2025 are hereby varied to the extent that there shall be stay of execution of the judgment delivered on 28th January 2025 in SCCOMM E118 of 2024 on condition that the Appellant deposits the sum of KES 300,000 with the court within seven (7) days from today.
 2. In default of compliance, the stay of execution granted on 12th April 2025 shall lapse automatically without further reference to court
 3. Costs of this application shall be borne by the Appellant
 4. Mention before the Deputy Registrar on 03rd July 2025 to confirm filing and service of the record of appeal

DELIVERED AT NAIROBI THIS 29TH DAY OF MAY 2025



WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ruth

For Appellants - Mr. Mwangangi for Githui & Partners Advocates

For Respondent - Mr. Kandere for S.K.Opiyo & Co. Advocates

