



**Simiyu v Attorney General & 4 others (Civil Suit 2 of 1988)  
[2025] KEHC 7328 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7328 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT 2 OF 1988  
RN NYAKUNDI, J  
MAY 28, 2025**

**BETWEEN**

**FRANCIS GEORGE SIMIYU ..... PLAINTIFF**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> DEFENDANT**

**THE INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> DEFENDANT**

**CHRISTOPHER WANJALA ..... 4<sup>TH</sup> DEFENDANT**

**CHRISTIAN HEALTH ASSOCIATION OF KENYA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. What is pending before this court is the applicants' Notice of Motion dated 05/02/2025 seeking the following orders;
  - a. Spent
  - b. That there be a Stay of Execution of the judgment dated 23<sup>rd</sup> December 2024 pending the hearing and determination of the Appeal.
  - c. That this Honourable Court be pleased to make any such further orders that it deems fit and just to meet ends of justice.
  - d. That costs of this application to abide the outcome of the Appeal.
2. The application is premised on the grounds on the face of it and the contents of the supporting affidavit sworn by Dr. Samuel Mwendwa.



3. In his affidavit, the deponent, who is the Applicants; General Secretary, stated that on 23/12/2024, the court delivered a judgment in favour of the 1<sup>st</sup> respondent and being dissatisfied with the same, a Notice of Appeal was filed against the decision. He urged that the appeal is arguable and he is not aware of the respondents means therefore he is apprehensive that the sum will be irrecoverable if the appeal succeeds. He stated that the applicant is willing to deposit a portion of the decretal sum as security and further, that the respondent will not be prejudiced if the application is allowed.

### **Hearing of the Application**

4. I note that there is no response by way of affidavit or grounds of opposition filed by the respondents. However, the parties filed submissions on the appeal. The Applicant filed submissions dated 27/03/2025 through the firm of Messrs. Luta and Company Advocates. The Respondents on their part filed submissions dated 23/04/2025.

### **Applicants' Submissions**

5. Counsel for the Applicant cited the provisions of Order 42 Rule 6 (1) of the Civil Procedure Rules, urging that one seeking orders must meet the following threshold: That the application has been made without unreasonable delay. Substantial loss may result to the Applicant unless the order for stay of execution is granted. Such security as the court orders for the due performance of the decree or order.
6. Counsel urged that the Applicant has met the threshold stipulated under Order 42 Rule 6 (2) of the Civil Procedure Rules 2010. On unreasonable delay counsel urged that the Judgment was delivered on 23<sup>rd</sup> December 2024 and the 5<sup>th</sup> Defendant filed the instant application for stay of execution on 5<sup>th</sup> February 2025 (approximately 1 month and twelve (12) days after delivery of judgment). Therefore, the application for stay of execution was brought without unreasonable delay.
7. On substantial loss, counsel urged that if an order of stay of execution is not granted, the Plaintiff will proceed to extract the decree and execute the same. Should the appeal succeed, it will not be able to recover the Decretal amount as the Plaintiff has no means to refund the same neither is the 5<sup>th</sup> Defendant aware of any of its assets for attachment and sale. This will result in a huge financial loss for the 5<sup>th</sup> Defendant without any recourse.
8. Counsel pointed out that bearing in mind that judgment was entered jointly and severally against all the Defendants in this suit, the Applicant, being a religious organization mandated to facilitate healthcare provision to the public, will be significantly affected in its ability to efficiently and effectively carry out its mandate if forced to foot the entire judgment amount when the refund of the amount is not guaranteed, in the event the appeal succeeds. Counsel cited the case of *George Madegwa and Another v Ann Nyariba Gitagia* (Suing as the administrators of the estate of Peter Elizabeth Waitiri (Deceased) eKLR in this regard.
9. On security, counsel submitted that the applicant is willing to deposit a portion of the Decretal amount as security in the sum of Kshs. 1,000,000/= being a fifth of the Decretal sum in a joint interest-bearing account held in the names of the advocates of the Plaintiff and the 5<sup>th</sup> Defendant as directed by the Court and that the Plaintiff shall not suffer any prejudice if the application is allowed. In this regard, he cited the case of *Focin Motorcycle Co. limited v Ann Wambui Wangui & Another* (2018) eKLR.
10. Counsel urged that the applicant has met the conditions necessary for granting orders of stay of execution pending the hearing and determination of the appeal provided under Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010.



## 2<sup>nd</sup> – 5<sup>th</sup> respondents' Submissions

11. Learned counsel for the respondents submitted that the conditions to be fulfilled for stay of execution are provided under Order 42, Rule 6 and Order 22 rule 22(1). Counsel cited the case of Elena Dondol Adoya Korir v Kenyatta University [2012] eKLR where Justice Nzioki wa Makau set out the criteria used to determine grant of stay of execution pending appeal.
12. On whether there is an arguable appeal, counsel cited the case of Kiu & another v Khaemba & 3 others (Civil Appeal (Application) E270 of 2021) [2021] KECA and further submitted that the 2<sup>nd</sup>-5<sup>th</sup> respondents are government entities/personnel dependent on funding by the public. Further, that there is no readily available money in public coffers which may result in substantial loss since the amount has to be budgeted for. Counsel posited that the 1<sup>st</sup> Respondent's means is not known as he has not disclosed nor furnished the court with any affidavit of means to confirm his financial means or status. The decretal sum is a substantial sum and in the event the Respondent is unable to repay it, the Appeal will have been rendered nugatory and the 2<sup>nd</sup> – 5<sup>th</sup> Respondents exposed to irreparable damage. He cited the case of Edward Kamau & Another v Hannah Mukui Gichuki & Another [2015] eKLR in this regard.
13. On security, counsel cited Order 42, Rule 8 and submitted that the Respondents herein are a government entity and are exempt from furnishing security. He additionally cited the case of Zedka Technical Services Limited v County Government of Uasin Gishu & 3 others [2020] eKLR. Further, he urged that should execution of the judgment proceed, the Applicants' Appeal will be rendered nugatory and expose the Applicant and 2<sup>nd</sup> to 5<sup>th</sup> Respondents to irreparable loss and damage, as the Respondent would be incapable of effecting a refund thereof. Counsel urged the court to allow the application as it is in the interest of justice. Additionally, that failure to grant the orders will amount to denying the 2<sup>nd</sup> to 5<sup>th</sup> Respondents the opportunity to exhaust its legal remedies.

## Analysis & Determination

14. The issue that arises for determination are as follows;
  - a. Whether the Application has met the threshold for orders of stay of execution

### Whether the Applicant has met the threshold for orders of stay of execution

15. 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 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.



### **Whether substantial loss may result to the Applicant**

16. Substantial loss was explained in the case of 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.”

17. In the case of G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR, the Court stated as follows:-

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

18. The decretal sum, which comprises of both special damages, is a total of Kshs. 4,220,000/- which is arguably a colossal sum of money. It is plausible that substantial loss could occur if the appeal succeeds and the respondent is unable to refund this sum. This is keeping in mind that the 2<sup>nd</sup> – 5<sup>th</sup> Respondents are government entities.

### **Whether the application was made without unreasonable delay**

19. In Nairobi HCC No. 32 of 2010, Utalii Transport Company Limited & 3 Others v NIC Bank Limited & another [2014] eKLR, the Court in considering what amounted to inordinate delay had this to say;

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable”

20. The impugned judgement was delivered on 23/12/2024 and the present application was filed on 05/02/2025. The application was filed within a month or thereabout of the judgement. It is my considered view that the application was made without unreasonable delay.



## Security

21. The purpose of security was clearly enunciated in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

22. The applicant has raised its apprehension of the ability that the respondent will not be able to refund the decretal sum. The law appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See *Kenya Posts & Telecommunications Corporation v Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001*; *ABN Amro Bank, N.K. v Le Monde Foods Limited Civil Application No. 15 of 2002*.

23. Orders for stay of execution are discretionary in nature. I have considered the pleadings and I note that the 1<sup>st</sup> Respondent failed to respond to the application or submit on the application. I also note that this is a very old matter that has had its fair share of challenges but ultimately it reached its determination.

24. That being said, I find that the applicant has met the threshold for the grant of orders of stay of execution. In the circumstances, I order as follows;

- a. The orders for stay of execution pending appeal are granted on condition that the applicant deposit Kshs. 2,000,000/- in a joint interest earning account in the names of the advocates on record for both parties.
- b. Costs shall abide the outcome of the appeal.

**DELIVERED VIA EMAI AND CTS DATED AND SIGNED AT ELDORET ON THIS 28<sup>TH</sup> DAY OF MAY 2025.**

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**R. NYAKUNDI**

**JUDGE**

