



**Board of Directors, County Government of Kakamega & another v
SO (Suing through His Next of Friend and Grandmother MM) (Civil
Appeal E062 of 2025) [2025] KEHC 9101 (KLR) (24 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E062 OF 2025
S MBUNGI, J
JUNE 24, 2025**

BETWEEN

**BOARD OF DIRECTORS, COUNTY GOVERNMENT OF
KAKAMEGA 1ST APPLICANT**

EXECUTIVE COUNTY GOVERNMENT OF KAKAMEGA 2ND APPLICANT

AND

**SO RESPONDENT
SUING THROUGH HIS NEXT OF FRIEND AND GRANDMOTHER MM**

RULING

1. Before this court is a Notice of Motion dated 21st May 2025, filed by the applicants seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That there be a stay of execution of the Decree of the Honorable Court in Kakamega CMCCC No. 381 of 2015 pending Hearing and final determination of this Appeal.
 - d. That this court allow the Appellant/Applicant to furnish the court with security in form of a bank guarantee from a reputable bank pending the hearing and determination of this Appeal.
 - e. That costs of this application be provided for.
2. The application was premised on the grounds that the Applicants, being dissatisfied with the judgment of the lower court, had lodged an arguable appeal which is not frivolous. They asserted that unless stay is granted, the appeal will be rendered nugatory as the Respondent was in the process of executing the



decreed. They further contended that the judgment sum of Kshs. 18,571,602.00 is colossal and, if paid out, may not be recoverable given the Respondent's limited means. The Applicants also state that the application has been brought without inordinate delay and in good faith, and that they are willing to provide security by way of a bank guarantee.

3. The application was supported by an affidavit of Vivianne Komwonyo, the County Attorney of Kakamega County, who averred that the Applicants had filed an appeal challenging the entire judgment in Kakamega CMCCC No. 381 of 2015, and that the appeal raised serious legal issues warranting consideration by the court.
4. She deponed that the Respondent had already taken steps to execute the judgment by initiating the taxation of the Bill of Costs. She affirmed that the Applicants risk suffering substantial loss if execution proceeds, as the Respondent lacks the capacity to refund the decretal amount if the appeal is successful. She further stated that the Applicants' were ready to furnish a bank guarantee as security, and that the application was filed promptly to safeguard the right of appeal.
5. The application was opposed vide a Replying Affidavit sworn on 12th June 2025 by MM, who stated that the parties named in the appeal differ from those in the original suit, rendering the appeal and application incompetent. She further averred that the judgment related to a child who suffered grievous harm, and that staying execution would be contrary to the best interests of the minor, which must remain paramount in accordance with Article 53(2) of *the Constitution*.
6. The Respondent disputed the allegation of her inability to refund the decretal sum and stated that the Applicants have failed to demonstrate substantial loss. She challenged the sufficiency and clarity of the proposed bank guarantee, noting the absence of critical particulars. The Respondent further stated that the application is intended to delay execution, thereby depriving the minor of urgently needed medical attention, including treatment for complications arising from the amputation and acquisition of a prosthesis. She urged the court to dismiss the application and allow enforcement of the judgment in the interest of justice and the child's welfare.
7. Parties agreed to dispose off the application by way of written submissions.

On record are the applicants' submission dated 19th June 2025 and the respondent's submissions dated 20th June 2025.

Applicants' Case.

8. The applicants submitted that they had satisfied all the conditions for grant of stay of execution as per Order 42 Rule 6(2) of the Civil Procedure Rules: namely, that the application was made without unreasonable delay; that they stood to suffer substantial loss if the decretal sum of Kshs. 18,571,602.00 was paid out before the appeal was heard; and that they were willing to provide adequate security in the form of a bank guarantee.
9. The Applicants contended that the Respondent had not filed any affidavit of means to demonstrate capacity to refund the decretal sum if the appeal succeeded. They relied on the decision in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006], where the Court of Appeal held that once the applicant raises doubt as to the Respondent's ability to refund, the evidential burden shifts to the Respondent.
10. On the issue of security, the Applicants submitted that a bank guarantee from a reputable institution was sufficient and appropriate, citing *G. Nduhiu Gitahi v Warugongo* [1988] KLR 621, where the Court of Appeal held that security may take many adequate forms, including a bank guarantee or payment into court.



11. The Applicants further cited Machakos HCCA No. E034 of 2024 and Lodwar HCCA No. E002 of 2024, where courts granted stay on similar terms, including acceptance of a bank guarantee as adequate security. They maintained that the objective of security is not to fetter the right of appeal but to protect the decree-holder's interests pending appeal.
12. It was their position that the judgment was delivered on 2nd April 2025 and the application filed on 21st May 2025, which was within a reasonable period. The Applicants therefore prayed for the court to allow the application in the interest of justice.

Respondent's Case.

13. The Respondent submitted that while the application was filed without delay, the Applicants had failed to satisfy the other mandatory conditions under Order 42 Rule 6(2) of the Civil Procedure Rules: namely, demonstration of substantial loss and provision of security.
14. On substantial loss, the Respondent argued that the Applicants merely alleged her inability to refund the decretal sum without any evidence, while overlooking the special circumstances of the case, specifically, that the decree relates to a minor who suffered severe injuries and urgently requires a prosthetic arm and medical care. She maintained that this justified immediate enforcement of the judgment.
15. The Respondent emphasized that the Applicants had not demonstrated how they would suffer substantial loss. She cited Machira t/a Machira & Co. Advocates v East African Standard (No. 2) [2002] KLR 63, asserting that a successful litigant should not be denied the fruits of their judgment in the absence of sufficient cause. She further submitted that the Applicants' failure to participate in the trial or challenge the special damages awarded undermined the equity of granting them a discretionary remedy.
16. On security, the Respondent contended that the Applicants' proposal to furnish a bank guarantee was vague and unsupported by particulars such as the amount, issuing bank, terms, or duration. She relied on Gianfranco Manenthi & Another v Africa Merchant Assurance Co. Ltd [2019] eKLR, to argue that the obligation to provide security is a binding condition and not a matter of mere willingness.
17. She further cited Arun C. Sharma v Ashana Raikundalia & 2 Others [2014] eKLR, reiterating that security serves to guarantee due performance of the decree in the event the appeal fails, and without it, there was no assurance that her interests would be protected.
18. She prayed for the court to dismiss the application. In the alternative, should the court be inclined to grant stay, she prayed that half the decretal sum (Kshs. 9,285,801.00) be released to her to cater for the minor's immediate medical needs, and that the balance be secured by a bank guarantee from a reputable commercial bank.

Analysis and Determination.

19. I have considered the application, the affidavits and rival submissions by counsels for the parties.
20. The main issue for determination is whether this court should issue stay of execution pending the hearing and determination of the appeal to the applicant.
21. Order 42 rule 6 of the Civil Procedure Rules states as follows: -
Stay in case of appeal [Order 42, rule 6.]



- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) 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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
22. The power of a court to grant stay of execution is discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision. (see *Butt v Rent Restriction Tribunal* [1979]).
23. On the issue of delay, it is not contested that the judgment was delivered on 2nd April 2025 and the present application was filed on 21st May 2025. I find that the application was made timeously and within a reasonable period. This satisfies the first limb of the rule.
24. Secondly, the applicant has stated that it stands to suffer loss if the orders sought are not granted, the loss to be suffered must be demonstrated. In the case of *Good News Church of Africa v Board of Management Eldoret Secondary School* [2021] eKLR the court stated as follows -:
- “Substantial loss is a key consideration in an application for stay of execution and stay of proceedings. The applicant must establish the loss which he/she will suffer if such orders are not granted.”
25. The applicants contend that the decretal sum of Kshs. 18,571,602.00 is colossal and, if paid out prior to determination of the appeal, it would not be recoverable in the event the appeal succeeds. They assert that the respondent lacks demonstrable means to refund the sum. The respondent disputes this, claiming the applicants failed to provide evidence of her inability to repay and that the application is



intended to delay the minor's access to medical care. However, the burden placed on the applicants is not to prove actual insolvency but to raise reasonable doubt as to the ability of the respondent to refund. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR, the Court of Appeal held that once the applicant expresses reasonable concern about refund, the burden shifts to the respondent to rebut the same.

26. In the present case, no affidavit of means was filed by the respondent. The respondent instead shifted focus to the child's needs, emphasizing the constitutional imperative under Article 53(2) to prioritize the best interests of the minor. While the court takes these considerations seriously, it is also mindful that the appeal raises arguable points and that execution prior to its hearing may render it nugatory.
27. On the issue of security, the Applicants have indicated their willingness to provide a bank guarantee from a reputable institution. However, they have not furnished details of such security, including the value, issuing bank, or terms of the guarantee. While the willingness to offer security is noted, it is incumbent on the applicant to present the security in a manner that assures the court of the protection of the respondent's interests in the event the appeal fails.
28. Courts have largely accepted bank guarantees as an acceptable mode of furnishing security. In the cases of *Justin Mutunga David vs China Road & Bridge Corporation (K) Limited* [2019] eKLR, *National Bank of Kenya Limited v Rachuonyo & Rachuonyo Advocates* [2021] eKLR, *Charles Wesonga Mbingi v Commissioner of Investigations and Enforcement* [2021] eKLR and *Mbukoni Services Limited & another v Mutinda Reuben Nzili & 2 others* [2021] eKLR the courts allowed the applicants to give bank guarantees to cover the whole or part of the decretal sum. I therefore find that a bank guarantee would also be sufficient security in this case.
29. I note that the appellants, in their memorandum of appeal, have not challenged liability but only the quantum of the damages awarded by the trial court. Consequently, there is no dispute that the respondent is entitled to some portion of the decretal sum.
30. This court is alive to the fact that the Respondent is a minor who has undergone amputation and has been awarded damages by the trial court to facilitate rehabilitation, medical care, and acquisition of a prosthetic arm. Article 53(2) of *the Constitution* of Kenya enjoins this court to consider the best interests of the child as of paramount importance in all matters affecting children. It is the view of this court that while the right of appeal must be preserved, it must be balanced against the right of the minor to immediate medical support and rehabilitation. In these circumstances, the court is persuaded that the respondent is deserving of partial access to the judgment sum, particularly to meet the minor's urgent medical needs.
31. The above analysis makes me find that the applicant has made out a case to warrant this court to exercise its discretion in its favor. And I will allow the prayer for stay of execution in following terms: -
 - I. That an order of stay of execution in a judgment /decree issued in Kakamega CMCC No. 381 of 2015 is hereby granted pending the hearing and determination of this Appeal on condition that the Applicant pay a half (1/2) of the decretal amount and provide a bank guarantee to the balance of the decretal amount which bank guarantee will be specific to this appeal and shall be valid for the entire duration of the appeal.
 - II. The Applicant shall have 14 days within which to comply with order (I) above and in default the order staying execution of the decree shall lapse and the respondent shall be a liberty to execute.
 - III. Mention on 3.9.2025 for further directions on the appeal.



IV. The costs of this Application shall be in cause.

32. Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF JUNE, 2025

S.N MBUNGI.

JUDGE.

In the presence of :

Court Assistant – Elizabeth Angong'a

Ms Kadenyi for the Respondent, present online.

Ms Munihi for the Applicant present online.

