



REPUBLIC OF KENYA



KENYA LAW
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**Kabinga v Meroka (Civil Appeal E928 of 2024)
[2025] KEHC 11756 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11756 (KLR)

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

CIVIL

CIVIL APPEAL E928 OF 2024

LP KASSAN, J

JULY 31, 2025

BETWEEN

MARTIN NGUGI KABINGA APPELLANT

AND

MUSTAPHER ONDERI MEROKA RESPONDENT

RULING

1. Before this court is the Appellant’s Application dated 13.08.2024 brought under sections 1A, and 1B of the *Civil Procedure Act*, Order 42 Rule 6 (2), Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking orders to wit:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That there be a stay of execution of the judgment/decree herein delivered on 19th July 2024 pending the hearing and determination of the substantive Appeal.
 - e. The Court be pleased to make such other further order as may be just and expedient in the circumstances to meet the overriding objectives.

Background

2. The application was supported by grounds that the Appellant/Applicant had filed an appeal against the Chief Magistrate’s Court judgment, which was delivered on 19th July 2024, in which the decretal sum awarded was Kshs. 4,585,050.00, along with costs and interest. It was argued that the decree holder, being a natural person with unknown financial means, could cause substantial and



unrecoverable loss if the decretal sum was paid and the Applicant later succeeded in their appeal. Conversely, the Applicant, as an insurance company had branches across Kenya, would be capable of paying the ordered sums if they did not succeed in the appeal. As additional security, the Applicant offered to remit the sum for deposit into an interest-bearing account in the joint names of their advocates and the decree holder's advocates, if the court deemed it appropriate. It was further asserted that granting the application would serve the ends of justice by allowing the Applicant an ample opportunity to exercise their right of appeal and would prevent hardship for the Applicant.

3. The Respondent's replying affidavit detailed their opposition to the Applicant's request. The Respondent was aware that initial prayers in the application were spent, leaving a specific prayer for the court's determination. It was contended that the application for a stay of execution mandated the provision of security as per civil procedure rules, unless the court ordered otherwise. While acknowledging the Applicant's offer to deposit the decretal amount into a joint account, the Respondent highlighted that the Applicant had previously deposited less than a third of the sum, which had been opposed, as it restricted the court's ability to issue directions. A key argument was that the application was unsustainable because the applicant, Martin Ngugi Kabinga, falsely claimed to be an insurance company with national branches, when in fact he was a natural person. Furthermore, the affidavit supporting the application was made by Beatrice Muriithi, who was not a party to the proceedings, lacked the standing to make depositions, and had not provided a valid power of attorney or authorization from the purported insurance company. The respondent asserted that the applicant should not dictate the amount of security, as this was solely for the court to decide, and cited legal precedents suggesting that half of the decretal sum should be paid to the decree holder and the other half placed in an interest-bearing account, or alternatively, the full amount should be deposited in court or an interest-earning account.
4. The supplementary affidavit, sworn by Beatrice Muriithi, a Legal Officer at Jubilee Allianz General Insurance Company Limited, affirmed that she was authorized to make the deposition. She had reviewed the Respondent's replying affidavit. The affidavit emphasized that the court should exercise its discretion in granting a stay of execution pending appeal, guided by legal precedent, and should balance the Appellant's right to pursue their appeal with the decree holder's entitlement to the judgment. It was asserted that the conditions for granting a stay were well-established and that the applicant, Jubilee Allianz General Insurance Company Limited, was bound by an insurance policy relevant to the case, which provided the legal standing to address the disputed issues. The deponent confirmed specific averments in the original application while disputing others in the replying affidavit, ultimately swearing the supplementary affidavit to support the application for a stay of execution in the interest of justice.

Issues for determination:

- a. Whether the judgment/decreet delivered on 19th July 2024 should be stayed pending hearing and determination of the Appeal?
- b. Who should bear the costs?

Applicant's submissions

5. The appellant's written submissions argued for a stay of execution pending appeal against a Chief Magistrate's Court judgment that had awarded the respondent Kshs. 4,500,000/- as general damages. The appellant contended that their appeal was arguable, citing several alleged errors by the trial magistrate, including wrongly attributing 100% liability, awarding excessive damages, and issues concerning the authenticity of the respondent's claim and the application of legal principles regarding



expert witnesses. A central argument was that if a stay was not granted, the appeal would be rendered nugatory, leading to irreparable loss, because the respondent, as a natural person, had unknown financial means and might be unable to refund the substantial decretal sum should the appeal succeed. In contrast, the appellant, an insurance company with a broad presence, was capable of paying if the appeal did not succeed. To demonstrate commitment, the appellant offered to deposit a portion of the decretal sum into a joint interest-bearing account. They emphasized that granting the stay was necessary to serve justice by allowing them to exercise their right of appeal and to prevent undue hardship, further asserting that the application was filed without unreasonable delay.

6. The appellant's further written submissions reiterated their request for a stay of execution pending an appeal against a Chief Magistrate's Court judgment that awarded the respondent Kshs. 4,500,000/-. The appellant argued that the trial court made several errors, including incorrectly attributing 100% liability, awarding excessive damages, failing to properly consider the authenticity of the respondent's claim, and misapplying legal principles concerning expert witnesses, all of which indicate that the appeal is arguable. They emphasized that without a stay, the appeal would be rendered nugatory, resulting in substantial and irrecoverable loss to them because the respondent, a natural person, has unknown financial means and may be unable to refund the large decretal sum if the appeal succeeds. Conversely, the appellant, an insurance company, is fully capable of paying if the appeal fails. They asserted that the court has the discretionary power to grant a stay to preserve the subject matter of the appeal, allow the appellant to exercise their right of appeal without prejudice, and prevent undue hardship, stressing that the application was filed promptly and that the balance of justice tilts in their favour.

Respondent's submissions

7. The respondent's written submissions primarily opposed the appellant's application for a stay of execution, noting that several initial prayers were already spent, leaving only the request for a stay pending the substantive appeal. Three main issues were raised for the court's consideration: the requirement for security, the locus standi of the deponent of the appellant's supporting affidavit, and the court's power to summarily reject the appeal. On the matter of security, it was emphasized that civil procedure rules mandated its provision for a stay, and while the appellant had conceded to depositing security, their counsel was seen to be attempting to dictate the amount, which was asserted to be a prerogative solely for the court. The respondent suggested that based on recent judicial precedents, either half of the significant decretal sum should be released to the respondent, given their severe injuries and need, with the other half deposited in a joint interest-earning account, or the entire sum should be deposited in court or a joint account. Concerning the deponent, Beatrice Muriithi, it was argued that she was a stranger to the proceedings, lacked proper standing, and had not produced any authorization, rendering her supporting affidavit defective and a basis for the application's dismissal. Finally, the respondent urged the court to summarily reject the appeal, contending that the appellant's grounds, including challenges to liability, the awarded damages, and the authenticity of the claim, were trivial and provided no sufficient reason to interfere with the subordinate court's judgment.

Analysis and Determination

8. The issue as to whether there ought to be stay of execution of the judgment/decreed delivered on 19th July 2024 pending the hearing and determination of the appeal are based upon principles in which such a prayer can be allowed are now well settled from the authorities from this court and from the superior courts. See *Halai & Another. -Vs- Thornton & Turpin (1963) Ltd [1990] eKLR*, *Butt-vs-Rent Restriction Tribunal p1982] KLR 417*.



9. Generally, a stay of execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 which provides:

“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.”
10. For orders of stay of execution to be granted, the Applicant must satisfy the conditions to wit that substantial loss may result to the Applicant unless the order is made; that the application has been made without undue delay; and that 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 See *Amal Hauliers Limited-vs-Abdulnasi Abukar Hassan* (2017) eKLR.
11. The court ought to fairly take into account the interests of the Respondent, who has been deprived of the benefits of his judgment, in addition to the Appellant's right to ventilate their case, which the court should not be quick to deny. See *Kenya Shell Ltd. v. Kibiru & others* (Supreme); *Attorney General v. Halal Meat Produces Limited*, Civil Application No. Nairobi 270 of 2008; and *Mukuma v. Abuoga* (1988) KLR 645.
12. Where the Applicant is successful, he or she shouldn't be in a position where he or she can't obtain their money back. Additionally, if the Applicant ultimately fails in his intended appeal, the Respondent who has a decision in his favour shouldn't find it difficult or impossible to enforce the decree. This is the guarantee security of costs gives to parties. See *Nduhiu Gitahi & Ano.-vs-Anna Wambui Warugongo* (1988) 2 KLR 100.
13. On the limb of substantial loss, the Applicant asserts that they will suffer irreparable loss if execution proceeds. However, no specific loss has been demonstrated beyond the general assertion that the appeal will be rendered nugatory. The burden of proving substantial loss lies with the Applicant. See *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR. In the present case, the Applicant has not provided evidence to substantiate this fear or show the Respondent's inability to refund the decretal sum.
14. On the limb of delay, the application was filed on 13.08.2024, shortly after the judgment/decree. There is no delay attributable to the Applicant. This condition is satisfied.
15. On the limb of security, the Applicant has expressed willingness to provide security. However, the nature and extent of such security is not defined. In the case of *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR, a mere statement of willingness is not enough. The court must be satisfied that the security offered is reasonable.
16. Lastly, on the limb of arguable appeal, an arguable appeal need not be one that will necessarily succeed but must raise bona fide points. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR. The memorandum of appeal dated 12.08.2024 a perusal of the same shows there are triable issues.
17. Taking all relevant factors into consideration, I do order that;
 - i. The Applicant will deposit the decretal sum of Kshs 4,585,050/= into an interest earning account in the joint names of the parties' advocates within 45 days from this Ruling date.
 - ii. In default of any of these conditions, the Respondent shall be at liberty to execute.



iii. The costs of this Application will be in the cause.

18. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2025.

LINUS P. KASSAN

JUDGE

In the presence of:-

No appearance for Appellant

No appearance for Respondent

Carol - Court Assistant

