



**Shadrack & Sons Limited v Lengeny & another (Suing as the Administrators
of the Estate of the Late Amos Lemaiyan Lengeny) (Civil Appeal
E009 of 2025) [2025] KEHC 11778 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11778 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E009 OF 2025
CM KARIUKI, J
JULY 31, 2025**

BETWEEN

SHADRACK & SONS LIMITED APPELLANT

AND

LEINSANKA OLE LENGENY 1ST RESPONDENT

SYLVIA LENGENY 2ND RESPONDENT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE AMOS
LEMAIYAN LENGENY**

RULING

1. The Appellant/Applicant filed a Notice of Motion dated 1st April 2025 under Order 42 Rule 6(1) of the Civil Procedure Rules, and Sections 1A, 1B, and 3A of the [Civil Procedure Act](#), seeking the following substantive orders:
 1. Spent.
 2. Spent.
 3. That the Honourable court be pleased to issue an order staying the execution of the judgment and Decree in Narok CMCC No. E114 of 2023 Sylvia Lengeny & Anor (Suing as the administrators of the Estate of the Late Amos Lemaiyan Lengeny) VS Shadrack & Sons Ltd pending the hearing and determination of the Appeal.
 4. That the costs of this application abide the outcome of the suit.
2. The application is supported by the affidavit of Peter Kamau, a Legal Officer at Britam General Insurance Company Ltd, sworn on 1st April 2025.



3. The application is based on the following grounds: There is no stay of execution currently in force, and execution of the judgment may occur at any time; The Applicant has lodged an appeal against the judgment/decreet delivered on 26th February 2025 in Narok CMCC No. E114 of 2023; From the Respondent's own testimony, it is evident that the Respondent is not in a financial position to refund the decretal sum should the appeal succeed; The appeal has high chances of success; and It is in the interests of justice that the stay orders sought be granted to avoid rendering the appeal nugatory.

The response

4. The Respondent, Leisanka Ole Lengeny, filed a Replying Affidavit sworn on 20th April 2025, opposing the Applicant's motion for stay of execution. The main grounds raised are as follows:
 - a. The application is premised on baseless arguments that do not meet the requirements under Order 42 Rule 6 of the Civil Procedure Rules, 2010.
 - b. The application is fatally defective as it is supported by an affidavit sworn by Peter Makau, a non-party to the proceedings.
 - c. The appeal is an afterthought, intended solely to delay satisfaction of the judgment and deny the Respondents the fruits of their lawfully obtained decree.
 - d. It is a settled principle that a successful litigant is entitled to enjoy the benefits of a judgment rendered in their favour without undue delay.
 - e. The application fails to meet the mandatory conditions under Order 42 Rule 6(2):
 - f. No demonstration of substantial loss.
 - g. Unexplained delay in bringing the application (over 30 days since judgment on 26/02/2025).
 - h. No offer or proposal of security for due performance of the decree.
 1. The Applicant has merely moved the court due to impending execution, not due to any bona fide apprehension of prejudice or hardship.
 2. The Respondent has the means to refund any decretal sums that may be offset if the appeal succeeds, and the Applicant's claims to the contrary are speculative and unsupported by evidence.
 3. The appeal only challenges the quantum of damages, not liability, and thus does not warrant a blanket stay of the entire judgment sum.
 4. In such circumstances, the equitable approach, as established by practice, is for the Applicant to pay half of the decretal sum and deposit the balance in a joint interest-earning account in the names of Counsel for both parties.
 5. The Respondent urges the court that if the application is to be allowed at all, it should be on condition that: The Applicant pays half of the decretal sum, plus costs and auctioneer's fees incurred so far; The balance be deposited in a joint interest-earning account.

Directions of the court

5. Upon perusal of the application on 2nd April 2025, the Court certified the application as urgent and issued interim directions as follows: That half of the decretal amount be deposited with the



Respondent's advocate within thirty (30) days from the date of the order; The said deposit to operate as a condition for stay of execution of the decree of the trial court.

6. The application was thereafter canvassed by way of written submissions filed by both parties.

The Applicant's Submissions

7. The Applicant submitted that they have demonstrated substantial loss within the meaning of Order 42 Rule 6(2) of the Civil Procedure Rules. It was argued that if the decretal amount is paid out and the appeal succeeds, the Respondents are unlikely to refund the sum, thereby rendering the appeal nugatory. The Respondents have not provided any material evidence of their financial ability to reconstitute the judgment amount in the event of a successful appeal. The Applicant relied on *G.N. Muema P/A Mt View Maternity & Nursing Home v Miriam Maalim Bishar & Another* [2018] eKLR and *Firoze Nurale Hirji v Housing Finance Co. of Kenya Ltd & Watts Enterprises Ltd, Nairobi HCCC No. 226 of 2003*.
8. On the issue of delay, the Applicant argued that the application was filed timeously. Judgment was delivered on 26th February 2025, and the Memorandum of Appeal (Narok HCCA No. E009 of 2025) was filed on 1st April 2025, within the prescribed 30-day period. The Applicant emphasized that the application was filed before any execution steps were undertaken. Reliance was placed on *Charles Nyamwega v Asha Njeri Kimata & Another* [2017] eKLR.
9. On the requirement of security, the Applicant submitted that they have offered security for the due performance of the decree as a sign of good faith, and they are ready and willing to comply with any terms imposed by the Court. They reiterated that the appeal only challenges the quantum of damage and does not raise issues of liability. They cited *Firoze Nurale Hirji* (supra).
10. The Applicant further argued that the appeal raises arguable points, both factual and legal. Although an arguable appeal is not the sole criterion for stay, it supports the Applicant's position that the appeal deserves to be heard without being rendered nugatory. The Applicant relied on *Total Kenya Ltd v Kenya Revenue Authority* [2013] eKLR and *Bake "N" Bite (NRB) Ltd v Daniel Mutisya Mwalonzi, Nairobi HCCA No. 411 of 2014*.
11. The Applicant maintained that the application was brought in good faith and that no prejudice would be suffered by the Respondents if the orders sought were granted. The goal of the application is to preserve the substratum of the appeal and uphold justice for all parties.
12. In conclusion, the Applicant urged the Court to find that all the conditions under Order 42 Rule 6(2) of the Civil Procedure Rules had been satisfied and prayed that the Notice of Motion dated 1st April 2025 be allowed as prayed, with a stay of execution granted pending the determination of Narok HCCA No. E009 of 2025.

The respondent's submissions.

13. The Respondent opposed the Applicant's Notice of Motion dated 01/04/2025, terming it fatally defective, incompetent in law, and incapable of granting the reliefs sought. The primary objection was that the supporting affidavit was sworn by Peter Makau, a person who is neither a party to the suit nor properly authorized under the Civil Procedure Rules. The Respondent emphasized that the insurer has no standing in the matter.
14. The Respondent submitted that the matter arises from a cause of action that is over two years old, and the Applicant's liability has already been finally adjudicated, both on liability and quantum. Execution is therefore proper, and the Applicant has not demonstrated any risk of suffering loss if execution



- proceeds. The allegation that the Respondent cannot refund the decretal sum was termed absurd and unsubstantiated.
15. Should the Court be inclined to allow the application, the Respondent urged the Court to order that the Applicant pay half of the decretal sum and deposit the remainder in a joint interest-earning account in the name of Counsel for both parties.
 16. The Respondent reiterated that the affidavit by Peter Makau is inadmissible and renders the application defective, since no authority to swear on behalf of the Applicant was filed as required under Order 1 Rule 13(2) and Order 51 Rule 4 of the Civil Procedure Rules. The Respondent cited *Moiyo Mataiya Ole Keiwua v Chief Justice of Kenya & 6 Others* [2008] eKLR, *P.M.M. Private Safaris v Kevin Ijatia* [2006] eKLR, and *David Gichiri & 3 Others v Emmah Kerubo Sese* [2021] eKLR.
 17. The failure to file proper authority or evidence of authorization, the Respondent argued, invalidates the affidavit and the entire application.
 18. The Respondent accordingly prayed for the dismissal of the application with costs.
 19. The Respondent emphasized that the appeal only contests quantum and is unlikely to result in a complete waiver of the decretal sum. The Court should not, therefore, grant a blanket stay of execution. The Respondent cited *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and Order 42 Rule 6 of the Civil Procedure Rules.
 20. It was submitted that the decree is competently issued, and any effort to qualify or limit its execution undermines the finality of trial court proceedings. The Respondent relied on *Joseph Gachie t/a Joska Metal Works v Simon Ndeti Muema*.
 21. The Applicant had not provided any evidence of the loss they claim to risk suffering if execution proceeds.
 22. Even if the appeal succeeds, the likelihood of variation beyond 50% is remote, and thus, half payment with security for the rest is equitable. Reference was made to *Elijah Njagi & Another v Yvonne Ndunge* [2021] eKLR.
 23. The Respondent emphasized that since liability is not in issue, they are entitled to enjoy the fruits of their judgment, to the extent that it does not undermine the substratum of appeal.
 24. On the issue of security, the Respondent acknowledged that it lies within the Court's discretion under Order 42 Rule 6(2)(b). The appropriate form of security, it was submitted, is a cash deposit into a joint interest-earning account, and not other speculative facilities. They relied on *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR.
 25. The Respondent concluded by urging the Court to direct that the Applicant settle half of the warrant sum plus costs and auctioneer's charges and deposit the remainder in a joint interest-earning account.

Analysis and Determination.

26. This Court has considered the pleadings, the affidavits in support and in opposition, as well as the rival submissions filed by both parties. The Court has also considered the relevant legal authorities and the applicable provisions of the Civil Procedure Rules, 2010, in determining the issues raised in the application.

Issues for determination

27. Flowing from the foregoing, the main issues that emerge for determination are.



- i. Whether the Application is incompetent for being supported by an affidavit sworn by a person who is not a party to the proceedings.
 - ii. Whether the Applicant has satisfied the conditions for grant of stay of execution pending appeal as set out under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, namely:
 - a) Whether the Applicant has demonstrated that they stand to suffer substantial loss if stay is not granted.
 - b) Whether the application was made without unreasonable delay; and
 - c) Whether the Applicant has provided or offered adequate security for the due performance of the decree.
 - iii. Whether the Appeal raises arguable grounds sufficient to warrant stay of execution.
 - iv. Whether a conditional stay should be granted, and if so, on what terms.
28. The Applicant seeks stay of execution of the judgment and decree issued in Narok CMCC No. E114 of 2023, pending the hearing and determination of Narok HCCA No. E009 of 2025, citing imminent execution and potential substantial loss. The application is contested by the Respondent, who argues that the application is defective and unmeritorious.
29. The Court is guided by Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, which sets out three cumulative conditions for the grant of stay of execution pending appeal:
- “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 the decree or order as may ultimately be binding on him has been given by the applicant.

Whether the Application is Defective Due to the Affidavit by a Non-Party

30. The Respondent has strongly contested the competency of the application, arguing that it is supported by an affidavit sworn by Peter Makau, a legal officer of the Applicant’s insurer, who is a stranger to the proceedings. The Respondent asserts non-compliance with Order 1 Rule 13(2) and Order 51 Rule 4, as no authority from the Applicant to the said deponent was annexed.
31. While it is true that affidavits must be deposed by parties or authorized representatives, this Court takes judicial notice of the common practice where insurers, particularly in motor accident claims, conduct litigation through their legal officers. That said, failure to attach express authority may be a technical defect, but not necessarily fatal, where the deponent discloses his role, and no prejudice is demonstrated. The Court finds this objection technical and curable, and not one that goes to the root of the application.

Whether Substantial Loss Has Been Demonstrated

32. The cornerstone of stay pending appeal is whether the applicant risks substantial loss if the stay is denied. The Applicant contends that the Respondents are unlikely to refund the decretal sum if the appeal succeeds, and therefore, the appeal would be rendered nugatory.



33. The Respondent asserts, to the contrary, that they are persons of means and willing to refund, though no tangible proof of financial capability has been presented to support this assertion. It is settled law that mere assurance without supporting material is insufficient to discharge the evidentiary burden.
34. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court held that:
- “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.”
35. In this regard, the Court is satisfied that substantial loss has been established.

Whether the Application Was Filed Without Delay

36. The judgment was delivered on 26th February 2025, and the application was filed on 1st April 2025—within thirty-three days. Although not strictly within the 30 days for appeal, the Respondent has not demonstrated that the delay—if any—is inordinate or prejudicial. Furthermore, the Memorandum of Appeal was filed concurrently with the application. This ground is thus satisfied.

Whether the Applicant Has Offered Security

37. The Applicant has expressed willingness to furnish security, and the Court had earlier directed that half of the decretal amount be deposited with the Respondent’s advocate. The Applicant has not disputed this condition.
38. The Court is guided by *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR, where it was held that:
- “Security must be one which serves the purpose for which it is intended: to guarantee the due performance of the decree.”
39. Given the nature of the claim—a monetary decree—the most practical and enforceable form of security remains cash deposit.

Conclusion and orders

40. Having considered the application, the response, the rival submissions, and applicable legal principles, this Court finds that:
- i. The application meets the threshold under Order 42 Rule 6(2);
 - ii. However, in the interest of balancing the right of appeal against the Respondent’s right to enjoy the fruits of judgment, a conditional stay is appropriate.
41. A stay of execution of the judgment and decree in Narok CMCC No. E114 of 2023 is hereby granted pending the hearing and determination of Narok HCCA No. E009 of 2025.
42. The stay is conditional upon the Applicant:
- i. Paying half of the decretal sum to the Respondent within 30 days;
 - ii. Depositing the remaining half in a joint interest-earning account in the names of the advocates for both parties within the same 30 days.



43. In default of compliance with any of the above conditions, the stay shall lapse automatically without further reference to this Court.
44. Costs of the application shall abide by the outcome of the appeal.
45. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
31ST DAY OF JULY 2025**

CHARLES KARIUKI

JUDGE

