



REPUBLIC OF KENYA



**Mbugua & 2 others v Esemek alias Emmaculate A. Esemek (Civil Appeal E004 of 2025) [2025] KEHC 11454 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11454 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CIVIL APPEAL E004 OF 2025  
RPV WENDOH, J  
JULY 30, 2025**

**BETWEEN**

**SIMON MBUGUA ..... 1<sup>ST</sup> APPELLANT  
WILLIAM THUNGU MBUGUA ..... 2<sup>ND</sup> APPELLANT  
ELDOROT EXPRESS LIMITED ..... 3<sup>RD</sup> APPELLANT**

**AND**

**IMMACULATE A. ESEMEK ALIAS EMMACULATE A.  
ESEMEKE ..... RESPONDENT**

**RULING**

1. The applicants, Simon Mbugua, William Thungu Mbugua and Eldoret Express Limited (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants) have filed the Notice of Motion dated 15/5/2025 against the Respondent Immaculate A. Esemek alias Emmaculate A. Esemek seeking the following orders.
  1. spent
  2. spent
  3. That the court be pleased to grant an order of stay of execution of the Judgment delivered on 29/4/2025
2. In Kapenguria CMCC.019 of 2024, Immaculate A. Esemek -V- Simon Mbugua & others, pending the hearing and determination of the appeal herein, being Kapenguria HCA E.004 of 2025.
3. The background to this motion is that the Respondent had sued the applicants for general and special damages for injuries that she sustained in a traffic accident involving her and the Respondents motor vehicle.



4. The trial court found in favour of the Respondent by awarding the Respondent damages on 29/4/2025. The applicants are aggrieved by the said Judgment and have preferred an appeal.
5. The application is supported by grounds found in the body of the application and the affidavit of the 1<sup>st</sup> applicant who deponed that he has been advised by his counsel that if an order of stay is not granted, the respondent is likely to proceed with execution and the applicants stand to suffer irreparable loss; that the appeal raises triable issues; that the entire decretal sum should be secured in a joint account deposit because liability is disputed; that if any part of the sum is paid to the Respondent, it will be alienated and put beyond the applicants' reach; that in the event the appeal succeeds, the applicants may not be able to recover the sum from the Respondent; that the appeal would therefore be rendered nugatory if the order of stay is not granted. He further deponed that the application has been brought promptly and without unreasonable delay; that it is brought in good faith and the Respondent will not suffer any prejudice.
6. In opposing the application, the Respondent's Counsel, Mwinamo Lugonzo Advocates, filed grounds of opposition to the effect that the application offends the provisions of Order 42 Rule 6 CPR; that the substantial loss to be suffered by the applicants has not been demonstrated; that the affidavit in support of the application is defective and that without prejudice to the above grounds, as a precondition of stay, half the decretal sum be paid to the Respondent and half be deposited in an interest earning account as security.
7. Both Counsel filed submissions.

**Applicant's submissions:**

8. The applicants Counsel, Kairu and McCourt, submitted that for an order of stay to be granted, the conditions to be satisfied are set out under Order 42 Rule 6 of the Civil Procedure Rules which are:
  1. That the court ought to be satisfied that substantial loss may result to the applicant unless the order of stay is granted;
  2. That the application seeking stay has been made without unreasonable delay;
  3. That the applicant is ready and willing to offer such security as the court may determine for the due performance of the decree.
9. Whether the application was made without unreasonable delay, Counsel submitted that Judgment was delivered on 29/4/2025, the Memorandum of Appeal lodged on 10/5/2025 and this application was filed on 16/5/2025 which was within reasonable time. Counsel relied on the use of *Bihija Ali Sempa & Another -V- Bakari Mohammed Motte (2014) eKLR* where Judge Odero found that an application which was filed within thirty-five (35) days after delivery of Judgment was filed timeously.
10. On substantial loss, the Counsel relied on the decision of *James Wangalwa & Another -V- Agnes Naliaka Wasike (2012) eKLR* where the court held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. Counsel also relied on the decision of *Century Oil Trading company Ltd -V- Kenya Shell Ltd NRB. (2008) eKLR* where the court held inter alia, that where it appears that the Respondent may not be able to refund the decretal sum in the event that the applicant is successful in his appeal, the substantial loss will be suffered by the applicants; that the applicants have expressed their concerns that the Respondent will be unable to refund the decretal sum if the appeal succeeds hence the Respondent was under an obligation to prove that if the decretal sum is paid to her, she would be in a position to refund it. Counsel also relied on *National Industrial Credit Bank Ltd – v – Aquinas Francis Wasike & Another (UR) CA 238/2005*



which was cited in Victor Ogola -V- Mary Waithe Kihui (2021) eKLR; that the Respondent has failed to file an affidavit of means to demonstrate that she is able to refund the decretal sum if paid to her in the event the appeal succeeds.

11. It was also submitted that the Respondent did not file any affidavit in reply to the applicants' averments that the Respondent has not demonstrated her means. Counsel also relied on the case of Musteno Rocco -V- Aniello Sterelli (2019) eKLR where the respondent failed to file a replying affidavit and it was held that the applicant had proved that they will suffer substantial loss.
12. On security it was submitted that the applicants have proposed to furnish the court with a joint bank deposit in the names of both Counsel on record for the whole decretal sum; that the offer for security is a demonstration of good faith on the part of the applicants and relied on the case of Focin Motorcycle Co., Ltd -V- Ann Wambui Wangui (2018) e KLR.

**Respondent's submissions: -**

13. The Respondent's Counsel submitted that the applicants have not demonstrated that substantial loss will be suffered by them because the decretal sum will be paid by the Insurance Company which defended the suit and it is them that will settle the decretal sum. Counsel also submitted that the appeal is basically on quantum and therefore the court should exercise its discretion and order half the decretal sum to be paid to the Respondents.
14. The Respondent also submitted that the applicant's financial ability is unknown as it is in public knowledge that Directline Assurance Company Limited has wrangles and there would be no security if the company is wound up.
15. I have considered the application, grounds of opposition, the submissions by both Counsel.
16. Orders of stay pending Appeal are governed by Order 47 Rule (6) (1) and (2) of the Civil Procedure Rules which set out the conditions to be met by an applicant before an order of stay can be granted. The conditions are;
  1. That substantial loss may result to the applicant unless an order of stay is granted;
  2. That the application has been made without unreasonable delay;
  3. That the applicant is willing to provide security for the due performance of the decree.

**Substantial loss:-**

17. It is the applicant's case that they will not be able to recover the decretal sum if the same is paid to the Respondent; that the applicant will suffer substantial loss in the event the appeal succeeds because the Respondent may not be able to repay the decretal sum and that the Respondent has not demonstrated that she is a person of means and able to repay the applicants.
18. In the case of Silverstein – V- Atsango Chesoni (2002)1KLR 867, the court said “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”.
19. The above case was cited in James Wangalwa & Another Case (Supra) where the court observed as follows: -

“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.

20. In the appellants' affidavit in support of the application, the deponent was apprehensive that if the decretal sum is paid to the Respondent, the applicants may not get it back in case the appeal succeeds. Once the applicant expressed that apprehension, the courts have held that the Respondent had a duty to demonstrate that she is a person of means and able to repay. In *National Industrial Credit Bank (K) Ltd (Supra)* the court said: -

“This court has said before, and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”.

21. In *Victor Ogola Case (Supra)* the court went further to state that in fact the Respondent should have filed an affidavit of means to demonstrate her ability to repay. In this case, the Respondent did not file any replying affidavit to respond to the averments of the applicant. Instead, the applicant only filed grounds of opposition which is not evidential. I find that the applicant has demonstrated that they stand to suffer substantial loss if the decretal sum is paid to the Respondent.
22. The respondent's Counsel submitted that half the decretal sum should be paid to Respondent because liability is not in issue. I have had a glimpse at the memorandum of appeal and to the contrary, liability is contested.

**Whether the application was filed without unreasonable delay: -**

23. The impugned Judgment was delivered on 29/4/2025. The Memorandum of appeal dated 10/5/2025 was filed in court on 12/5/2025 and this application under consideration was filed on 18/5/2025. Justice Mwera in *Mbogo Gatuku -V- A.G HC 1983/1990* held that “even a delay of a day or two calls for an explanation.”
24. Whether or not there has been unreasonable delay depends on the circumstances of each case. In this case however, there was no delay at all. The applicant moved with alacrity to file the appeal and application which demonstrates that the applicants are keen on challenging the said judgment.

**Provision of security: -**

25. In the supporting affidavit, the applicants indicated that they are willing to deposit the whole decretal sum in a joint interest earning account of Counsel of both parties. I agree with the finding in *Focin*



Motorcycle case (Supra) that the offer to deposit the full sum in a joint account is a demonstration of good faith. The court said:-

“Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay.”

26. In the end, this court is satisfied that the applicant has demonstrated that he is deserving of the order of stay as prayed in the application dated 15/5/2025. The court makes the following orders;
1. There be an order of stay of execution of the Judgment in CMCC.E019/2024 Immaculate A. Esemeki -V- Simon Mbugua & others, pending appeal;
  2. That the applicant do deposit the full decretal sum in a joint interest earning account of both Counsel of the applicant and Respondent in a reputable financial institution within fourteen (14) days of this ruling;
  3. The applicant to prepare, file and serve the Record of Appeal within forty-five (45) days from today's date.
  4. The costs will abide the appeal.

**DATED, SIGNED AND DELIVERED AT KAPENGURIA ON 30<sup>TH</sup> DAY OF JULY, 2025**

**HON. R. WENDOHO**

**JUDGE**

Ruling delivered virtually in open court at Kapenguria in presence of; -

Appellant- N/A

Respondent – Mr. Matekwa holding brief for Mr. Mwinamo.

Juma/Hellen- Court Assistants

