

KENYA / JUDGMENT

Karithi & 2 others v Thuo t/a Renekam Enterprises & another [2026] KEHC 13549 (KLR)

[2026] KEHC 13549 (KLR)

COURT

High Court

BEFORE

LP Kassan

CASE / FILE NUMBER

Civil Appeal E594 of 2021

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPELLATE DIVISION

CIVIL APPEAL NO. E594 OF 2021

NANCY KARITHI 1ST APPELLANT/RESPONDENT

KARRY MART LIMITED 2ND APPELLANT/RESPONDENT

GEORGE KARIITHI 3RD APPELLANT/OBJECTOR

-VERSUS-

IRENE THUO

T/A RENEKAM ENTERPRISES..... 1ST RESPONDENT/APPLICANT

ADAM W. NGETHE

T/A GARAM INVESTMENTS.....2ND RESPONDENT

RULING**Introduction**

1. This Ruling concerns the Notice of Motion dated 18th April, 2024, filed by the 1st Respondent/Applicant and Decree Holder, Irene Thuo t/a Renekam Enterprises, seeking, principally, the release of the sum of Kshs. 500,000/= deposited in Court as security in the present appeal, together with interest thereon.
2. The application arises from a long-running dispute following the judgment in Nairobi Milimani CMCC No. 4912 of 2016, delivered on 12th October, 2018 by Hon. D. O. Mbeja, SRM. The Applicant contends that the security was furnished for purposes of an intended appeal which did not proceed to a competent appeal and that there is consequently no legal or factual basis for the continued retention of the money.
3. The application has been opposed by the Appellants/Respondents. They maintain, among other things, that the sum of Kshs. 500,000/= was deposited as security pursuant to the orders made in the proceedings, that there was a consent or consent ruling concerning the matter, and that the security ought not to be released. The Respondents have also relied on subsequent proceedings in HCCAMISC E132 of 2025 and, in particular, the order made on 2nd December, 2025.
4. I have considered the Notice of Motion, the affidavits filed in support and opposition thereto, the written submissions by the parties, the record before this Court and the subsequent procedural developments which bear upon the question of whether the security should continue to be held.

Background

1. The dispute has its genesis in Nairobi Milimani CMCC No. 4912 of 2016, in which judgment was delivered on 12th October, 2018. The Applicant is the successful litigant in that suit and is consequently the Decree Holder.
2. Following the judgment, proceedings relating to the intended appeal were commenced in this Court. In the circumstance, a sum of Kshs. 500,000/= was deposited in Court as security. The Court record contains a Court Deposit Receipt showing deposits amounting in aggregate to Kshs. 500,000/=. The Applicant now seeks release of that money.
3. The Applicant's case is that the Respondents were granted time to file their Record of Appeal but failed to do so. It is further contended that an application for stay of execution had earlier been dismissed by Hon. Justice C. Meoli on 4th August, 2022, and that no appeal or review of that decision was pursued. The Applicant therefore maintains that there is no subsisting stay or competent appeal capable of justifying the continued detention of the security.

4. The record further shows that on 20th December, 2024, Hon. Justice Joe M. Omido issued directions specifically in relation to the present application. The Court noted a discrepancy between the amount stated in the application, namely Kshs. 345,000/=, and the Respondents' assertion that Kshs. 500,000/= had been deposited. The Applicant was accordingly directed to clarify the exact amount deposited and provide supporting documentation. The Respondent was, in turn, directed to file an affidavit annexing the consent order said to have been recorded before the lower Court and to address compliance with its terms.
5. The Applicant subsequently maintained that the sum of Kshs. 500,000/= was indeed the amount deposited as security and produced documentary material in support of that position. The Applicant's submissions consequently urge the Court to bring the matter to finality and release the security to the Decree Holder.
6. A further development occurred in HCCAMISC E132 of 2025, where, on 2nd December, 2025, this Court made orders concerning the intended appeal, including an order that the Kshs. 500,000/= then held as security in HCCA E594 of 2021, the appeal having been struck out, be placed and held as security for costs of the intended appeal. The same order enlarged time for filing the intended appeal and deemed the annexed Memorandum of Appeal duly filed. This order has subsequently become a central feature of the Respondents' opposition to the present application.
7. It is significant, and common ground on the record, that the appeal in the present file had by then been struck out. The order of 2nd December 2025 was therefore not made in a vacuum: it was made precisely because the original appellate process in HCCA E594 of 2021 had come to an end, and it re-purposed the fund already in Court to secure costs of a fresh, intended appeal, rather than creating a wholly new deposit obligation.
8. The Applicant has challenged the effect of those subsequent proceedings, including through a Preliminary Objection dated 10th December, 2025, contending, inter alia, that the order in HCCAMISC E132 of 2025 improperly interfered with the security deposited in the present appeal and that it was made in circumstances which the Applicant disputes.
9. The Respondents, on the other hand, contend that the subsequent order is subsisting and binding and that this Court should not, through determination of the present application, effectively undermine or contradict orders made in the separate miscellaneous proceedings.

The Applicant's Case

1. The Applicant submits that the purpose of security under Order 42 rule 6 of the Civil Procedure Rules is to secure the due performance of the decree or order that may ultimately become binding upon the judgment debtor. It is argued that where the appeal does not proceed, there is no justification for retaining security indefinitely and thereby continuing to deny the successful litigant the fruits of judgment.

2. In support of that proposition, the Applicant relies, inter alia, on *Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] KECA 94 (KLR)*, where the Court observed that the successful litigant should not ordinarily be denied the opportunity to enjoy the fruits of judgment and that, where appropriate, the deposited decretal amount may be released to the successful party.
3. That principle accords with the established approach that security furnished for purposes of stay is not an end in itself. Its purpose is to secure the eventual performance of the decree while balancing the right of appeal against the successful party's right to enjoy the fruits of judgment. The Court of Appeal in *Butt v Rent Restriction Tribunal [1982] KLR 417* emphasised that the discretion relating to stay must be exercised judicially and with regard to the circumstances of each case.
4. The Applicant therefore urges this Court to find that the circumstances no longer justify retention of the Kshs. 500,000/= and to order its release together with interest. The specific prayers sought include release of the security to the Applicant's advocates and settlement of the outstanding decretal amount.

Respondents' Position

1. The Respondents oppose the release of the security. Their position, as emerging from the affidavits and submissions, is that the deposit was made pursuant to the proceedings relating to the intended appeal and that its release would undermine the protection afforded to the Appellants/Respondents.
2. The Respondents further rely on an alleged consent or consent ruling concerning the security and maintain that the same remains binding. They also rely upon the order of 2nd December, 2025 in HCCAMISC E132 of 2025, under which the Kshs. 500,000/= was directed to be retained as security for the intended appeal.
3. It is also the Respondents' contention that the subsequent order granting enlargement of time and deeming the Memorandum of Appeal duly filed altered the procedural position upon which the Applicant's application for release is founded. They therefore urge the Court not to release the security while those subsequent proceedings and the intended appeal remain relevant to the dispute.
4. Those competing positions raise both a procedural question concerning the effect of the subsequent proceedings and a substantive question as to whether, in the circumstances obtaining when this Court determines the present application, the continued retention of the Kshs. 500,000/= is justified.

Issues for Determination

1. Having considered the pleadings, affidavits, submissions and the history of the matter, I consider that the following issues arise for determination:

- a. Whether the Kshs. 500,000/= deposited as security in HCCA E594 of 2021 ought to continue to be held by the Court;
- b. What effect, if any, the subsequent proceedings and orders in HCCAMISC E132 of 2025 have on the present application; and
- c. Who should bear the costs of the application.

Applicable Legal Framework

1. The starting point is Order 42 rule 6 of the Civil Procedure Rules, 2010. The provision empowers the Court to order stay of execution pending appeal upon satisfaction of the prescribed conditions, including provision of security for the due performance of the decree or order that may ultimately be binding upon the appellant.
2. Security under Order 42 rule 6 is therefore not intended to operate as a punishment against a judgment debtor, nor as an indefinite restraint upon a successful litigant. Its purpose is to protect the fruits of the judgment while ensuring that an appellant who succeeds on appeal is not left without an effective remedy.
3. The Court of Appeal has consistently emphasised the need to balance these competing interests. In **Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR)*, the Court explained that the purpose of preserving the status quo pending appeal is to prevent substantial loss which would render the appeal nugatory. At the same time, the Court imposed security as a condition of the stay granted.
4. Similarly, in **Butt v Rent Restriction Tribunal* [1982] KLR 417*, the Court of Appeal recognised that the discretion to grant stay is judicial and must be exercised according to the circumstances of each case. The underlying consideration is that an appellant should not be deprived of the right to appeal, while at the same time a successful litigant should not be unnecessarily deprived of the fruits of judgment.
5. The same principle is reflected in **Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR*, relied upon by the Applicant. The Court observed that security is intended to secure the due performance of the decree and that the successful litigant should not be denied the opportunity to execute the decree and enjoy the fruits of judgment merely because an appeal has been preferred.
6. The purpose of security is therefore closely connected to the decree or order whose performance it is intended to secure. It cannot properly be divorced from the proceedings in which the security was furnished and the particular purpose for which it was ordered — and where, as here, that purpose is renewed by a subsequent order of the Court, the security continues to be tethered to a live and legitimate object.

7. This position was reiterated by the Court of Appeal in **Afyare Enterprises Company Ltd v Nyaribo t/a I.N. Nyaribo & Co. Advocates* [2025] KECA 1819 (KLR)*. The Court emphasised that the conditions under Order 42 rule 6 must be considered within the parameters of the applicable law and that the discretion of the Court cannot be exercised in disregard of those parameters.
8. The Supreme Court has also underscored that court-ordered security must serve the purpose for which it is imposed and must be considered within the broader constitutional objective of facilitating access to justice. In **Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* [2023] KESC 11 (KLR)*, the Supreme Court explained, albeit in the context of security for costs, that security is not an end in itself and that the Court must consider the circumstances of the particular proceedings and the interests of justice.
9. Proportionality cuts both ways. Just as security ought not to be retained once it has ceased to serve any purpose, security ought equally not to be released where an intervening, subsisting order of the Court has renewed its purpose by tying it to a fresh and properly constituted appellate process.

Whether the Security Should Continue to be Held

1. In the present case, there is no dispute that a sum of Kshs. 500,000/= was deposited in Court. The documentary material placed before the Court supports that amount. The directions issued by Hon. Justice Joe M. Omido on 20th December, 2024 are significant because they demonstrate that the Court itself required clarification of the amount deposited and directed production of the relevant deposit documents.
2. The Applicant has explained that the security was furnished in connection with the intended appeal from the judgment in Nairobi Milimani CMCC No. 4912 of 2016. The Applicant's position is that the Respondents thereafter failed to prosecute the appeal within the prescribed period and that the earlier application for stay was dismissed on 4th August, 2022. Had matters rested there, the Applicant's case for release would have carried considerable force.
3. Matters did not, however, rest there. The Respondents have placed considerable, and in my view decisive, reliance upon the order made in HCCAMISC E132 of 2025 on 2nd December, 2025, by which this Court, among other orders, enlarged time for filing an intended appeal, deemed the Memorandum of Appeal duly filed, and directed that the Kshs. 500,000/= held in HCCA E594 of 2021 be retained as security for costs of that intended appeal.
4. I have carefully considered that development. It is not an incidental or passing reference to the security; it is an operative order of this Court, made after due consideration, expressly and specifically directed at the identical fund now in issue. It does not merely touch upon the security collaterally — it re-designates its purpose.

5. The question before this Court cannot sensibly be answered without regard to that order. To grant the relief sought in the present application would require this Court to proceed as though the order of 2nd December 2025 did not exist, notwithstanding that it is a subsisting order of this same Court, made in respect of this same fund, and unreversed.
6. It is correct, as the Applicant points out, that the Notice of Motion predates the order of 2nd December 2025 by more than a year, and that the application had already been the subject of directions on 20th December 2024 requiring clarification of the amount and the alleged consent. That chronology, however, does not assist the Applicant's case for release. An application of this nature, concerning funds held in the custody of the Court, must be determined having regard to the circumstances subsisting at the time of determination, not frozen at the date of filing. A court is not obliged, still less permitted, to close its eyes to an intervening and directly relevant order simply because it postdates the filing of the application.
7. I am not, in this Ruling, sitting on appeal over the order made in HCCAMISC E132 of 2025, nor do I purport to review or pronounce upon its correctness. It suffices for present purposes that the order was made by a court of competent jurisdiction, that it remains in force, and that it has not been set aside, varied or stayed. Any challenge to its propriety, including the matters raised in the Applicant's Preliminary Objection dated 10th December, 2025, falls to be determined in that proceeding or on appeal therefrom, and not collaterally in this Ruling.

The Right to the Fruits of Judgment

1. The right of a successful litigant to enjoy the fruits of judgment is an important consideration. It is not merely a procedural convenience. As the Court of Appeal has repeatedly recognised, the right of appeal and the right of the successful litigant to enjoy the judgment must be balanced.
2. Security is the mechanism through which that balance is ordinarily achieved. It is intended to ensure that, if the appeal succeeds, the appellant's position can be restored; conversely, if the appeal fails, the successful litigant should not be required to commence a fresh and potentially futile process to recover the decretal sum.
3. The right to the fruits of judgment, important as it undoubtedly is, cannot be exercised in a vacuum divorced from other subsisting orders of the Court touching the same fund. Where a competent court has, in the exercise of its jurisdiction, directed that particular monies be retained for a specified purpose, that direction must be given effect unless and until it is lawfully discharged. As the Court of Appeal held in **Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] KECA 945 (KLR)*, court orders are not optional and cannot simply be disregarded by parties, or, it follows, superseded by a later ruling of the same court that fails to account for them.

4. The Applicant has, undoubtedly, been kept out of the use of this money for a considerable period, and the Court is not unsympathetic to that position. That deprivation, however, is now the direct consequence of a subsisting order of this Court redirecting the fund to secure costs of a fresh, deemed-filed appeal — not the consequence of an appeal that has simply lapsed for want of prosecution. The two situations, though outwardly similar in effect, are legally distinct, and it is the latter that now obtains.

The Effect of the Order of 2nd December, 2025

1. I turn to what is, in my view, the decisive issue: the effect of the order made by this Court on 2nd December, 2025 in HCCAMISC E132 of 2025.
2. The order is material because it expressly directed that the Kshs. 500,000/= then deposited in HCCA E594 of 2021 as security, the appeal having been struck out, be placed and held as security for costs of the intended appeal. It also enlarged time for filing the intended appeal and deemed the annexed Memorandum of Appeal duly filed.
3. An order of a court of competent jurisdiction must be respected unless and until it is lawfully discharged, varied, reviewed or overturned. The Court of Appeal made the position emphatically clear in **Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] KECA 945 (KLR)*: court orders are not optional and cannot simply be disregarded by parties or other persons affected by them. That principle applies with equal force to this Court itself: I cannot, through this Ruling, make an order that would have the practical effect of nullifying, varying or overriding the separate, subsisting order of 2nd December 2025.
4. To order the release of the Kshs. 500,000/= to the Applicant at this stage would do precisely that. It would strip the order of 2nd December 2025 of any practical effect, notwithstanding that the order has not been set aside, and notwithstanding that an intended appeal now stands properly instituted, with time enlarged and the Memorandum of Appeal deemed duly filed, by virtue of that very order. Comity between proceedings of the same Court, and the integrity of its own record, does not permit such a result.
5. If the Applicant considers the order of 2nd December 2025 to have been improperly made or to have improperly interfered with the security in this file — as asserted in the Preliminary Objection dated 10th December, 2025 — the appropriate course is to pursue that challenge within HCCAMISC E132 of 2025 itself, or by way of appeal therefrom. It is not open to the Applicant to achieve, through a favourable ruling on a Notice of Motion filed in a separate and earlier context, what amounts in substance to the setting aside of that order.

Whether Continued Retention of the Security is Justified

1. In my view, the Respondents have, in the particular circumstances of this matter, demonstrated a sufficient and presently subsisting basis for the continued retention of the Kshs. 500,000/=.

2. The purpose for which the money is held has not lapsed; it has been renewed and re-directed, by a subsisting order of this Court, to secure the costs of an intended appeal that has, by the same order, been deemed properly instituted. The fund therefore remains, at the time this Ruling is delivered, tethered to a live and legitimate appellate process — the very circumstance that Order 42 rule 6 is designed to accommodate.
3. The authorities relied upon by the Applicant — **Kenya Shell*, *Halai & another v Thornton & Turpin (1963) Ltd [1990] KECA 65 (KLR)* and **Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd [2019] eKLR** — are all cases in which no live appellate process remained to justify continued retention of security. They are distinguishable. Here, by contrast, a subsisting order of this Court has established precisely such a process, and it is that order, not the earlier, since-struck-out appeal, which now governs the status of the fund.*
4. I do not consider it necessary, for purposes of disposing of this application, to resolve the parties' competing allegations concerning the alleged consent order referred to above. The basis for retention of the security is now, independently of that dispute, anchored in the order of 2nd December 2025, and it is on that basis that this application falls to be determined.
5. The Court must not lose sight of the fact that litigation must eventually come to an end, and that a successful litigant's right to the fruits of judgment is a weighty one. But that end must be reached in a manner consistent with, and not in defiance of, the Court's own subsisting orders. Where those orders point to the continued retention of security pending a properly instituted appeal, the balance presently favours retention, without prejudice to the Applicant's right to seek release of the fund upon the final determination, or lawful discontinuance, of the intended appeal referred to in HCCAMISC E132 of 2025.

Disposition

1. In the result, the Notice of Motion dated 18th April, 2024 is hereby dismissed, and I make the following orders:
2. ****The sum of Kshs. 500,000/= deposited in Court as security in Civil Appeal No. E594 of 2021 shall continue to be held by the Court, as security for costs of the intended appeal, in accordance with and pursuant to the order made in HCCAMISC E132 of 2025 on 2nd December, 2025.****
3. ****For the avoidance of doubt, nothing in this Ruling determines, or purports to determine, the validity or propriety of the order made in HCCAMISC E132 of 2025, that being a matter for determination, if pursued, in that proceeding or on appeal therefrom.****
4. ****The Applicant/Decree Holder shall be at liberty to apply afresh for release of the security, or any balance thereof, upon the final determination or lawful discontinuance of the intended appeal referred to in HCCAMISC E132 of 2025.****

5. ***The costs of the Notice of Motion dated 18th April, 2024 are awarded to the Appellants/ Respondents.***

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2026.

HON. L. P. KASSAN

JUDGE

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