

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA  
ELCLA NO. E006 OF 2025

WISON GACANJA ..... APPELLANT

VERSUS

NJUGUNA KAHARI & KIAI ADVOCATES .....  
RESPONDENTS

**RULING**

*[NOTICE OF MOTION DATED 18<sup>TH</sup> AUGUST 2025]*

1. The respondent moved the court through the notice of motion dated 18<sup>th</sup> August 2025, seeking for inter alia to strike out the memorandum of appeal dated 5<sup>th</sup> February 2025; the conditional order issued on 10<sup>th</sup> February 2025 be vacated and or set aside; the decretal sum of Kshs.2,279,740 deposited in court by the appellant be released to the respondent forthwith, and costs be provided for. The application is based on the nine (9) grounds on its face and supported by the affidavit of Paul Njuguna Chuchu, advocate, deposing inter alia that their bill of costs dated 17<sup>th</sup> August 2023 was taxed at Kshs.2,279,740, and upon them demanding payment, the appellant declined to pay necessitating the commencement of execution process; the court issued notice to show cause why the appellant should

not be committed to civil jail, and warrants of arrest were issued; that the appellant filed the memorandum of appeal dated 5<sup>th</sup> February 2025 which has never been served, and an application for stay of execution pending appeal; that the stay application was granted on condition the decretal sum was deposited in court, and directions on filing the record of appeal were issued; that though the decretal sum was deposited in court, the record of appeal was not filed within the timeline set and hence this application, as the conduct of the appellant shows he is not interested in pursuing the appeal.

2. The record shows that the application dated 18<sup>th</sup> August 2025 and mention notice dated 5<sup>th</sup> September 2025 for 2<sup>nd</sup> October 2025 were served upon counsel for the appellant, and an affidavit of service sworn by John Mwatu on 25<sup>th</sup> September 2025, filed. During the mention of 2<sup>nd</sup> October 2025, only counsel for the respondent attended, and the court fixed the application for hearing on 4<sup>th</sup> November 2025. The counsel was directed to serve hearing notice. I have seen another affidavit of service sworn by John Mwatu on 6<sup>th</sup> October 2025 confirming that the hearing notice for 4<sup>th</sup> November 2025 was served. When the matter was called for hearing today the 4<sup>th</sup>

November 2025, only counsel for the respondent was present, and she informed the court that no replies to the application has been filed. The court allowed the Respondent's counsel to prosecute the application, and she made short oral submissions that I have considered. The court then fixed the matter for ruling on the 12<sup>th</sup> November 2025.

3. The issues arising for determinations on the notice of motion dated the 18<sup>th</sup> August 2025 are as follows:

a. *Whether the respondent has made a reasonable case for the memorandum of appeal dated 5<sup>th</sup> February 2025 to be struck out, and or for the decretal sum deposited in court to be released to them.*

b. *Who pays the costs?*

4. The court has considered the grounds on the notice of motion, affidavit evidence, oral submissions by the learned counsel for the respondent, the record and come to the following conclusions:

a. The record confirms that the appellant filed the memorandum of appeal dated the 5<sup>th</sup> February 2025 on 9<sup>th</sup> February 2025. He also filed the notice of motion dated 10<sup>th</sup> February 2025 seeking for stay of execution orders on 10th February 2025, and the court on the

same date issued directions on hearing date of 24<sup>th</sup> February 2025, service of the application, filing and exchange of replies, and at orders (4) directed as follows:

*“4. THAT interim stay of execution in terms of prayer 2 is granted to be in force until the hearing date on condition the applicant deposits the whole decretal sum in an interest earning bank account in the joint names of both parties’ counsel, or with the court in ten (10) days from today.”*

- b. On the 24<sup>th</sup> February 2025, counsel for both parties were present. The counsel for the appellant informed the court that the deposit of the decretal sum was made on 21<sup>st</sup> February 2025. The application was heard orally, and fixed for ruling on 2<sup>nd</sup> April 2025. In its ruling, the court found merit in the application and confirmed the stay order in terms of prayer (3), and inter alia directed that:
- “the decretal sum deposited pursuant to the order of 10<sup>th</sup> February 2025 be retained as security provided by the appellant for the due performance of the decree.”* The court also directed that the record of appeal be filed and served in thirty (30) days. It is also discernible from the

record that the appellant/his counsel did not attend court during the subsequent mentions of 3<sup>rd</sup> July 2025, 2<sup>nd</sup> October 2025 and on the hearing of today, 4<sup>th</sup> November 2025. However, it is apparent from the record that the appellant filed record of appeal dated the 29<sup>th</sup> October 2025, that the respondent's counsel admitted having been served with, but which she added does not affect their prayer for the decretal sum to be released to them.

c. Filing of replies to applications is guided by *Order 51 Rule 14* of the Civil Procedure Rules provides as follows:

*"14. (1) Any who wishes to oppose any application may file any one or a combination of the following documents-*

- (a) a notice of preliminary objection: and/or*
- (b) replying affidavit; and/or*
- (c) statement of grounds of opposition;*

*(2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing."*

That as of today, there is nothing on record to show the appellant intended to oppose the respondent's

application dated the 18<sup>th</sup> August 2025, as none of the three documents stipulated in Order 51 Rule 1 had been filed, and served upon the respondent by the appellant. The said application is therefore taken as unopposed.

d. That when the learned counsel for the respondent made her oral submissions, she only sought for the release of the decretal sum, without pressing for the striking out of the memorandum of appeal. I will therefore take it that the respondent had abandoned the prayer for striking out the memorandum of appeal, and it is noteworthy that counsel acknowledged that the record of appeal has since been filed, and served upon the respondent.

e. Under section 27 of Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where ordered differently by the court, on good grounds. That the respondent having been successful is awarded costs.

5. Flowing from the above conclusions on the notice of motion dated 18<sup>th</sup> August 2025, the court finds and orders as follows:

a. *That the conditional order issued on 10<sup>th</sup> February 2025 be and is hereby vacated for the reason of delay in filing and serving the Record of Appeal.*

- b. *That the decretal sum of Kshs.2,279,740/- deposited in court by the appellant be released to the respondent in satisfaction of the decree forthwith.*
- c. *That the prayer for striking out of the memorandum of appeal is marked as abandoned.*
- d. *The respondent is awarded costs.*

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF NOVEMBER 2025.

Kibunja, J.

S. M.

MOMBASA.

ELC

IN THE PRESENCE OF:

APPELLANT : No Appearance

RESPONDENT : Mr. Mugo for Wambugu

NECHESA-COURT ASSISTANT.

Kibunja, J.

S. M.

MOMBASA.

ELC