



REPUBLIC OF KENYA



**Obaro & another v Onyango & another (Civil Appeal E043 of 2024)
[2024] KEHC 14574 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E043 OF 2024
DK KEMEL, J
NOVEMBER 22, 2024**

BETWEEN

LUCAS ONYANGO OBARO 1ST APPELLANT

CPL JAMES MAINA MUCHEMI 2ND APPELLANT

AND

PETER OCHIENG ONYANGO 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

RULING

1. The Appellants/Applicants have filed the present application dated 16/9/2024 pursuant to Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 42 Rule 6, and Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking the following reliefs:
 - i. Spent
 - ii. Spent.
 - iii. That an order of stay of execution of Judgment and Decree pending the hearing and determination of the appeal be issued.
 - iv. That the costs of the application abide by the outcome of the appeal.
2. The application is supported by grounds set out on its face and by a supporting affidavit of the 1st Appellant/Applicant sworn on even date. The Applicants gravamen, is inter alia; that judgment has been entered against the Appellants in favour of the 1st Respondent and that the Appellants have already lodged an appeal thereto; that they have raised an arguable appeal; that the subject motor vehicle is presently grounded at Kitengela and is not road worthy; that the 1st Respondent is a man of straw and will not be in a position to refund the monies if the same is paid out to him and further that he is



a man always on the move across different countries and might be unavailable in the event the appeal becomes successful; that there is need for orders of stay of execution pending appeal; that if the stay is not granted then the appeal will be rendered nugatory; that the Appellants are willing to deposit the log book to motor vehicle registration Number KAD xxxM as security or guarantee that the motor vehicle will not be disposed off during the pendency of the appeal.

3. The application was strongly opposed. The 1st Respondent swore an affidavit dated 27th September, 2024 wherein, he deponed inter alia; that the subject motor vehicle is not grounded as alleged; that the application is only meant to prevent the Respondent from enjoying the fruits of the judgment; that the appeal has no chance of success ; that the 1st Respondent is a man of means and is in a position to refund monies in the event of success of appeal; that the Appellants should deposit the decretal sum of Ksh550,000/= in court or joint interest earning account in the name of both advocates.
4. The application was canvassed by way of written submissions. The Applicants submissions are dated 25th October, 2024 while the Respondents' submission appear to be in respect of a different civil appeal not related to this appeal. There are thus no submissions by the Respondents.
5. I have given due consideration to the rival affidavits. I find the issue for determination is whether the application has merit.
6. It is not in dispute that the trial court vide its judgment dated 16th August, 2024 has ordered the 1st and 3rd Appellant to restore the suit motor vehicle registration number KAD xxx M to the 1st Respondent or in the alternative pay him the sum of Kshs500,000/= being refund of monies that had been paid by the 1st Respondent. It is not in dispute that vide the Appellants' replying affidavit in support of the application the appellants are not willing to avail the suit motor vehicle as ordered by the trial court as it is claimed that the vehicle is grounded and that they are only ready to avail the log book as security. This is despite the fact that the trial court provided for an alternative for refund of the purchase price. As this is an issue brought pursuant to the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, the task of this court is to determine whether the Appellants have met the conditions imposed therein. The same provides as follows:
 - a. The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. 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.
7. As regards the issue of whether the application has been filed in good time, it is noted that the judgment of the trial court was rendered on 16/8/2024. The present application was filed on 17/9/2024 and hence there was no undue delay on the part of the Appellants in filing the application for stay of execution.
8. On the issue of whether substantial loss will be occasioned if an order of stay is not granted, the Appellants contend that the order by the trial court to deliver the possession of the suit motor vehicle yet the same is grounded in Kitengela and that they stand to incur great expenses in the process which might not be recovered from the 1st Respondent in the event of success of the appeal. The 1st Respondent in his response, has merely claimed that he has the ability to refund any monies but has not availed documentary evidence in that regard. There is thus a likelihood that the Appellants stand



to suffer substantial loss thereby meriting the grant of an order of stay of execution. I am satisfied that the Applicants have shown that they stand to suffer substantial loss if stay is not granted.

9. As regards the issues of security, the Appellants have proposed to avail the log book to the suit vehicle registration No. KAD xxx M to be deposited as security pending determination of the appeal. It is noted that the trial court ordered for the delivery up of the suit vehicle or refund of Kshs 500,000/=. The Appellants have deliberately avoided the issue of the alternative order for refund of the purchase price. Indeed, the relationship between the Appellants and Respondents have ground to a halt and thus 1st Respondent is now interested in the refund. I am not convinced by the Appellants' proposal to deposit the log book to the suit vehicle yet the same is the subject of the appeal. The Appellants had been ordered to deliver up the vehicle to the 1st Respondent. If they are not willing to do that then, I expected them to avail the vehicle plus the log book if indeed they were serious about the issue of security. It seems to me that the Appellants want to have their cake and eat it and that is why I am not persuaded by their proposal. I find an order that the decretal sum of Kshs500,000/= be deposited in a joint interest earning account in the names of both advocates would be quite appropriate in the circumstances.
10. In the result, the Appellants' application dated 16/9/2024 is allowed in the following terms: -
- a. An order of stay of execution of the judgment and decree in Siaya CMCC No. E078 of 2023 is hereby granted upon the Appellants/Applicants' depositing the sum of Kshs500,000/= into a joint interest earning account in the names of the advocates for the parties within the next thirty (30) days from the date hereof failing which the stay shall lapse.
 - b. The costs of the application shall abide in the appeal.

DATED AND DELIVERED THIS 22ND DAY OF NOVEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

M/s Agina for.....1st & 2nd Appellant

M/s Mugofor Respondents

Ogendo.....Court Assistant.

