



**Kamau v Kenchic Limited (Civil Appeal E321 of 2024)
[2024] KEHC 15902 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15902 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E321 OF 2024
JK NG'ARNG'AR, J
DECEMBER 18, 2024**

BETWEEN

FRANCIS ANTHONY KAMAU APPLICANT

AND

KENCHIC LIMITED RESPONDENT

RULING

1. The Appellant filed a Notice of Motion application dated 21st November 2024 under Certificate of Urgency pursuant to Article 40 and 50 of the Constitution 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 45, Order 42 Rule 6 (6), Order 40 Rule 10, Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law.
2. The Appellant/Applicant seeks for orders that pending the hearing and determination of the application dated 26th September 2024, an order of stay of execution of the judgment and decree in Mombasa CMCC No. 2087 of 2018, *Kenchic Limited v Francis Anthony Kamau* be issued restraining the Respondent, its agents, servants, employees, or assigns, including Autoland Auctioneers, from attaching, selling, or disposing of the Applicant's property. That costs of this application be provided for.
3. The application is premised on grounds on its face and the Supporting Affidavit of the Applicant sworn on 21st November 2024 that the Respondent herein instituted the suit Mombasa CMCC No. 2087 of 2018, *Kenchic Limited v Francis Anthony Kamau* against the Appellant/Applicant on or about 9th October 2018 seeking damages resulting from an alleged accident that occurred on or about 19th June 2016 involving motor vehicles KBR 156B and KCF 640H. That soon thereafter, the Respondent allegedly proceeded to serve the Plaintiff and Summons to enter appearance upon the Applicant/Appellant and on the strength of the said assertions the Honourable Court proceeded to enter ex-parte judgment against the Appellant/Applicant. The Appellant/Applicant dispute having been served with the Plaintiff and Summons to enter appearance and that the Affidavit of Service



- filed therein contained false and/or misleading information. That the Appellant/Applicant was only aware of the suit against him when his insurance company was served by the Respondent's advocates demanding settlement of the decretal sum.
4. The Appellant/Applicant avers that he instructed his then advocates on record to seek the intervention of the court in setting aside the ex-parte judgment and that vide a ruling dated 6th September 2024, the trial court dismissed the Appellant/Applicant's application which led to lodging of the appeal before this court. That in furtherance of the said appeal, the Appellant/Applicant filed the application dated 26th September 2024 seeking stay of execution of the ex-parte judgment. That the Respondent has since obtained Warrants of Attachment of Movable Property and Warrants of Sale of Property which were issued on 19th November 2024, and has instructed Autoland Auctioneers to execute the same, with the sole intention of auctioning the Applicant's property during pendency of the instant appeal.
 5. The Appellant/Applicant states that the Respondent's actions pose a significant and imminent threat to the Applicant/Appellant's property, business, and financial stability, which will occasion grievous prejudice and irreparable harm unless restrained. That the Respondent will not suffer any prejudice or harm if the orders sought herein are granted, as the decree will remain intact pending the determination of the appeal, and that the Respondent's interests are secured. That the appeal herein raises substantial questions of law and fact which deserve to be heard on merit without being rendered academic or premature execution. That the application herein has been brought promptly and without unreasonable delay following commencement of execution proceedings. That granting the orders sought herein is in the interest of justice and equity as the Respondent can adequately be compensated by way of costs if the appeal is ultimately unsuccessful.
 6. The Respondent filed Grounds of Opposition dated 29th November 2024 that the Notice of Motion application dated 21st November 2024 is sub judice as the Appellant's other Notice of Motion application dated 26th September 2024 equally seeks stay of execution of the judgment and resultant decree from the primary suit, therefore an outright abuse of the court process. That the application fails to meet the basic tenets for grant of an order of stay of execution as the Applicant fails to offer any security at all for such decretal sum. The Respondent states that there being no appeal against the judgment endorsed on 28th January 2023 in the primary suit, this appeal on a post-judgment ruling delivered on 13th September 2024 in the primary file is not arguable and stands no chance of success.
 7. The Respondent argues that execution is a lawful process and is no ground at all for grant of an order for stay of execution. That there is no apprehension at all that the Respondent or his insurers exercising their right of subrogation under the subject policy would be unable to reimburse the Appellant of any moneys recovered as against him were execution to issue and the appeal to ultimately succeed, the appeal would not be rendered nugatory. That the application fails to meet the basic tenets of grant of orders for review. That there is no justification to grant temporary stay or to review the court's earlier orders of 30th September 2024 and that it is in the interest of justice that the applications are dismissed with costs.
 8. The application was canvassed by way of written submissions. The Appellant/Applicant in their submissions dated 4th December 2024 argued on whether the Appellant/Applicant should be granted stay of execution by citing Order 42 Rule 6 of the *Civil Procedure Rules* and that the same is done at the discretion of the court on sufficient cause being established by the Applicant. That the Applicant is obliged to satisfy the conditions set out in Order 42 Rule 6 (2) that substantial loss may result to the Applicant unless the order is made, that the application has been made without unreasonable delay, and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.



9. The Appellant/Applicant submits that it is not disputed that the Applicant will suffer substantial loss should the application not be allowed. The Appellant/Applicant relied on the holding in the case of *Sewankambo Dickson v Ziwa Abby* HCT 00-CC MA 0178 of 20005 cited with authority in the case of *Victoria Mwikali Musyoka v Lucy Mueni Mwandikwa* (2020) eKLR. That the Appellant/Applicant filed the instant appeal and application without unreasonable delay and that he is ready and willing to offer security as this court may order. That unless this court stays execution, the Respondent shall proceed with execution and the Appellant/Applicant shall suffer irreparable loss and damage which will render the appeal nugatory. The Appellant/Applicant relied on the decision of the court in *RWW v EKW* (2019) eKLR and *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR.
10. I have considered the Notice of Motion application dated 21st November 2024, the Respondent's Grounds of Opposition and Submissions. The issue for determination is whether the application is merited for grant of the orders sought.
11. The Appellant/Applicant seeks for orders that pending the hearing and determination of the application dated 26th September 2024, an order of stay of execution of the judgment and decree in Mombasa CMCC No. 2087 of 2018 be issued. This is on the basis that the Respondent has since obtained Warrants of Attachment of Movable Property and Warrants of Sale of Property which were issued on 19th November 2024. That the Respondent has also instructed Autoland Auctioneers to execute the same with the sole intention of auctioning the Applicant's property. However, the Respondent opposes the application on grounds that the application dated 21st November 2024 and 26th November 2024 both seek stay of execution of the judgment and decree from the primary suit, which is an abuse of the court process.
12. This court has perused the applications on record together with documents furnished to this court and established that inasmuch as the applications dated 26th September 2024 and 21st November 2024 both seek stay of execution pending the hearing and determination of the application dated 26th September 2024, circumstances have since changed as the Respondent has commenced the process of execution requiring intervention of this court for the interest of justice. This court will therefore go ahead and determine the application dated 21st November 2024 on merited as follows: -
13. The Court of Appeal in *Butt v Rent Restriction Tribunal* (1982) KLR 417 gave guidance on the discretion of the court in an application for stay of execution as follows: -
- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
14. On the one hand, the Respondent in their Grounds of Opposition pointed out that the Appellant/Applicant fails to offer any security and that this being an appeal on a post-judgment ruling, it is not arguable and stands no chance of success. That execution is a lawful process and not a ground for grant of the order of stay of execution. The Respondents stated that they have the capability of reimbursing the Appellant/Applicant of any monies recovered were execution to issue and that the appeal would therefore not be rendered nugatory. On the other hand, the Appellant/Applicant submitted that he will suffer substantial loss should the application not be allowed, that the instant appeal and application were filed without unreasonable delay, that he is ready and willing to offer security as this court may order, and that unless this court stays execution, the Respondent shall proceed with execution and the Appellant/Applicant shall suffer irreparable loss and damage which will render the appeal nugatory.
15. In determining whether to grant stay of execution, the same ought to be balanced against the Respondent’s right to enjoy the fruits of the judgment. The court in *Samvir Trustee Limited v Guardian Bank Limited* (2007) eKLR held as follows: -

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
16. This court has established that judgment in the primary suit was entered on 28th January 2023. The ruling of the trial court which the Appellant/Applicant is appealing against is dated 6th September 2024 while the Warrants of Attachment of Movable Property and Warrants of Sale of Property were issued on 19th November 2024. There was therefore no unreasonable delay in filing the appeal and application herein.
17. The Appellant/Applicant supplied this court with copies of Warrants of Attachment of Movable Property, Warrants of Sale of Property and Proclamation of Attachment which demonstrates imminent irreparable loss and damage that may render determination of the pending appeal and application herein an academic exercise. The Appellant/Applicant has also shown willingness to supply security for due performance of the decree.
18. In consideration of the above, I find merit in the application dated 21st November 2024 and issue the following orders: -
 - a. There shall be stay of execution of the judgment and decree in Mombasa CMCC No. 2087 of 2018, *Kenchic Limited v Francis Anthony Kamau*, pending hearing and determination of the application dated 26th September 2024 on condition that the Appellant/Applicant deposits Kshs. 272,139 in an interest earning account in the names of councils of the parties within 21 days.
 - b. Costs shall be in the cause.



DATED AND DELIVERED VIA TEAMS CTS TO PARTIES WITH PRIOR NOTICE THIS 18TH DAY OF DECEMBER 2024

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J.K. NG'ARNG'AR, HSC

JUDGE

