



Nyoro v Kagiri (Civil Appeal E240 of 2022) [2023] KEHC 468 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEHC 468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E240 OF 2022
RB NGETICH, J
JANUARY 26, 2023**

BETWEEN

ISAAC GACHII NYORO PLAINTIFF

AND

HAWA MUTHONI KAGIRI DEFENDANT

RULING

1. This is a ruling on application dated October 11, 2022 seeking interim orders of status quo and stay of execution of the ruling issued in Thika CMCC No 511 of 2021. The application is premised on the grounds that the senior resident magistrate honourable D Milimu delivered a ruling in CMCC No 511 of 2021 on October 3, 2022 but the ruling was overtaken by events as the motor vehicle KAT XXXB had been sold by auction *vide* an interlocutory judgment issued on December 15, 2021.
2. The application is supported by the affidavit of Isaac Gachii Nyoro sworn on October 11, 2022. He averred that the ruling delivered on October 3, 2022 was in favor of the respondent; the court restrained the appellant from transferring or interfering with motor vehicle KAT XXXB and ordered the vehicle be returned to the respondent. He further stated that the vehicle had already been sold through auction to a third party and the orders issued herein had been overtaken by events. He seeks a stay of the orders issued on October 3, 2022 and contend the current appeal which has high chance of success.
3. On December 13, 2022, this court directed that the application be heard by way of written submissions. At the time of writing this ruling, parties had not filed their submissions.

Analysis And Determination

4. I have considered ground of the application and averments herein and what is in issue is whether the applicant has met threshold for grant of orders sought. The applicant's argument is that orders issued on October 3, 2022 have been overtaken by events as the motor vehicle was sold through a public auction on July 28, 2022.



5. From the record, the judgment in the trial court was delivered on December 15, 2021 in favor of the applicant and the motor vehicle was sold on July 28, 2022 through a public auction. On July 25, 2022, the respondent filed an application in the trial court seeking stay of execution of the decree by the trial court. By ruling of October 3, 2022, the trial court stayed the execution of the decree and ordered the applicant to release motor vehicle KAT XXXB to the respondent.
6. It is on the basis of the ruling of October 3, 2022 that the applicant filed the current application seeking stay orders of October 3, 2022 pending the hearing of the appeal.
7. Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#) provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under sub rule (1) unless –
 - (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.”
8. In considering an application for a stay of execution, the court must be satisfied that the following conditions have been met, namely;
 - i. The applicant must establish a sufficient cause.
 - ii. The substantial loss will be suffered if a stay of execution is not granted.
 - iii. Security of costs and
 - iv. Lastly the application must be brought without unreasonable delay.
9. The applicant stated that motor vehicle KAT XXXB had already been sold to a 3rd party and therefore the orders of October 3, 2022, had been overtaken by events.
10. The applicant is required to show that the intended appeal is arguable and unless the court grants the orders of stay of execution, the intended appeal will be rendered nugatory. From the court file, the applicant contends that the motor vehicle was sold to a 3rd party and thus the orders of October 3, 2022 have been overtaken by events. The vehicle is in the possession of a third party whom he cannot be able to trace.



11. In Bungoma High Court Misc Application No 42 of 2011 *James Wangalwa & Another v Agnes Naliaka Cheseto* the court held as follows: -

“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. This is what substantial loss would entail.”

12. Further, the court in granting stay orders should try to balance the interest of both the applicant and the respondent; the applicant who seeks to maintain the status quo and the respondent who seeks to enjoy the fruits of the judgment.

13. In view of the above and based on the fact that the applicant contends the motor vehicle had already been sold to a third party, I am not convinced that the appeal will be rendered nugatory if the orders of stay of execution are not granted.

Final Orders: -

1. Application dated October 11, 2022 is hereby dismissed.
2. Costs to the respondent.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 26TH DAY OF JANUARY, 2023

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RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Ms Weyimi holding brief for Waweru Nyambura for Appellant

