



**Consumer Federation of Kenya (COFEK) v Riria (Civil Appeal  
E366 of 2022) [2023] KEHC 1288 (KLR) (Civ) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1288 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E366 OF 2022**

**JK SERGON, J**

**FEBRUARY 24, 2023**

**BETWEEN**

**CONSUMER FEDERATION OF KENYA (COFEK) ..... APPLICANT**

**AND**

**JENNIFER RIRIA ..... RESPONDENT**

**RULING**

1. The subject matter of this ruling is the Notice of Motion dated 27<sup>th</sup> September, 2022 taken out by the appellant/applicant herein, in which it sought for an order for stay of execution of the judgment delivered on 6<sup>th</sup> May, 2022 in CMCC no. 5764 of 2018 pending the hearing and determination of the appeal and also stop and lift the purported proclamation and sale of Motor Vehicle Reg. No. KAR 995Z, belonging to Stephen Mutoro hereof.
2. The respondent put in a replying affidavit sworn by her advocate Emmanuel Mwangambo Mwagonah on 23<sup>rd</sup> November, 2022, to oppose the Motion.
3. The instant Motion was canvassed through oral arguments whereby the parties' respective advocates chose to rely on the relevant documents filed.
4. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing the Motion.
5. The provisions of Order 42, Rule 6(2) of the *Civil Procedure Rules*, 2010 express that even where an application for a stay of execution or proceedings is denied or granted by the trial court, the court sitting on appeal is at liberty to consider a similar application and to make such orders as it deems just.
6. In his affidavit filed in support of the motion dated 27/9/2022,



Mr. Stephen Mutoro stated that on 26<sup>th</sup> September 2022 the respondent's auctioneers issued the applicant with seven days with a notice of proclamation of attachment of moveable property and the applicant's goods and his personal car Reg. No. KAR 995Z which may be carted away by the auctioneers if the stay is not granted.

7. The applicants avers that the auctioneers were not entitled to proclaim his personal car Reg. no. KAR 995Z and that the applicant is facing financial constraints and therefore it cannot afford to liquidate the decretal amount which is excessive and amenable to this appeal.
8. The applicant states that the auctioneers has illegally and purported to proclaim property belonging to the applicant's official Mr. Stephen Mutoro.
9. In response, Mr. Emmanuel Mwagambo Mwagonah stated that the application has no merit based on the conduct of the applicant who has brought this application in bad faith and is employing diversionary delay tactics to deny the respondent her right to enjoy the fruits of the judgment entered in her favour.
10. The respondent avers that there must be a balance struck so that the order for stay does not merely benefit the tortfeasor in this case, who has not incurred any harm, and that the applicant has not provided security that may bind it to the proper performance of the decree.
11. The principles guiding the grant of an application for stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:

No order for stay of execution shall be made under subrule (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.
12. In the case of Consolidated *Marine vs. Nampijja & another*, Civil App. No.93 of 1989 (Nairobi), the Court held that-

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
  13. Substantial loss is a factual issue, which must be raised in the supporting affidavit and further supported by evidence. In dealing with the issue of substantial loss, I am alive to the fact that the applicant herein ought to establish that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicants as successful parties in the appeal.
  14. In the case of *Shell Ltd vs Kibiru & Another*, Civil Appeal No. 97 of 1986, Nairobi it was stated that-

“The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or



because it would lose its money, if payment was made since the Respondents would be unable to pay the money.”

15. The applicant in this matter contends that the respondent has illegally and purported to proclaim property belonging to the applicant’s official Mr. Stephen Mutoro and that unless this matter is urgently heard and stay granted then the applicant’s assets will be carted away thus rendering the applicant and its officials to suffer irreparable loss and damage.
16. On the other hand the respondent stated that the applicant has not demonstrated the loss they can or likely to suffer if the stay orders not be granted and that it has not provided any evidence showing that it cannot afford to liquidate the decretal amount.
17. The applicant avers that the respondent has not proved means or capability of ever refunding the applicant the decretal amount in the event the appeal succeeds. On his part, the respondent is of the view that the applicant has not shown any irreparable loss it may suffer and that the appeal has no chance of success.
18. I am also alive to the reality that unless the applicant is granted an opportunity to defend its case, it stands to be condemned unheard, thereby undermining the dictates of substantive justice and violating the applicant’s constitutional right to be heard on its defence in the dispute before the same is conclusively determined.
19. In the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR in which the court reasoned that:

“The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted... 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.”
20. The courts have time and time again discussed the question on who has the burden of proof on the issue of refund of the decretal sum. I am both guided and bound by the Court of Appeal’s analysis in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where it held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”
21. In the absence of anything to indicate or ascertain the respondent’s financial capacity therefore, I am satisfied that the applicant has reasonably demonstrated the manner in which it stands to suffer substantial loss.
22. Order 42 Rule 6(2)(b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted an order for stay pending appeal is that he must furnish security. The applicant herein have given the issue of furnishing security a wide berth. This Court notes that in *Butt v Rent Restriction Tribunal* (1982) the Court of Appeal stated that a Court can order security upon application by either party or on its own motion and that failure to put security for costs as ordered will cause the order for stay of execution to lapse



23. In the case of *Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates* [2014] eKLR, the Court held that-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

24. Bearing in mind that the nature of the security that may be deposited is left at the discretion of the Court, I hereby allow the application dated 27<sup>th</sup> September, 2022 and make the following orders-

- i. There shall be a stay of execution of the judgment delivered on 6th May 2022, in Milimani CMCC no. 5764 of 2018 and all consequential orders on the condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocates and or firm or advocates within 45 days from today’s date. In default, the order for stay shall automatically lapse.
- ii. Costs of the Motion to abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023.**

.....

**J. K. SERGON**

**JUDGE**

**In the presence of:**

..... for the Applicant/Appellant

..... for the Respondent

