



**Odongo t/a Odongo Investment Auctioneers v Okinda & another; Oduor (Objector)
(Civil Appeal 21 of 2023) [2023] KEHC 21025 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 21 OF 2023
MS SHARIFF, J
JULY 27, 2023**

BETWEEN

**OSCAR OTIENO ODONGO T/A ODONGO INVESTMENT
AUCTIONEERS APPELLANT**

AND

**GRACE OKINDA 1ST RESPONDENT
SHAMIN CHEPKEMOI SAMBU 2ND RESPONDENT**

AND

OKINDA BARON ODUOR OBJECTOR

RULING

1. The appellant's notice of motion dated February 6, 2023 seeks one main prayer that is; stay of execution pending the hearing and determination of the appeal herein. He also seeks costs of the application.
2. The application is premised on the ground that the appellant was served with an order emanating from the subordinate court requiring him inter alia to surrender the attached motor vehicle registration number xxxx to the objector. That as such he is compelled to unconditionally surrender the subject motor vehicle. That the said motor vehicle had been detained at Kondele Police station as an attached goods in proceedings relating to distress for rent. That the motor vehicle despite being owned by the objector, the same was ordinarily parked at the respondent's residence.
3. The application is opposed though the replying affidavit of Grace Okinda who depones inter alia that the appellant can still trace the suit motor vehicle if the same is released to the respondent if he obtains orders for the repossession even after release. He faults the appellant for not conducting due diligence before impounding the motor vehicle as he left many household items in the house which he ought to have attach in lieu of the objector's motor vehicle.



4. The application was disposed by way of written submissions. The same have been considered.

Analysis and determination.

5. An application for stay of execution is governed by order 42 Rule 6 of the [Civil Procedure Rules](#) which provides;

1. No appeal or second appeal shall operate as a stay of execution or proceedings 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 subrule (1) unless
 - i. '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;
 - ii. 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.'

6. From the above, the applicant ought to establish;

- i. That if the order for stay is not granted, he might suffer substantial loss,
- ii. That the application has been filed without unreasonable delay, and;
- iii. That the Applicant has offered security for the due performance of any decree or order that may be binding on him.

7. On the first limb, it is obvious the applicant is an auctioneer who had obtained and indeed proclaimed the objector's motor vehicle which was then ordered to be released to the owner. It is not in doubt the motor vehicle is registered in the objector's name. The repossession was to cover auctioneer's fees and satisfy decretal sum given by the subordinate court. The objector is not a party in the said proceedings.

8. It is obvious the decree was passed against the 1st respondent and the suit motor vehicle is registered in the objector's name. Whereas the attached motor vehicle was being stored in the 1st respondents house, that fact does not transfer ownership thereof to the 1st Respondent and it's attachment amounts to conversion.

9. Substantial loss was stated in [RWW v EKW \[2019\] eKLR](#), to mean:

' The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.'



10. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.
11. The subject of this appeal is a monetary decree whose sum is fixed and ascertainable. The decree is against the 1st respondent as opposed to the objector whose motor vehicle has been attached.
12. In *Kenya Shell Ltd v Kibiru & Another [1986] eKLR 410*, the court held inter alia;
 1. .
 2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
 4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.
13. Premised upon the fact that the motor vehicle attached does not belong to the 1st respondent's, I find the release of the said motor vehicle to its owner, the objector herein will not occasion the appellant any substantial loss as its attachment was misdirected. The appellant's recourse is against the 1st respondent whom the decree has been passed against.
14. I thus find that this limb has not been established.
15. On the balance I find that the application dated February 6, 2023 unmerited and proceed to dismiss it with costs to the respondents and the objector. The costs are assessed at Kshs 7000.

Delivered, signed and dated at Kisumu this 27th day of July 2023.

MWANAISHA. S. SHARIFF

JUDGE

In the presence of :-

Ms Anuro for the appellant

Mr Ouru for the Respondents

N/A by the objector

