



REPUBLIC OF KENYA



**Dianga v Ali (Civil Appeal E093 of 2022) [2023] KEHC 25015 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 25015 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E093 OF 2022  
MS SHARIFF, J  
OCTOBER 31, 2023**

**BETWEEN**

**ALEX S. DIANGA ..... APPELLANT**

**AND**

**JAMIL IBRAHIM ALI ..... RESPONDENT**

**RULING**

**A. Case Background**

1. The Appellant/Applicant herein was the Respondent while the Respondent herein was the Claimant in Kisumu Small Claim No. 18 of 2022 wherein judgment was delivered in favour of the Respondent on 29<sup>th</sup> August, 2022 for a sum of Kshs.81,432 plus costs and interest.
2. The Appellant was aggrieved by the said judgment and on 15<sup>th</sup> September 2022 he filed a memorandum of appeal dated 12<sup>th</sup> September, 2023 and on 3<sup>rd</sup> November, 2022 he filed a record of appeal.
3. On 19<sup>th</sup> October 2022 the Adjudicator issued a decree and a certificate of costs whereafter the Respondent commenced the execution process.

**B. Application:**

4. Upon proclamation of the Appellant's motor vehicle registration No. KAP 853H on 21<sup>st</sup> December 2022 by M/s Jeaks Auctioneers, he sought court's leave to be heard during the High Court's Christmas Recess and thus filed a notice of motion dated 22<sup>nd</sup> December 2022 which sought the following prayers:-
  1. Spent
  2. Spent



3. This Honourable Court be pleased to issue an order lifting the proclamation and attachment levied against the Appellant/Applicant and to suspend the warrants of attachment and sale of motor vehicle registration number KAP 853H to await the determination of the intended appeal.
4. This Honourable Court be pleased to issue an order of restitution of motor vehicle registration number KAP 853H already attached by the Respondent or their agents back to the Applicant/Appellant.
5. That this Honourable Court be pleased to grant stay of execution of the decree issued in respect of the judgment delivered on 29<sup>th</sup> August, 2022 by Hon. G. C. Serem as regards ...
6. That the costs of this application be provided for.

### **C. Submissions:**

5. Whereas parties had initially intimated to court that they had commenced negotiation with a view of settling the application and the appeal, no consensus was reached and parties were then directed to file submissions on the application. Both parties complied.

### **Ci Appellant's Submissions:**

6. *Vide* his submissions dated 20<sup>th</sup> April, 2023 and filed on 8<sup>th</sup> May 2023 the Appellant outlined the issue for determination as follows:-

“ whether the proclaimed/attached motor vehicle registration No. KAP 853H detained by the Respondent should be released to the Applicant.”
7. The Appellant has restated the known principle of law that orders of stay of execution and intended to preserve the subject matter pending the hearing and determination of an appeal while balancing the interest of the parties. Reliance has been placed on the case of *RWW vs GKW* (2019) eKLR as quoted in Stanley *Kiplagat Rono & Another –vs- William Kiprotich Cherus* (2021) eKLR, in this regard.
8. The Appellant submits that a denial of orders of stay of execution will occasion him substantial loss that cannot be remedied by an award of damages and costs.
9. It is the Appellant's submission that the impugned judgment was delivered on 1<sup>st</sup> September, 2022 and that he filed the application herein simultaneously with his appeal on 3<sup>rd</sup> November, 2022 wherefore his application was filed timeously.
10. The Appellant submits that he is ready and willing to release the motor vehicle and that whereas the same is still under attachment, he has been holding the same without washing it.
11. It is the Appellant's position that the Respondent will not suffer any prejudice that cannot be compensated by an award of costs and he thus per paragraph 8 of his submissions, craves that his notice of motion application dated 15<sup>th</sup> day of October 2021 be allowed lest he suffers irreparable loss.
12. On the issue of costs, the Appellant submits that the Respondent agents; M/s Jeaks Auctioneers have presented an unreasonable invoice of K/shs.104, 417 which is inclusive of storage charge and the cumulative costs are way above the decretal sum wherefore the Respondent is out to enrich himself unjustly to the prejudice of the Applicant who is a primary school teacher and thus not able to meet such costs. The Applicant thus invites this court to balance the interest of both parties lest he is



subjected to double jeopardy of paying what he terms as exaggerated costs in addition to the impugned decretal sum.

13. In conclusion the Appellant urges this court to release the attached motor vehicle on a running attachment until his appeal is heard and determined. Further that a *caveat* be placed to prohibit the Respondent from selling and or transferring the attached motor vehicle.

#### **Cii. Respondent's/Claimant's Submissions:**

14. The Respondent has set out the issues for determination by this court as being whether or not the Appellant is entitled to the orders sought in his notice of motion dated 22<sup>nd</sup> December, 2022.
15. The Respondent submits that the lodging of an appeal does not guarantee an appellant orders of stay of execution and an Applicant has to satisfy the tripartite conditions set out in Order 42 Rule 6 of the [Civil Procedure Rules](#); the Applicant has to demonstrate that he stands to suffer substantial loss if stay orders are not granted, that he has approached the court without delay and finally that he is ready to furnish security for the due satisfaction of the decretal sum in the event that his appeal is disallowed. The case of [Owade & Another –vs- Njoroge](#) (2022) eKLR has been cited in support of this position.
16. The Respondent has posited that it is incumbent upon the Applicant to adduce evidence of substantial loss and not to merely throw that assertion to the court without demonstrating the loss. The reliance has been placed on the cases of [George Kabura Wabiku -vs- Scholastica Gathinya Mwangi](#) (2022) e-KLR, [Justus Kyalo Musyoka -vs- Benjamin Karuga Kibiru](#) (1986) eKLR, where the courts rendered themselves on the need to provide evidence of substantial loss in an application for stay of execution pending appeal.
17. On the issue of delay, the Respondent submits that the Appellant had been in a slumber from 29<sup>th</sup> August, 2022 and was only jogged into motion by the proclamation and attachment of his motor vehicle by M/s. Jenks Auctioneers on 21<sup>st</sup> December, 2022.
18. The Respondent maintains that the Appellant had duly been served with a proclamation and eventually with a notification of sale of the attached motor vehicle pursuant to Rule 12 (c) of the [Auctioneers Act](#) No. 5 of 1996.
19. The Respondent submits that the Appellant had initially enjoyed 30 days stay of execution but opted not to liquidate the judgment sums within that period wherefore the Appellant's hands are tainted. Further that the Appellant is seeking equity while derogating from equity.
20. As regards the need for the court to balance the interests of parties, the Respondent submits that the successful party is ordinarily entitled to enjoy the fruits of the judgment and when considering a stay application a court has to uphold the overriding objective of dispensing justice in accordance with the law while preventing the abuse of court process. Further that the right of appeal has the balance against the right of successful party to enjoy the fruits of a judgment without road blocks by the Appellant. Citation has been made of the cases of [Machia t/a Macharia & Co. Advocates –vs- East African Standard](#) (2012) eKLR, [Wilson –vs- Church](#) (No. 2) (1879) 12 ChD. 454 (458), [Owade & Another –vs- Njoroge](#) (2022) eKLR and [Justus Kyalo Musyoka –vs- Joma Kivungo](#) (2019) eKLR.
21. On storage costs the Respondents submit that M/s. Jenks Auctioneers are entitled to their costs for the professional services rendered given that the Appellant had been duly served with a proclamation but opted not to satisfy the judgment sum even after the trial court had granted him a 30 days stay of execution. Further that the payment of execution costs cannot be tantamount to exposing the Appellant to double jeopardy. Reliance has been placed on Rule 7 of the [Auctioneers Practice Rule](#) 2009 which provides that a debtor shall pay auctioneers charges save for the exceptional circumstances



outlined under Section 7 a-c of the said Rules. It is submitted that a waiver of payment of auctioneers charges will further prejudice the Respondent who is already being kept away from realizing his judgment.

22. The Respondent submits that the auctioneer charges are ascertainable as fees and storage charges from 22<sup>nd</sup> December, 2022 until the date of release or auction which ever comes earlier.
23. It is posited by the Respondent that the court can order provision of further security pursuant to rule 107 (3) and that in this instance the Appellant has filed to deposit such costs as were ordered by this court hence exhibiting his general reluctance to comply with court orders.
24. The Respondent submits that this court should order the Appellant to bear the auctioneer's costs and that the stay orders be discharged and the Respondent be allowed to proceed with execution process.

#### **D. Analysis and Determination:**

25. The criteria for grant of stay pending appeal is clearly provided for under Order 42 Rule 6 (2) of the Civil Procedure Rules thus:

- “2. 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.”

26. The issue that emerges for determination is whether the Applicant has satisfied the said criteria hence entitled to the orders sought.

#### **D(i). Substantial Loss:**

27. Save for stating that he will stand to suffer substantial loss that cannot be compensated by an award of damages and costs, no iota of evidence has been placed before this court to demonstrate the said substantial loss wherefore this court is unable to gauge this the said claim loss.
28. In any event the attached motor vehicle is capable of being valued and if sold in an auction, then a definite sale price shall be known wherefore its value is quantifiable and in the event of a successful appeal then the value can be compensated by an award of quantified damages. This then dispels the appellant's claim that he will suffer substantial loss if stay pending appeal not granted.

#### **D(ii) Timeous filing of the application:**

29. It is the principle of equity that one who seeks equity must approach the court with clear hands. The Appellant herein has deliberately approached this court with tainted hands; he has without shame made material misrepresentation to this court to the effect that he had filed his application for stay of execution simultaneously with his appeal, a fact that he knows not be true. This application was filed on 22<sup>nd</sup> December 2022 and the appeal preceded it on 15<sup>th</sup> September 2022. The delay period of more than 3 months has not been explained and this gives credence to the Respondent's position that the Appellant's current application is nothing more than a reaction to the proclamation and the eventual attachment of his motor vehicle by M/s. Jenks Auctioneers. Indeed, the Appellant had been



asleep. This court aids the vigilant and not the indolent. Further at paragraph 8 of his submissions the Appellant makes reference to a notice of motion and supporting affidavit dated 15<sup>th</sup> October 2021 which date precedes the claim before the small claims court.

**D(iii) Security for Costs:**

30. Whereas the Appellant's motor vehicle has already been attached, which attachment this court finds to be proper and lawful the same does not constitute the envisaged security for costs as its value may not meet the decretal sum plus costs in the event that this appeal fails, given the daily storage charges and the auctioneers fees that are lawfully payable by the Appellant pursuant to the provisions of Rule 7 of the Auctioneers Rule 1997 which provides as follows:

- “7. Payment of auctioneer's charges
- A debtor shall pay the charges of the auctioneer unless
- a. that debtor cannot be found; or
  - b. he has no goods upon which execution can be levied; or
  - c. the sale proceeds are insufficient to cover the charges in which cases the creditor shall pay the charges or the deficiency thereof.”

31. Had the Appellant filed this application simultaneously with his appeal, attachment would not have been effected: he is thus the author of his own misfortune.

32. The Appellant was ordered to deposit security for costs but opted to ignore that order of this court and has exhibited outright indifference in complying thereto and his state of defiance has persisted to-date despite his enjoyment of an interim order of stay of execution. It is trite law that he who seeks equity must do equity.

**E. Conclusion:**

32. On the balance this court finds that for reasons stated herein above, this application is devoid of merit and the same is disallowed with costs to the Respondent. The Appellant shall also pay the auctioneers fees and storage charges.

33. The interim orders of stay of execution granted to the Appellant on 22<sup>nd</sup> December 2022 by Justice Musyoka J. lapsed on 22<sup>nd</sup> February 2023 wherefore the Respondent is at liberty to proceed with the execution process.

**DELIVERED, SIGNED AND DATED AT KISUMU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2023.**

**MWANAISHA S. SHARIFF**

**JUDGE**

