



**Aduogo v Credit Bank Limited (Civil Appeal 11 of 2022)
[2022] KEHC 14319 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 11 OF 2022
JN KAMAU, J
OCTOBER 25, 2022**

BETWEEN

VIOLET ACHIENG ADUOGO APPELLANT

AND

CREDIT BANK LIMITED RESPONDENT

RULING

1. In her notice of motion application dated February 23, 2022 and filed on February 24, 2022, the appellant herein sought an order for stay of execution of the ruling and order of Hon S. Telewa (SRM) that was delivered on February 1, 2022 in CMCC No 29A of 2019.
2. The said application was supported by her affidavit that she swore on February 23, 2022. She averred that she was aggrieved by the aforesaid decision..
3. She contended that she had already filed a memorandum of appeal and that the appeal was arguable and had high chances of success. It was her contention that she stood to suffer substantial loss should the respondent execute against her. She added that she was ready to abide by the court's conditions for the granting of the order for stay of execution pending the hearing and determination of the appeal herein. She thus urged this court to allow her said application.
4. In opposition to the said application, Georgine J Imbaya, advocate, swore a replying affidavit on March 9, 2022 on behalf of the respondent herein.
5. The respondent asserted that the present application was misconceived, an afterthought, an abuse of the court process, elusive and a subtle scheme for the appellant to deny it its fruits of judgment. It averred that the appellant had not demonstrated what substantial loss she would suffer if it proceeded with the execution which it averred was a lawful process and in accordance with the trial court's judgment.



6. It was its contention that the appellant's main ground of appeal was that the subject motor vehicle was undervalued yet she was still in arrears of Kshs 4,007,714.16 which sum continued to accrue interest. It added that she failed to enjoin the auctioneers as parties to the suit in the trial court and hence she had not demonstrated that she had an arguable appeal.
7. It was its further averment that she had not met the conditions of being granted an order for stay of execution and thus urged this court to dismiss the present application with costs.
8. The appellant's written submissions were dated June 9, 2022 and filed on June 14, 2022 while those of the respondent were dated June 23, 2022 and filed on June 24, 2022. The ruling herein is based on the said written submissions which both parties relied upon in their entirety.

Legal Analysis

9. Both parties were agreed on the conditions that an applicant had to meet before he or she could be granted an order for stay of execution pending appeal.
10. In arguing that she had met the conditions for being granted an order for stay of execution pending appeal, the appellant relied on the case of *Stanley Kiplagat Rono & another v William Kiprotib Cherus* [2021] eKLR where Odeny J held that the purpose of an order for stay was to preserve the subject matter in dispute so that the rights of the appellant who was exercising the right of appeal were safeguarded and the appeal was not rendered nugatory.
11. She contended that in the event the respondent executed against her, she would suffer substantial loss as she would be left as a beggar as it would auction all her remaining items thus rendering her appeal nugatory. She averred that the respondent did not follow the due process of the law when it sold her subject motor vehicle.
12. She pointed out that she filed the present application without unreasonable delay as judgment was delivered on February 1, 2022 and she filed the present application on February 23, 2022.
13. She added that she was ready and willing to deposit security of costs at Kshs 400,000/= and alluded to hard economic times that she had gone through.
14. On the other hand, the respondent submitted that the appellant did not demonstrate that she had met the pre-requisites of being granted an order for stay of execution pending appeal.
15. It argued that she failed to demonstrate that she would suffer substantial loss in the event the said order was not granted. It stated that it was a sound financial institution and emphasised that she would therefore not suffer any substantial loss. In this regard, it placed reliance on the cases of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR where Warsame J (as he then was) held that there had to be proper evidence of substantial loss and *James Wangalwa & another v Agnes Naliaka Chesato* [2012] eKLR where Gikonyo J held that substantial loss was what had to be prevented by preserving the status quo because such loss would render the appeal nugatory.
16. It averred that the appellant had not explained the delay in filing the present application twenty two (22) days after the judgment was delivered.
17. It added that the sum of Kshs 400,000/= that the appellant was offering was not reasonable as it did not resonate with the decretal sum in question. It pointed out that in the worst case scenario, the decretal sum ought to be deposited in a joint interest earning account in the name of the counsels as a pre-condition for stay.



18. Before an order for stay pending appeal under order 42, rule 6(2) of the [Civil Procedure Rules, 2010](#) can be granted, an applicant has to demonstrate the following:-
 1. That substantial loss may result unless the order is made.
 2. That the application has been made without unreasonable delay.
 3. Such security as the court orders for the due performance of the decree has been given by the applicant.
19. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
20. Having said so, this court noted that the appellant's suit in the lower court was dismissed. There was nothing to stay because it was a negative order. The appellant had also sought an injunction. She could only have sought an injunction pending appeal as provided in order 42 rule 6(6) of the [Civil Procedure Rules](#).
21. The said order 42 rule 6(6) of the [Civil Procedure Rules](#) provides as follows:-

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
22. Accordingly, although the appellant had since filed a memorandum of appeal in accordance with the law, having considered the appellant's present application, this court found and held that the same could not be granted as prayed as the wrong relief had been sought herein.
23. This was not a default that could be remedied or overlooked as a technicality in line with article 159(2) (d) of the [Constitution](#) of Kenya, 2010 which provides that courts shall administer justice without undue regard to procedural technicalities. If the court proceeded to grant a temporary injunction without the same having been sought by the appellant herein, it would be tantamount to descending into the arena and prosecuting the case on her behalf to the detriment of the respondent herein, a position that no court should ever find itself in.

Disposition

24. The upshot of this court's decision was that the appellant's notice of motion application dated February 23, 2022 and filed on February 24, 2022 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.
25. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER 2022

J. KAMAU

JUDGE

