



**Ngethe v Komo (Environment and Land Appeal E035 of 2022)  
[2022] KEELC 3410 (KLR) (13 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3410 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E035 OF 2022**

**BM EBOSO, J  
JUNE 13, 2022**

**BETWEEN**

**ALLAN MUNGAI NGETHE ..... APPELLANT**

**AND**

**PETER NDICHU KOMO ..... RESPONDENT**

**RULING**

1. The respondent sued the appellant in the Chief Magistrate Court at Kiambu, seeking a sum of Kshs 12,199,999. His case was that he entered into a sale agreement with the appellant, dated November 29, 2018, pursuant to which he agreed to purchase from the appellant Villa Number 9, erected on Land Reference Number 21103/1. The agreed purchase price was Kshs 25,500,000. He paid the appellant a total of Kshs 14,749,999 and subsequently ran into financial problems. Consequently, the appellant invoked clause 16.2 of the sale agreement, rescinded the contract and took 10% of the purchase price as stipulated under the contract. The amount refundable to the respondent after reckoning the 10% liquidated damages forfeited to the appellant was Kshs 12,999,999. The appellant failed to refund the said amount, triggering the suit.
2. The appellant filed a defence dated November 29, 2021. Upon service of the defence, the respondent filed an application for an order striking out the appellant's defence on the ground that the defence was a sham. The appellant did not respond to the application. Hon Ominde, Chief Magistrate, considered the application and rendered a ruling dated April 5, 2022 in which she granted the application by striking out the appellant's defence and entering judgment in favour of the respondent.
3. Aggrieved, the appellant brought the present appeal through a memorandum of appeal dated April 20, 2022. Subsequent to that, the appellant brought a notice of motion dated April 25, 2022, seeking an order of stay of execution of the judgment in the Chief Magistrate Court. The said application is the subject of this ruling.



4. The application was supported by the appellant's affidavit sworn on April 25, 2022 in which he deposed that he did not know the respondent's physical address, financial means, assets or source of income; and that he was apprehensive that in the event execution was to issue and his appeal subsequently succeeds, the respondents will not be in a position to refund him the money and he will not be in a position to trace any attachable assets of the respondent. He added that given that the sale agreement was rescinded due to the respondent's inability to raise funds, he was apprehensive that the respondent would not be in a position to refund him any money in the event the appeal succeeds.
5. The respondent opposed the application through a replying affidavit dated May 24, 2022. He deposed that upon entry of the impugned judgment, the appellant asked for the details of his bank account and the same were supplied to the appellant but he had failed to settle the judgment sum. He added that the appellant had failed to satisfy the conditions for grant of an order of stay pending appeal. The respondent further deposed that he was facing imminent auction due to the loan he took to pay purchase price to the appellant. He urged the court to decline the application.
6. The application was canvassed through brief written submissions dated June 8, 2022, filed through the firm of Mogaka Nyantika & Company Advocates. The respondents filed written submissions dated June 7, 2022 through the firm of Ochich TLO & Associates. I have considered the rival submissions. The single question to be answered in this application is whether the appellant has demonstrated a proper basis for grant of stay of execution in terms of the entire judgment sum.
7. The conditions upon which this court exercises jurisdiction to grant an order of stay of execution pending an appeal are set out in Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides as follows:
  - “(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.”
8. The principal award in the impugned ruling is made up wholly of the net amount which the appellant unequivocally confirmed was refundable to the respondent after deducting the liquidated damages of 10% of the purchase price. Indeed, among the appellant's exhibits is a letter dated August 12, 2021 in which the appellant stated as follows:

“Per the terms of the agreement for sale November 29, 2018, the amounts paid by your client on account of the purchase price as at the date of termination of the agreement was KES 14,749,999/=. Accordingly, the refundable amount after forfeiture of the sum of KES 2,550,000 being 10% KES 25,500,000 is the sum of KES 12,199,999/=”
9. The appellant has not disputed the fact that the respondent is entitled to the above amount. What is disputed is the interest which the Chief Magistrate awarded to the respondent at commercial rates. In the circumstances, I do not think the appellant has demonstrated elements of substantial loss in so far as the principal sum is concerned.



10. The appellant's apprehension is premised on the respondent's preceding inability to pay balance of the purchase price. My understanding of the appellant's apprehensive is that the respondent may not be able to refund him the disputed interest in the event this court found the trial magistrate to have erred in awarding the respondent the contested interest. In the circumstances, I will direct that the amount relating to interest be deposited in a joint interest earning account.
11. In the end, the appellant's notice of motion dated April 25, 2022 is disposed in the following terms.
- a) There shall be a conditional stay of execution in Kiambu CMC E & L Case No 10 of 2021 for a period of nine months on condition that:
    - (i) The principal sum of Kshs 12,199,999 is paid to the respondent in this appeal within 7 days from today.
    - (ii) The interest sum in the decree shall be deposited in this court within the same period of seven (7) days.
    - (iii) In default of (i) or (ii) above, the stay order shall stand vacated.
  - (b) The parties advocates shall within 14 days open a joint interest earning account into which the money deposited in court will be transferred.
  - (c) Costs of the application shall be in the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 13TH DAY OF JUNE 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Mwaniki for the Appellant/Applicant

Mr Ochich for the Respondent

**Court Assistant: Ms Lucy Muthoni**

