



Kariuki v Denkon Enterprises Limited (Environment and Land Appeal E226 of 2024) [2025] KEELC 4503 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KEELC 4503 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E226 OF 2024**

JG KEMEI, J

APRIL 4, 2025

BETWEEN

PETER KARIUKI APPLICANT

AND

DENKON ENTERPRISES LIMITED RESPONDENT

RULING

(In respect to the applicant’s application dated the 5/3/25 seeking stay of execution of the judgement(?) delivered on 16/12/24 in MCELC NO E355 of 2022), interim injunction stopping the execution of the decree therein)

1. The Applicant moved the Court vide the application date the 5/3/25 seeking orders as follows;
 - a. Stay of execution of the judgement delivered on the 16/12/24 and the resultant decree issued on 20/1/25 pending the hearing and determination of the appeal.
 - b. An interim injunction stopping the Respondent and or agents’ employees’ servants and auctioneers from proceeding from selling the applicants moveable property attached herein.
 - c. Costs of the application.
2. The application is premised on the grounds annexed and the supporting affidavit of Peter Paul Karuri sworn on even date. He described himself as the Applicant /appellant hence competent to swear the affidavit. That judgement was delivered in MCELC NO E355 of 2022 in favour of the Respondent for the sum of Kshs 140,000/- being special damages and Ksh 200,000/- as general damages for trespass. He sought and obtained stay of execution for a period of 45 days from the date of delivery of judgment. That he is dissatisfied with the judgment hence the filing of the appeal by way of memorandum of appeal dated the 20/12/24 which raises arguable issues with a high chance of success hence the need to stay the execution pending its hearing and determination. That the Respondent has commenced the



process of execution and has instructed the firm of Betabase Auctioneers who on 24/2/25 obtained warrants of attachment of moveable property and sale in execution of the decree. He opined that the said warrants are defective on grounds that the total sum is Kshs 430,212/- instead of Ks 424024/- set out in the decree of the Court. He avers that he was served with the proclamation of attachment on the 4/3/25 detailing the household moveable goods allegedly proclaimed from his house which on the material date was locked. That unless the Court issues the orders of stay his household goods will be sold to his detriment before the appeal is heard and determined. That he is ready and willing to provide reasonable security as may be ordered by the Court.

3. On the 6/3/25 the Court upon considering the application under certificate of urgency granted orders of interim stay of execution pending the hearing and determination of the substantive motion.
4. The application is opposed by the Respondent through the replying affidavit sworn by Paul Kinyanjui on 7/2/25 where he deponed that he is an employee of the Respondent and duly authorized to do swear to the facts of the case. He averred that the application relates to the rent arrears owed to the Respondent by the appellant for the year 2021. He urged the Court to order for security should it be minded to grant the orders of stay of execution in any event. Moreso, that the Applicant has not been forthcoming with the orders of the (Business Premises Rent Tribunal) BPRT Tribunal which ordered him to vacate the house, hence the insistence on security of costs.
5. Parties were directed to file their written submissions on the application. The parties have complied and I have read and considered the said submissions which now form part of the ruling.
6. Having carefully considered the application in its entirety, the affidavits and the rival submissions the issue for determination is whether the Applicant is deserving of the orders of stay of execution. Interlia, whether the orders of interim injunction can be granted.
9. Order 42 rule 6(2) of the Civil Procedure Rules provides as follows;
 - (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—
 - (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.
7. The jurisdiction to grant stay lies in the discretion of this Court which must be exercised on the basis of sound and settled principles, not arbitrarily or capriciously on a whim or in consideration of any extraneous matters. In the case of the Court of Appeal gave guidance on how a Court should exercise



Butt v Rent Restriction Tribunal [1982] KLR 417 discretion in an application for stay of execution and held that: -

- “ 1. the power of the Court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle is granting or refusing a stay is: If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge’s discretion. (sic) (trial Court judgement).
 3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the Applicant at the end of the proceedings.
 4. The Court in exercising its powers under order XLI rule 4 (2) (b) of the civil procedure Rules can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse”.
8. Order 42 Rule 6(6) of the Civil Procedure Rules 2010, gives this Court the power to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the subordinate Court or tribunal has been complied with.
9. In the case of Richard Muthusi v Patrick Gituma Ngomo & another [2017] eKLR where the Learned Judges stated the principles to be applied in considering an application for stay of execution as thus: -
- “ The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The Applicant who would succeed upon such an application must persuade the Court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”
10. The Applicant has informed the Court that execution has commenced with the proclamation and warrants of the moveable goods in satisfaction of the decretal amount. From the pleadings on record I understand the Applicant to begrudge the manner in which the proclamation and warrants of attachment were carried out that is to say his moveable goods were proclaimed in his absence and at a time that his house was locked; 7 days given by the auctioneer to make good the decretal amount was insufficient; the sums demanded by the Auctioneer are in excess of the decretal amounts and therefore the warrants of attachment and sale are illegal null and void.
11. With respect to whether the Applicant has demonstrated substantial loss the Court answers the same in the negative. It is trite that execution on its own is does not amount to substantial loss because it is a lawful process. See the case of James Wangalwa & Another V. Agnes Naliaka Cheseto [2012] eKLR where the Hon Court held;
- “No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR.



This is so because execution is a lawful process. 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...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

12. I have perused the memorandum of appeal of the Applicant and I find that there is indeed an arguable case. Whether or not it will succeed on appeal is not for this Court to interrogate at this juncture.
13. It is not disputed that the decree of the Court relates to a liquidated sum. The Applicant has not shown that the Respondent even if he succeeds in execution, the defendant cannot refund the monies should it succeed in the appeal. I take note that the Applicant is ready and willing to pay reasonable security for the due performance of the decree. I will make the final orders in the end.
14. As with regards whether the application is inordinate, I note that the judgment in this case was delivered on 16/12/24 and this application was made on 5/3/25 a period of over 2 months considering that the Applicant had obtained 45 days stay in the trial Court, I find that the delay is not inordinate.

Final orders for disposal

15. To balance the rights of the parties in this proposed appeal, that is the right of the Respondent to enjoy the fruits of its judgement vis a vis the right of the Applicant to be heard on his appeal, the Court proceeds to grant orders of stay of execution of the judgment delivered on 16/12/24 in MCELC No E355 of 2022 on terms;
 - a. The Applicant to pay the sum of Kenya Shillings Three Hundred and forty Thousand only (Kshs 340,000/-) in an interest earning account jointly held by both counsels of the parties within a period of 15 days.
 - b. The Applicant is directed to file his Record of appeal forthwith and in any case within a period of 60 days from the date of this Ruling
 - c. If the Applicant defaults in any of a and or b above the orders granted herein shall lapse automatically.
 - d. The prayer for interim injunction is unnecessary in view of the orders of stay of execution granted above. It is struck out.
 - e. Costs of the application shall be borne by the Applicant in favour of the Respondent.
16. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF APRIL, 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the Presence of:-

1. Mr. Mare for the Appellant
2. Mr. Muchiri for the Respondent
3. CA - Ms.Yvette

