



REPUBLIC OF KENYA



**Lugonzo v Al-Husnain Motors Ltd (Civil Appeal E164 of 2024)
[2025] KEHC 156 (KLR) (20 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E164 OF 2024
S MBUNGI, J
JANUARY 20, 2025**

BETWEEN

DAVID CHIMWANI LUGONZO APPELLANT

AND

AL-HUSNAIN MOTORS LTD RESPONDENT

RULING

1. The appellant filed a notice of motion under Certificate of Urgency seeking the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That pending the hearing of this appeal there be stay of execution of the orders of the trial court made on October 1, 2024 in Kakamega CMCC No. E093 of 2024.
 - iv. That the costs hereof be provided for.
2. The grounds of the application were that the respondent filed an application seeking that the court set aside ex parte orders obtained by the applicant in Kakamega CMCC No. E093 of 2024. The applicant stated that they filed a response in the portal, but there was confusion in service and on that ground alone the court proceeded to grant all the orders the Respondent had sought including those that had been over taken by events and contrary to the loan agreement and the [Auctioneers Act](#).
3. The Applicant stated that he made the application dated 02.10.2024 to remedy the situation and the court gave directions that the same be heard on 9/10/2024. He averred that the same was duly served on the respondent. The applicant averred that he received a notification on 08.10.2024 that the application had been dismissed and the file closed.



4. The applicant avers that when he came to court, he could not access the file and upon further follow up, the applicant learnt that the file had been taken back to the magistrate who had again dismissed the application on 09.10.2024 for non-attendance.
5. The applicant avers that he was in court and the file was not called out for his response.
6. It is his submission he has been condemned unheard contrary to Article 50 of *the Constitution* and that the applicant's right to be heard and fair trial have been limited contrary to Article 25 of *the Constitution*.
7. The applicant further states that the court had no jurisdiction to dismiss the application for want of prosecution.
8. This court directed that the application to be canvassed by way of written submissions. As at the time of writing this ruling, no submissions are on record.

Respondent's Case.

9. Vide a replying affidavit sworn by one Kashif Riaz, the manager of the respondent, the respondent stated that it had filed a miscellaneous cause against the Plaintiff/ Applicant seeking to repossess motor vehicle registration number KDN 178E and upon obtaining an order to reposes the said motor vehicle, proceeded to serve the appellant/ applicant with the said orders only to realize that the appellant had obtained orders on 11/06/2024 against the Defendant/ Applicant in Kakamega Civil Suit No. E093 of 2024.
10. He stated that the Defendant was never served with any pleadings and any orders in Kakamega Civil Suit No. E093 of 2024. Considering the fact that they were never served, and that the applicant had obtained adverse orders in the said suit, the Respondent proceeded and filled an application dated 12/09/2024 seeking to set aside the said court orders among other orders and reliefs from the court. The respondent submits that the application was set out for hearing, and when the matter was fixed for mention on 23/09/2024 to confirm compliance with the said court orders, the Appellant/ Applicant had not complied with the said court order.
11. The Appellant/ Applicant having failed to comply with the court orders dated 20/09/2024 to file and serve upon the respondent their response to their application dated 12/09/2024, the Court proceeded to issue orders dated 01/10/2024 accordingly and fixed the matter for Pre-trial directions on 20/11/2024.
12. It was then that the Appellant filed an application dated 02/10/2024 seeking stay of execution of orders dated 01/10/2024. The said application was fixed for hearing on 09/10/2024 and the respondent was directed to file a response to the said application, which they did. The respondent submits that when the said application came up for hearing on 09/10/2024 there was no representation from the Applicant to prosecute the said application and the same was dismissed for want of prosecution.
13. The respondent stated that despite being served with court orders dated 01/10/2024, appellant/ applicant failed, ignored and or neglected to settle the outstanding balance of Kshs. 3,516,000/= owed to the respondent which led to the respondent filing a contempt application dated 18/10/2024 against the appellant.
14. The respondent averred that allowing the present application will be prejudicial as the Respondent has suffered and continues to suffer due to the Plaintiff/Respondent's brazen contempt of court order as he is not paying and has never made attempts of settling the outstanding balance of Kshs 3,516,000/



= owed to the respondent. Further, the respondent submitted that the applicant is yet to comply with the orders dated 01/10/2024 which the present application seeks to set aside.

Analysis.

15. I have looked at the application, the supporting affidavit and replying affidavit filed by the respondent and the annexures filed by both parties.
16. The main issue for determination is whether this court should grant stay of execution of the orders of the trial court made on 01.10.2024 in Kakamega CMCC No. E093 of 2024.
17. The trial court gave a hearing date of 01.10.2024 where the court granted the orders sought by the defendant to repossess the applicant's motor vehicle among other orders thereof, since no response to the application had been filed by the applicant. As per the trial court proceedings, counsel for the applicant was in court with a response, but the same had not been served upon the respondent herein. The applicant attests this to a confusion in service, averring that the process server served the wrong party.
18. Vide an application dated 02.10.2024, the applicant was granted leave to file his response and the matter was slated for hearing on 09.10.2024. The applicant avers that he was notified 08.10.2024 that the application was dismissed for want of prosecution. Upon further follow-up in court, the applicant avers that he was informed that the trial magistrate had again dismissed the application on 09.10.2024.
19. I have seen the annexures attached by the applicant which show the two message notifications he received. This seems to have been an error on the side of the court with regard to the technical challenges associated with the electronic filing platform.

Determination

20. Stay of execution is provided for under 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—
 - (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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.



- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) 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.
21. The three conditions to be fulfilled can be summarized as follows;
- i. That substantial loss may result to the applicant unless the order is made.
 - ii. Application has been made without unreasonable delay.
 - iii. Security as the court orders for the due performance.
22. The power of a court to grant stay of execution is discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision. (see *Butt vs. Rent Restriction Tribunal* [1979]).
23. On whether the application was filed without delay, the trial court entered a ruling against the applicant on 01.10.2024. The present application seeking stay of execution was filed on 14.10.2024. I therefore find that there was no inordinate delay on the part of the applicant and therefore this ground succeeds.
24. Secondly, the applicant has stated that they stand to suffer loss if the orders sought are not granted. In the case of *Good News Church of Africa v Board of Management Eldoret Secondary School* [2021] eKLR the court stated as follows -:
- “Substantial loss is a key consideration in an application for stay of execution and stay of proceedings. The applicant must establish the loss which he/she will suffer if such orders are not granted.”
25. The applicant has stated that the respondent had obtained orders for repossession of the applicant's motor vehicle obtained through a loan to which the applicant had paid Kshs 5,000,000/- being about 65% of the purchase price. I will agree with the applicant in such an event, it will suffer substantial loss.
26. On the issue of security, I have perused the trial court proceedings. On 23.09.2024, Mr. Odhiambo counsel for the defendant told the court that despite an agreement by both parties that the applicant would deposit Kshs. 500,000/- by 23.09.2024, no payment had been made by the applicant. Mr. Munyendo, counsel for the plaintiff stated that the applicant would pay the Kshs. 500,000/- on or before 10.10.2024 and Kshs. 200,000/- monthly installments until payment in full. The applicant, despite showing willingness and readiness to comply with the agreement, did not honor his word to pay Kshs. 500,000/- to the respondent herein before the said court date. He did not explain why.
27. The three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. From the above analysis, I find that the applicant has wholly satisfied the conditions to warrant the stay of execution.
28. In the upshot of the above, this Court in the exercise of its discretion and in the interests of justice, shall grant stay of execution of the orders of the trial court made on 01.10.2024 in Kakamega CMCC No. E093 of 2024 on the following conditions:



- i. That the Applicant shall pay to the Respondent the agreed sum of Kshs. 500,000/- as per the trial court proceedings of 20.09.2024 within 14 days from today.
 - ii. That the Applicant shall pay the repossession fees, if any, incurred by the respondent within 14 days from today.
 - iii. A default of Order (i) and/or (ii) above by the Applicant, automatically the Order of Stay of Execution of the trial court orders of 01.10.2024 shall lapse.
 - iv. Costs of the application abide to the outcome of the appeal.
29. Mention on February 12, 2025 to take directions on how to dispose off the appeal.
30. It is so ordered.
31. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF JANUARY, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Appellant/applicant – absent.

Respondent – Mr. Odhiambo for the respondent present.

Court Assistant – Elizabeth Angong'a

