



**Sasah Contractors Limited v Jaramogi Oginga Odinga of Science
& Technology; Equity Bank Limited (Garnishee) (Civil Case
E002 of 2023) [2025] KEHC 328 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL CASE E002 OF 2023
DK KEMEL, J
JANUARY 23, 2025**

BETWEEN

SASAH CONTRACTORS LIMITED PLAINTIFF

AND

JARAMOGI OGINGA ODINGA OF SCIENCE & TECHNOLOGY DEFENDANT

AND

EQUITY BANK LIMITED GARNISHEE

RULING

1. The Defendant/Applicant filed an application dated 4/11/2024 seeking the following reliefs:
 - i. Spent.
 - ii. Spent.
 - iii. Pending the hearing and determination of the Defendant/Applicant's appeal to the Court of Appeal, there be a stay of execution of the decree herein on such terms and or conditions, as the court shall deem just and expedient.
 - iv. That the cost of this suit be provided for.
2. The application is supported by the grounds set out on the face thereof as well as the supporting affidavit of Kimwele Muneeni, the Acting Legal Officer of the Defendant/Applicant sworn on even date who averred inter alia; that the Defendant/Applicant was aggrieved by the entry of judgment herein in default of defence; that the Defendant/Applicant was also aggrieved by the dismissal of her application dated 15th May 2024 seeking to set aside the judgment in default of defence and further aggrieved by the court allowing the Plaintiff/Respondent's application dated 13/5/2024 and



the making of the decree nisi absolute and the determination and order that the application dated 12/6/2024 as being res judicata yet the same was seeking to recall the decree herein as the same was not founded on a sound or procedural judgment and whether there was a valid judgment; that the Defendant/Applicant has applied for certified copy of proceedings which are yet to be supplied; that the Defendant/Applicant has a plausible appeal that raises arguable, legal and factual grounds of appeal and which shall be rendered nugatory and an academic exercise if the stay of execution sought is not granted; that the Defendant/Applicant is a public institution that uses public funds from the Consolidated Fund, a contribution by the taxpayers and which funds must be utilized prudently; that the Defendant/Applicant is ready and willing to provide such reasonable security for the due performance of the decree herein pending the hearing and determination of the appeal to the Court of Appeal; that the Defendant/Applicant being a public institution is unlikely to be wound up, become insolvent and or be deregistered to the risk or loss of funds should the appeal before the Court of Appeal be lost, which is unlikely; that the Plaintiff/Respondent, on the other hand, is a private limited liability company whose directors are private citizens and whose assets have been attached and sold on account of its inability to service bank loans and or finance facilities advanced to it which raises doubt on its ability to refund the decretal sum if the same is paid out and the appeal in the Court of Appeal succeeds as it is likely to; that the Defendant/Applicant is ready and willing to give such security, guarantee and or such other form of security as shall be acceptable to the Plaintiff/Dcreeholder for the due performance of the decree herein; that the Plaintiff Dcreeholder does not stand to suffer any substantial loss, damage and or prejudice if the orders sought herein are granted; that the application has been made without undue delay; that this court has the power, authority and jurisdiction to grant the orders sought and that it shall meet the ends of justice if the same are granted as prayed.

3. The application was vehemently opposed by the Plaintiff/Respondent. The Plaintiff's Managing Director Samwel Odhiambo Okumu swore a replying affidavit dated 13/11/2024 wherein he averred inter alia; that he is conversant with facts giving rise to the suit and was authorized by the Plaintiff to swear the affidavit; that the current dispute between the parties arose out of an agreement entered into on 11/2/2024 wherein the defendant contracted the Plaintiff to undertake construction works, plumbing works, mechanical works, electrical fittings, landscaping and related works for 1000 capacity student hostel at its main campus in Bondo town in Siaya County in various phases at a contract price of Kshs 663,941,731.00 inclusive of taxes; that the plaintiff executed and handed over the works as agreed and that the details of the plaintiff's claim are set forth in the plaint; that the defendant was served with pleadings to enter appearance but failed; that the court entered a default judgment upon the plaintiff's request; that vide application dated 11/10/2023, the defendant approached the court for an order of stay of execution of the judgment entered on 18/10/2023 for stay of proceedings and for leave to defend the suit; that a conservatory order was granted by the court ex-parte on the said application on 12/10/2023, which application is on record; that after filing of response by the Plaintiff, the court, with consent of parties, directed payment of part of the amount due to the plaintiff be released to it and that the parties do sit and reconcile the figures, agree on what was due and file a consent in court; that the orders were made on 26/10/2023 and that the defendant made part payment of the judgment debt amounting to 4,813,158.12 as agreed between the parties; that several meetings were held by the parties, exchanged documents as they pursued settlement as agreed in court; that pursuant to the grant of leave afore-stated, the defendant filed an affidavit sworn by its project manager –Mr. Erick Warui stating that the Plaintiff had been paid Kshs 803,923,063.77 although did not cite any evidence; that it is common ground that the parties had reached an agreement even before this suit on value of work undertaken by plaintiff which was Kshs.844,058,672.12 (in affidavit in support dated 11/10/2023); that there is documentation of the monies paid out to the plaintiff, the outstanding and the retained monies of the Plaintiff by the defendant; that in the application dated 12/6/2024, the defendant stated that it had obtained the concurrence of the Attorney General to hire external counsel to act for it in this matter;



that the defendant was and is aware that it cannot engage external counsel to act for it in this or in any other matter without permission of departments, state agencies, state corporations and parastatals who are to be represented in meetings that the parties convened in trying to settle this matter as directed by court; that it was discovered that Ms. Maryanne Omondi Advocate – was a state counsel working with Attorney General, Ms. Ivor Nyamita Advocate & Ms. Jeptanui Katwa Advocate were inhouse counsel employed by defendant; that it is worth noting that while trying to prove that permission was sought to engage external counsel, the defendant attached to its affidavit in support of its application dated 12/6/2024, a letter dated 29/5/2024 by the Solicitor General to the Chief Executive Officer responding to its request for permission to engage external counsel in several matters that were in court including this current matter; that the defendant was granted approval on several conditions, the principal of which was that it had to ensure compliance with the Constitutional requirements of the prudent use of public resources and consider Article 227 of *the Constitution* to ensure that the procurement and appointment of external counsel is done in compliance with the applicable procurement laws and processes; that he has interacted with the defendant’s officers in almost all departments, and that he is aware Ms Onsongo & Co. Advocates has never been legal counsel for the defendant and has never been prequalified to offer legal services and that his appointment is violation of Public procurement & Asset Disposal Act, Cap 412 C of the Laws of Kenya; that there is no appeal against the judgment and decree of the court and no notice of appeal has been filed; that this court dismissed the defendant’s application dated 15/5/2024 and that there is no order or other decision made in respect of the said application that is capable of execution; that the Garnishee order that was given by this court is not directed at the Defendant but the Garnishee and therefore the same is an issue between the Plaintiff and the Garnishee; that the notice of appeal on which this application is hinged has been filed by a counsel who is not lawful on record for the Defendant; that it is not correct that the Defendant uses funds from the consolidated fund since it receives large sums of money in the form of grants and donations from several bodies and partners within Kenya and from overseas and further it receives also money from students; that the Defendant continues to hold onto the retention monies belonging to the Plaintiff amounting to over Kshs 60,000,000/= and which money should have been released to the Plaintiff upon completion of the works; that the Defendant’ claim that there was no judgment on record amounts to splitting hairs in that even if there was any error, the same was clerical and does not vitiate the judgment at all as it has nothing to do with the Plaintiff and is correctable by the court without involving the parties; that the Plaintiff is entitled to the immediate enjoyment of the fruits of the judgment and decree; that the application is misconceived and lacks merit and further the conduct of the Defendant is such that it is not entitled to favourable exercise of this court’s discretion.

4. The application was canvassed by way of written submissions. Both parties duly filed and exchanged written submissions.

Defendant/Applicant’s Submissions

5. Vide submissions dated 26/11/2024, learned counsel raised three issues for determination namely:
 1. Does the Applicant’s application meet the parameters of Order 42 Rule 6 of the Civil Procedure Rules?
 2. Balancing the interests of both parties, what is the most commendable order that the court can make/issue in the circumstance?
 3. Who bears the costs of the application?



6. It was submitted that prior to filing this present application, the Defendant filed and served the Notice of Appeal under Rule 75 of the Court of Appeal Rules which notice is deemed to be an appeal for purposes of an application for stay of execution.

It was submitted that the application is brought pursuant to provisions of Order 42 Rule 6 of the Civil Procedure Rules which 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 appeal case of in so far as the court appeal 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 orders set aside.”
2. No order for execution shall be made under Sub rule 1, unless-
- a. the court is satisfied that substantial 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.

These principles were enunciated in *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary and the discretion should be exercised in such a way as not to prevent an appeal.
- b. The general principle in granting or refusing a stay is, if there is no other overwhelming hinderance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
- c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 for costs as ordered will cause the order for stay of execution to lapse.

He submitted that in an application for stay of execution pending appeal, it is required of the Applicant to demonstrate that he has an arguable appeal and that the grounds of appeal raise real triable issues and that the application has been filed without undue delay. In the absence of this, the application is rendered nugatory should the decision of the appellate court overturn that of the trial court; that this court must determine whether or not granting the order will occasion substantial loss to the Applicant.



Substantial loss was explained in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto (2012) eKLR, that: -

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 Civil Procedure Rules. 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 vey 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.”

This court while balancing these two interests, must satisfy itself that no party would suffer undue prejudice. This principle was enunciated in the decision of the Court of Appeal in Absalom Dova vs. Tarbo Transporters (2013) eKLR, where it stated:

The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights’ the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under ...reconciliation.

The right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs. Guardian Bank Limited (2007) eKLR, the court stated that:-

The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.

7. It was submitted that the Defendant has already filed a notice of appeal wherein it has set out some grounds of appeal which it intends to raise before the Court of Appeal for determination. The Applicant now seeks for an order of stay of execution in order to obtain a chance to canvass and ventilate its appeal and that the said appeal is likely to be rendered nugatory if the stay sought is not granted.
8. It was further submitted that the execution herein is by way of Garnishee in that the funds in the Defendant’s bank account has been attached and therefore the Defendant is unable to access those funds in order to finance its activities and processes. That the order on the Garnishee was made on 30/10/2024 and that this application was filed on 4th of November, five days later and therefore there was no inordinate delay on the part of the Applicant.



9. It was submitted that the Defendant is ready and willing to offer security for the due performance of the decree in the event it loses the appeal. The Defendant maintains that the court should balance the interest of the parties so that none is disadvantaged as they wait for the determination of the appeal. Learned counsel pointed out that in pursuing this arrangement for the parties, the Defendant urges the court to grant the order of stay of execution of the decree on condition that the applicant provides the requisite security. The Applicant has offered to deposit security which shall be at the Plaintiff/Respondent's reach should the appeal fail. Finally, it was submitted that the Defendant/Applicant has made out a case for the grant of the orders sought on such reasonable and fair conditions/terms as the court shall deem just and expedient.

Plaintiff/Respondent's Submissions

10. Learned counsel submitted that it is necessary to give a chronology of the events leading to the current state of affairs which are as follows: Basing on the proceedings of 11/9/2023 before Ogembo J, the application is based on the ground set out in the body of the Notice of a motion and supporting affidavit sworn by Mr. Kimwele Muneeni, Ag Legal Officer of the Defendant/Applicant. Among the grounds relied upon are that the Applicant had denied ever being liable and or indebted to the Plaintiff as claimed in the Plaint or at all; The Plaintiff/Respondent filed a request for judgment in default of appearance and or file a defence within legally prescribed period now the plaintiff (Sasah Contractors Limited) requests for inter locutory judgment to be entered as prayed. The Plaintiff/Respondent moved the court to tax the party and party bill of costs, drew and had a decree signed by the court. The Plaintiff/Respondent sought to execute the decree by way of garnishee and indeed garnisheed the Defendant/Applicant's bank accounts with M/s Equity Bank Limited; that the Defendant/Applicant filed an application dated 15/5/2024 seeking to reinstate the application dated 11/10/2023; that the plaintiff filed an application dated 13/5/2024 seeking to have the garnishee nisi made absolute; that the defendant filed another application dated 12/6/2024 seeking to have the decree that was being executed to be recalled and cancelled as the same was not based on any lawful judgment, none had been entered that was capable of giving rise to a decree; that the court directed that the application dated 12/6/2024 be kept in abeyance pending the hearing and determination of the application dated 13/5/2024 by the plaintiff and 15/5/2024 by the defendant. The said applications were canvassed by written submissions and in the ruling delivered on 30/10/2024 the court dismissed the defendant's application dated 15/5/2024 and allowed the plaintiff's application dated 13/5/2024. The defendant sought to have its application dated 12/6/2024 listed down for hearing but the Plaintiff submitted that the same was res judicata as it sought similar orders as the one dated 15/5/2024 by the defendant/Applicant seeking for reinstatement of the application dated 11/10/2024 that had been dismissed for non-attendance. The application dated 10/10/2024 was not heard and or determined on its merit. Upon hearing counsel for the parties, the court ruled that Defendant/Applicant's application dated 12/6/2024 was res judicata and that the same was struck out; that the defendant applied for a temporary stay of execution pending the filing and determination of a formal application for stay pending appeal. The court granted temporary orders of stay; that defendant filed application dated 4/11/2024 that is the subject of these submissions. Learned counsel submitted that it should be noted that prior to filing application dated 4/11/2024, the defendant had filed and served a Notice of Appeal under Rule 75 of the Court of Appeal Rules, which notice is deemed to be an appeal for purposes of an application for stay of execution.

It was submitted that the application is brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules that provides that;

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appeal 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 orders set aside.”

No order for stay of execution shall be made under sub rule (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 decree or order as may ultimately be binding on him has been given by the applicant.”

11. It was submitted that in an application for stay, the court must consider the overriding objective and balance the interest of the parties to the suit since the court is enjoined to place the parties on equal footing, in this case the Plaintiff who has been denied the fruits of the judgment must be taken care of.
12. It was submitted that the present application must be looked at bearing in mind the standard principles as well as the Constitutional provisions regarding the issue of equity and in this case the Defendant entered into a contract with the Plaintiff wherein the Plaintiff was to undertake a construction of a student’s hostel with capacity to host 1000 students and that the Plaintiff has accomplished the work and now requires to be paid. It is instructive that the parties had earlier on agreed to undertake the joint reconciliation of accounts and thereafter file the same in court thereby confirming that the Defendant is out to frustrate the Plaintiff.
13. It was further submitted that the Defendant’s claim that there was no judgment is a lie because the Defendant participated in the taxation of the Costs and further the earlier application by the Defendant indicated that it sought to set aside the said judgment and therefore they cannot now turn around and claim that there was no judgment yet in their application dated 15/5/2024, the same was never raised. However, the Defendants sought to raise the same in an application dated 12/6/2024 which was struck out by the court and therefore the same would not be an issue in any appeal on the ruling of this court dated 30/10/2024. It was submitted that the Defendant seems to dwell on the issue of semantics and that the words used by the court was, “judgment against the defendant to be entered as prayed” as opposed to judgment is entered as prayed. It is clear that this is just a clerical error which is curable by the O2 principle under Article 159 of *the Constitution* and that the same can be corrected by the courts of its own motion under Section 100 of the *Civil Procedure Act*.
14. Finally, it was submitted that the Defendant’s claim that it uses funds from the Consolidated Fund is untrue since it is clear that it wants to use the claim of being a public institution with a view to trampling on the rights of the Plaintiff. The Defendant is expected to respect the rights of other entities or individuals. Learned counsel urged the court to dismiss the application.
15. I have given due consideration to the application, rival affidavits as well as the rival submissions. It is not in dispute that the Defendant’s application dated 15/5/2024 seeking for stay of a Garnishee order as well as reinstatement of its application dated 11/10/2023 that had been dismissed for want of prosecution was dismissed on 30/10/2024. It is also not in dispute that the Plaintiff’s application dated 13/5/2024 was allowed on 30/10/2024 to the extent that the decree nisi was made absolute regarding Defendant’s account numbers 1260299752274 and 075xxxxxxxx with the Garnishee herein totaling to Kshs 74, 502, 736/02 was ordered released to the Plaintiff. It is also not in dispute that interim orders of stay of execution were granted by this court on 30/10/2024 pending the filing of a formal application for stay pending appeal by the Defendant to the Court of Appeal. It is also not in dispute that the Defendant has since filed its Notice of Appeal to the Court of Appeal pursuant to Rule 75



of the Court of Appeal Rules. It is also not in dispute that the issue of the appointment Defendant's present counsel as its external counsel has since been determined vide the ruling dated 18/12/2024. I find the only issue for determination is whether the Defendant's present application has satisfied the conditions imposed by Order 42 Rule 6(2) of the Civil Procedure Rules.

16. Under Order 42 Rule 6 (2) of the Civil Procedure Rules, an applicant seeking for an order of stay of execution pending appeal must satisfy three conditions namely; that the application has been made without unreasonable delay; that substantial loss may result to the applicant if the order is not made; that the applicant is ready and willing to furnish security for the due performance of the decree which may ultimately be binding upon him. These are thus the conditions that the Defendant/Applicant should fulfil before the order of stay can be considered.
17. On whether the application has been lodged timeously, it is noted that the adverse orders made against the Applicant were made on 30/10/2024 and that the Defendant's application was filed five days thereafter. I find that there was no delay and that the application has been filed without unreasonable delay. I find this condition has been met.
18. On whether substantial loss might be suffered by the Defendant, it is noted that the amounts involved is quite a tidy sum running into millions of shillings. The Defendant is a public institution and stands to suffer substantial loss if the order of stay is not granted pending determination of the appeal at the Court of Appeal. Substantial loss was explained in the case of *James Wangalwa & Another Vs Agnes Naliaka Cheseto* [2012] ECLR as follows:

“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 exception 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 Civil Procedure Rules. 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.”

19. The issue of substantial loss affecting an Applicant must be weighed against the right of the successful party who is also entitled to enjoy the fruits of his/her judgement. In the case of *Absalom Dova Vs Tarbo Transporters* [2013] eCLR, the Court of Appeal held that the discretionary relief of stay of execution pending appeal should be given to serve the interest of both applicant and respondent and that none should be disadvantaged as both of them have rights in that the applicant needs to have the appeal not rendered nugatory while on the other hand the respondent needs to enjoy the fruits of his/her judgement. The same view was also held by the court in *Samvir Trustee Limited Vs Guardian Bank Limited* [2007]eCLR. The issue of substantial loss will therefore be seen through the prism of the Respondent's circumstances as well. It is my view that the Respondent's concerns will be taken care of through the conditions to be imposed regarding the issue of security to be furnished by the Applicant.
20. On whether the Applicant is ready to provide security, the Defendant has averred that it is ready to do so. It is noted that the Defendant's two accounts with the Garnishee had already been garnished and that the decree nisi had been made absolute but later temporarily stayed pending the filing of this application. The Garnishee has already confirmed that the said monies in the two accounts belong to the Defendant herein. I find that the said monies should now be deposited into a joint interest earning account in the names of both Advocates pending determination of the Defendant's appeal at the Court



of Appeal. The counsels will enter a consent to pave way for the release of the monies into the new joint account. That arrangement will take care of the concerns of the parties herein.

21. In the result, it is my finding that the Defendant's application dated 4/11/2024 has merit. The same is allowed in terms of prayer 3 thereof on condition that the Defendant/Applicant deposits the sum of Kshs 74, 502, 736/02 contained in the Defendant's bank account numbers 1260xxxxxxxx and 075xxxxxxxx with the Garnishee into a joint interest earning account in the names of both Advocates for the parties herein within thirty (30) days from the date hereof failing which the stay shall lapse. Both learned counsels for the parties shall enter into a consent to pave way for the release of the said monies into the new joint account. The costs of the application shall abide in the appeal.

Orders accordingly

DATED AND DELIVERED AT SIAYA THIS 23RD DAY OF JANUARY, 2025.

D. KEMEI

JUDGE

In the presence of :

Onsongo.....for Defendant/Applicant

Otieno David.....for Plaintiff/Respondent

Bwire.....for Garnishee

Ogendo.....Court Assistant

