



**Onjong’o v Ajinja & another (Civil Case E036 of 2024)
[2025] KEHC 1599 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL CASE E036 OF 2024
DK KEMEL, J
FEBRUARY 21, 2025**

BETWEEN

PETER OCHIENG ONJONG’O APPLICANT

AND

KEVIN OTIENO AJINJA 1ST RESPONDENT

PETER OCHIENG AJONGO 2ND RESPONDENT

RULING

1. The Appellant/Applicant herein Peter Ochieng Onjong’o moved this court vide his application dated 24th August 2024 pursuant to Order 42 Rule 6 of the Civil Procedure Rules, Sections 3, 3A and 3B of the *Civil Procedure Act* seeking principally for an order of Stay of Execution of the Decree made on 3rd June 2024 and/or all proceedings in Siaya Small Claims Case No. 024/ 2024 Peter Ochieng Onjong’o Vs. Otieno Kevin Ajinja and Erick Otieno Awino pending the hearing and determination of the appeal herein. The application also seeks for costs.
2. The application is supported by the grounds set out on the face thereof and by the supporting affidavit of the Appellant /Applicant sworn on even date. The Appellant’s gravamen is inter alia; that he had lodged a Notice of Motion for review dated 4th July, 2024 before the trial court on grounds that it did not have jurisdiction to try the claim but which was dismissed by the Adjudicator on 23rd August, 2024; that he has lodged his appeal against the judgment of the adjudicator as well as the ruling and that the appeal will be rendered nugatory if orders of stay are not granted; that he stands to suffer substantial loss and damage if the stay is not granted; that the application has been made without unreasonable delay; that as regards the issue of security, the Applicant contents that the petrol station subject matter of the sale agreement and the suit in this appeal had been sold for a sum of Ksh1,500,000/= and which is in the possession of the Respondents and that the same is sufficient as security for the performance of the decree; that the Appellant has a good and arguable appeal which raises triable issues; that it is in the interest of justice that the orders sought are granted.



3. The application was opposed by the Respondents who filed grounds of opposition dated 31st December, 2024 which are inter alia; that the application is incompetent and bad in law as the same has been brought without any eminent danger of execution ; that the application is meant to prevent the Respondents from enjoying the fruits of the judgment; that the Appellant has not approached the court appropriately for the orders; that the Appellant had made a similar application for stay of execution of the judgment vide an application dated 4/7/2024 wherein the Appellant was ordered to deposit Kshs 200,000/= as security pending appeal; that the Appellant instead of complying with the order has filed the present application; that the appellant be compelled to comply with the orders made by the trial court in order for him to proceed with the appeal; that the application should be dismissed with costs.
4. The application was canvassed by way of written submissions. The Appellant submissions are dated 17/12/2024 while the Respondents relied on their grounds of opposition dated 5/1/2025.
5. I have given due consideration to the Appellant's application dated 24/8/2024 as well as the rival submissions. It is not in dispute that the Appellant has lodged an appeal which is pending determination. It is also not in dispute that the Appellant had lodged an application dated 4/7/2024 before the trial court seeking for orders of stay of execution of the judgment of the lower court pending the appeal and that the trial magistrate granted him a conditional stay of execution wherein he was to deposit a sum of Kshs 200,000/= in a joint interest earning account in the names of the advocates on record within 30 days from 23rd August, 2024 pending determination of the appeal. It is not in dispute that those orders are still in force and have not been set aside or reviewed either by this court or the lower court. It is also not in dispute that the present application is similar to the one dated 4/7/2024. I find the issue for determination is whether the Appellant's application dated 24/8/2024 has merit.
6. The Appellant's application has been brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules which provides that an applicant seeking for orders of stay pending appeal must satisfy three conditions namely: firstly, that the application has been filed without unreasonable delay; secondly, that the Applicant stands to suffer substantial loss and damage if the order of stay is not granted and thirdly, that the applicant is ready and willing to furnish security for the due performance of the decree which may be binding on him or her.
7. On whether the application has been filed timeously, it is noted that the application was filed just one day after the ruling was made and two months three weeks from the date of the judgment of the lower court. I find the period not inordinate and hence I am persuaded that the application has been brought without unreasonable delay. This condition has been satisfied by the Appellant.
8. On whether substantial loss is likely to be suffered by the Appellant, it is noted that the judgment sum is Kshs800,000/= plus costs. This amount is a tidy sum by any standards and that the Appellant is likely to be financially oppressed if the same is paid to the Respondents whose means have not been disclosed and that the Appellant might not be refunded in the event of success of the appeal. It is noted that the Respondents have not sworn affidavits regarding their financial means or their source of income so as to assuage the concerns of the Appellant. I find this condition has been met by the Appellant.
9. On whether security has been offered by the Appellant, it is noted that the Appellant has shifted the responsibility to furnish security upon the Respondents. I find this to be rather queer in that the property namely a petrol station is the subject of the suit and therefore as long as the same is still pending determination, it cannot be offered as security. The Appellant was under obligation to furnish a separate security for the due performance of the decree which might become binding upon him. I find that the Appellant has not satisfied this condition.



10. From the foregoing, it is clear that the Appellant has not satisfied one of the conditions imposed by Order 42 Rule 6 of the Civil Procedure Rules. It is mandatory that all the three conditions must be met before an applicant can obtain an order for stay of execution pending appeal.
11. It is noted that the Appellant's present appeal stems from the ruling of the trial court dated 23/8/2024 in which he seeks to have the whole of the said ruling set aside as well as the judgment dated 3/6/2024. It is also clear that the Appellant's appeal mainly hinges on a main ground that the trial court did not have jurisdiction to try the claim. This is a triable issue and which will be determined during the hearing of the appeal. It is also instructive that the Respondents have a judgment in their favour and therefore under normal circumstances, they ought to be allowed to enjoy the fruits of their judgment. On the other hand, the Appellant who has lodged his appeal, is also entitled to ventilate the same before the court. Hence, each of the parties must be given their day in court in line with dictates of Articles 48 and 50 of the Constitution. That being the position, this court must balance the interests of the parties herein.
12. It is noted that the Respondents even though have vociferously opposed the Appellant's application, they have through their counsel's submissions proposed that the court do impose conditions over the deposit of the security by the Appellant. They have proposed that the appellant do deposit half of the decretal sum in an account in the names of both advocates while the other half be made payable to the Respondents and that the same be complied within 30 days and finally, the costs do abide in the appeal. Again, the Respondents have attacked the Appellant's application aforesaid on the ground that the Appellant has not complied with the orders of the trial court dated 23/8/2024. I find that even though this could be the position, the said argument has been overtaken by events in view of the fact that the Appellant has appealed wholly against the ruling of the said court as can be seen in the Memorandum of Appeal and thus the Respondent's ground of objection in that regard must be rejected. On the same vein, the Appellant having opted not to comply with orders of the trial court regarding the deposit of the security must now contend with this court's orders over the same.
13. Whereas, the proposals by the Respondents regarding the deposit of the security are appropriate, it is not lost to the parties that the key plank in the Appellant's appeal is that the trial court did not have jurisdiction to determine the matter. In the event the appeal succeeds, then the Appellant will have been prejudiced by the terms proposed by the Respondents. I am of the considered view that the appropriate order to be made in the circumstances is that the decretal amount should be deposited into a joint interest earning account in the names of both the advocates pending determination of the appeal.
14. In view of the foregoing observations, the Appellant's application dated 24/8/2024 is allowed in the following terms:
 - i. An order of stay of execution of the decree dated 3/6/2024 and or all proceedings in Siaya Small Claims Court Case No. 024/2024, Peter Ochieng' Ajong'o Vs. Otieno Kevin Ajinja and Erick Otieno Owino is hereby granted pending the hearing and determination of the appeal on condition that the entire decretal amount be deposited into an interest earning account in the joint names of the advocates for the parties within thirty (30) days from the date of this ruling failing in which the stay shall lapse.
 - ii. The costs of the application shall abide in the appeal.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 21ST DAY OF FEBRUARY, 2025.

D. KEMEI



JUDGE

In the presence of

N/A Ario..... for Appellant/Applicant

Ondego..... for Respondents

Ogendo..... Court Assistants

