



REPUBLIC OF KENYA



KENYA LAW
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**Obonyo v Achieng & another (Civil Appeal E046 of 2024)
[2025] KEHC 7246 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 7246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E046 OF 2024
A. ONG'INJO, J
FEBRUARY 20, 2025**

BETWEEN

CAROLINE OBONYO APPLICANT

AND

PAULINE ACHIENG 1ST RESPONDENT

GRACE AKOTH OKELO 2ND RESPONDENT

RULING

1. By a Notice of motion dated 12th September 2024, the Applicant moved this court pursuant to the provisions of Order 42 rules 6 (1), (2) and (6) of the Civil Procedure Rules and Section 1A, 1B, 3A and 63 of the Civil Procedure Act, seeking the following orders that: -
 - i. Spent
 - ii. spent
 - iii. The Honourable court be pleased to grant an order if stay of execution of the judgment and decree made and/or issued on the 12th August 2024, vide Migori SCC No. E101 of 2024 together with all consequential orders and in particular, the limb awarding Kshs. 153, 650/=, costs and interest of the suit in the subordinate court to Respondent, pending the hearing and determination of the intended appeal.
 - iv. Costs of this application be borne by the Respondents jointly and/or severally.
 - v. Such further and/or other orders be made as the court may deem fit and expedient.
2. The application is premised on the grounds on its face and supported by the affidavit of Caroline Obonyo, the Applicant herein. In the said affidavit, the Applicant deposes that the Respondents lodged a claim vide Migori SCC No. E101 of 2024 alleging that she misappropriated a sum of Kshs. 153, 650/



- = belonging to a group by the name Oruba Star Women and were demanding a refund. She lodged a response to the claim denying the allegations and the matter proceeded to hearing and judgment rendered on 12th August, 2022 stating that she was indebted to the Respondents and was ordered to pay together with interest and costs.
3. Following the delivery of the judgment she lodged the instant appeal and requested for proceedings to facilitate compilation of the record of appeal. The Applicant averred that the Respondents were in the process of executing the judgment and decree and in the event of execution of the decree before the hearing and determination of the appeal, her rights and interests will be defeated.
 4. The Applicant deposed that the Respondents have no known income and resources and in the event the decree is executed the likelihood to recover the money will be futile and she will suffer substantial loss if the orders are not granted.
 5. She also argued that the appeal raises salient, pertinent and plausible issues of law which are arguable and thus deserving to be ventilated before the court. She stated that she was willing to provide a requisite security as the court may order.
 6. She averred that unless the Respondents are restrained by an order of stay of execution, they may execute thereby defeating the substratum of the appeal rendering it nugatory. She further averred that there exists sufficient cause to preserve the subject matter pending hearing and determination of the appeal. That it is in the interest of justice that the application be heard and allowed.
 7. In response to the application, the Respondents filed a Replying affidavit dated 27th September, 2024 sworn by Pauline Achieng. In the said affidavit, she asserts that she is the 1st Respondent and has authority to swear the affidavit on behalf of the 2nd Respondent. She deposes that the Applicant has a duty to deposit Kshs. 153, 650/= in court as security pending hearing and determination of the intended appeal. The deponent states that stay of execution is a preserve and discretion of court and there must be good reasons to that effect.
 8. Lastly, she deposed that the Applicant is silent on any deposit to be made in court without which this court can move suo moto to dismiss the application.
 9. This application proceeded by way of written submissions. Both parties complied and filed their respective written submissions. The Applicant's submissions are dated 30th October 2024 whereas the Respondent's submissions re dated 6th November 2024.

Applicant's submissions

10. The Applicant raised two issues for determination and submitted that she is seeking remedies that are envisaged under Order 42 Rule 6 of the Civil Procedure Rules, 2010. It provides that;
 - a. That substantial loss may result to the applicant unless the order is made.
 - b. That the application has been made without unreasonable delay, and
 - c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has given.
11. On substantial loss, the Applicant submitted that substantial loss is the corner stone to granting of stay of execution pending hearings and determination of the appeal. The Applicant needed to place before court affidavit evidence, testament to the nature of loss that is alluded to and or believed to be eminent. The Applicant would suffer substantial loss as she averred that the Respondents have no definite source of income.



12. The Applicant submitted that she has demonstrated that there is need to grant the orders sought as recovering the decretal amount from the Respondents who have no known income will be difficult and will cause hardship on her. She submitted that the Respondents also failed to produce any resolution from their members consenting to the filing of the case as they belonged to Oruba Star Group Women, a self-help group engaged in financial assistance to women members within Migori County. The Applicant cited the case of *Machira T/A Machira & Co. Advocates vs East African Standard* (2002) eKLR and *Ndegwa Gichine vs Sicily Warware Njira* (2018) eKLR.
13. On unreasonable delay, the Applicant submitted that the subject application seeking stay of execution pending appeal is dated 12th September 2024 whereas the judgment was delivered on 12th August 2024. Therefore, the instant application was filed timeously and without unreasonable delay as it was lodged within the 30 days period.
14. In regards to furnishing security, the Applicant submitted that she is obliged to demonstrate her willingness to furnish security for the due performance of the decree. Reliance was put on the case of *Focin Motorcycle Co. Ltd vs Ann Wambui & Another* (2018) eKLR.
15. It was urged by the Applicant that the Respondents shall not suffer prejudice in any manner as same can be compensated by way of costs. Further, the Court is bestowed with jurisdiction to grant an order of stay of execution as provided under Order 42 rule 6 of the Civil Procedure Rules. The applicant relied on the case of [*Butt vs Rent Restriction Tribunal, Nairobi CACA No. 6 of 1979*](#).

Respondents' submissions

16. The Respondents submitted that the application is very silent on security and the application rides on mere speculations without valid issues for issuance of orders sought. The Respondents further submitted that it is only fair and just that orders can only be granted on the basis of confirmation of security deposited in court pending hearing of the appeal. The Respondents cited the case of Civil Appeal No. E123 of 2023 *Njenga vs Njeri & 2 others*.

Analysis and determination

17. I have considered the Notice of motion application dated 12th September 2024, the response thereto, the written submissions and the cited authorities. I find the sole issue arising for determination is whether the Applicant has satisfied the court for grant of stay of execution orders pending hearing and determination of the appeal herein.
18. The principles guiding grant of stay of execution orders pending appeal are well anchored in Order 42 Rule 6 of the Civil Procedure Rules, 2010. It 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 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 sub rule (1) unless—



- a. The court is satisfied that substantial loss may result to the Applicants 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.” (Emphasis mine)
19. From the above provision it is clear that an Applicant seeking stay of execution pending hearing and determination of an appeal must satisfy the following conditions;
 - a. That substantial loss may result to the applicant unless the order is made.
 - b. That the application has been made without unreasonable delay.
 - c. That security for costs has been furnished for the performance of the decree.

a. Whether substantial loss may result to the applicant unless the order is made.

20. On the question of whether substantial loss may result to the Applicant unless the order is made, this court is guided by the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, where the court observed 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 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.”

21. In the instant appeal, the applicant averred that she would suffer substantial loss as the Respondents have no definite source of income. Further, she averred that recovering the decretal amount from the Respondents who have no known income will be difficult and will cause hardship on the Applicant. The Respondents have not placed any material as to their ability to repay the decretal amount in the event that the appeal succeeds. It is on this basis that the Applicant shall suffer substantial loss if stay is not granted. I therefore find that the Applicant has satisfied this condition for the grant of stay of execution.

b. Whether the application has been made without unreasonable delay.

22. On the question of unreasonable delay, a perusal of the pleadings shows that the judgment in this matter was delivered on 11th August 2024 whereas the present application is dated 12th September 2024 and filed in court on 19th September 2024. The memorandum of appeal was filed ten days later on 22nd August 2024 from the date of the judgment.. In the case of *Jaber Mohsen Ali & another vs Priscillah Boit & another* [2014] eKLR the court stated that:

“...The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter...”



23. In the instant application, I am satisfied that there has been no inordinate delay in bringing the instant application as it was filed within one month and 9 days.

c. Whether security for costs has been furnished for the performance of the decree.

24. As regards security for costs, the Applicant has submitted that she is obliged to demonstrate her willingness to furnish security for the due performance of the decree. The Respondent on the other hand submitted that the application is very silent on security and the applicant rides on mere speculations without valid issues for issuance of orders sought. The Respondents further submitted that it is only fair and just that orders can only be granted on the basis of confirmation of security deposited in court pending hearing of the appeal.

25. In the case of *Focin Motorcycle Co. Limited vs Ann Wambui Wangui & another* [2018] eKLR, the court held thus;

“The applicant has deponed that he is ready to provide security. It is the Court which determines the security upon ordering stay to ensure the due performance of the obligations by the applicant as to costs and to satisfy the decree. It is therefore sufficient to depose that he is ready to provide security. The applicant has submitted that he has ability to provide security as will be ordered by the Court as it is a company with substantial investments in the County and once called upon by the Court will avail such security.’

26. To buttress the position the court in the case of *Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, held that;

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

27. Accordingly, from the foregoing discussion, I am of the considered view that the applicant has satisfied the limb on security for due performance of the decree.

28. This court is alive to the fact that the grant or refusal of stay of execution pending hearing and determination of an appeal is a matter of discretion and this court will exercise such discretion to serve justice to the parties in these proceedings. In the case of *Butt vs Rent Restriction Tribunal* (1982) KLR 417, the court of appeal held that;

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in 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.
3. 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.



4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. 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.”
29. Accordingly, I allow the Applicant’s application dated 12th September 2024 and grant stay of execution of the decree in Migori SCC No. E101 of 2024 on the following conditions:
- a. The Applicant shall deposit the entire decretal sum of Kshs. 153,650/= with the court pending hearing and determination of this appeal, within 30 days of this ruling.
 - b. Failure to comply with (a) above will automatically terminate the order of stay.
 - c. The Applicant to file and serve a record of appeal within 30 days of this ruling.
 - d. This matter shall be mentioned on 27/3/2025 or directions on hearing of the appeal.
 - e. Costs shall be in the cause.

Orders accordingly

DELIVERED DATED AND SIGNED IN MIGORI THIS 20TH DAY OF FEBRUARY 2025.

A. ONGINJO

JUDGE

