



REPUBLIC OF KENYA



KENYA LAW
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Ol Kalou Dairy (2016) Limited v Josephat t/a Venture Auctioneers (Civil Appeal E223 of 2024) [2025] KEHC 2363 (KLR) (17 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E223 OF 2024
JM NANG'EA, J
FEBRUARY 17, 2025**

BETWEEN

OL KALOU DAIRY (2016) LIMITED APPLICANT

AND

**GEOFFREY NDUNG'U JOSEPHAT T/A VENTURE
AUCTIONEERS RESPONDENT**

RULING

1. Vide Notice of Motion dated 11th October 2024 the Appellant craves the following reliefs;-
 1. Spent
 2. Spent
 3. That this honourable court be pleased to issue orders for stay of Execution of of the Judgement entered on 8th March 2024 and decree issued on 18th April 2024 against the appellant/Applicant and consequential orders pending hearing and determination of the Appeal.
 4. That this Honourable Court orders for the immediate and unconditional release of the Appellant/Applicant Motor Vehicle Registration No. KCY 097K Isuzu NRP illegally and irregularly attached by the Respondent on 10/07/2024 which is currently in the custody of M/s Okuku Auctioneers Agencies (sic).
 5. That the orders issued be ordered served upon M/s Okuku Auctioneers Agencies for compliance .
 6. That the costs of this application be provided for.
2. The application arises from judgement of the lower court (Hon. Dominic Macharia Resident Magistrate/Adjudicator) in which the Respondent was granted Kshs. 935,000/= together with costs



and interest against the Appellant in Nakuru Small Claims Court’s Case No. E102 of 2024. Aggrieved by the decision, the Appellant lodged this appeal relying on a number of grounds of appeal as per Memorandum of Appeal dated 11/10/2024.

3. By Affidavit in Support of the Motion, the Appellant’s General Manager (Francis Gitahi Mihiu) inter alia avers that their aforesaid motor vehicle was wrongly attached in purported execution of the impugned judgement and decree as they were not aware of institution of the suit. The attachment is also described as illegal and irregular for the reason that the vehicle is jointly registered in the names of the Appellant and Co-operative Bank of Kenya Limited, the latter having a “first charge” over the vehicle. The court is therefore told that the Appellant would suffer prejudice yet it has an arguable appeal which would be rendered nugatory if execution continues.
4. Through affidavit evidence in reply, the respondent opposes the Motion. He attacks the application as moot, the attached motor vehicle having been long sold even before the claim in the lower court was filed. A certificate of sale of the vehicle is said to have been issued after proclamation and advertisement. According to the respondent ,therefore, the decree of the trial court has already been executed by the Auctioneers instructed.
5. The foregoing averments notwithstanding, the Respondent wants the Appellant to deposit security for costs in the sum of Kshs. 150,000 to avoid exposing him into unnecessary litigation since the appeal is a mere academic exercise, according to him.
6. The Appellant put in a supplementary affidavit in answer to the Respondent’s deposition. It maintains that it was not aware of the claim and that the subject vehicle was unlawfully sold without notice or proclamation. The Appellant insists that the vehicle be released unconditionally contending that any sale thereof was null and void given that it is a joint owner as alluded to hereinabove.
7. Learned Counsel for the parties filed Written Submissions which the court has perused against the application, the Respondent’s reply and all annexures to the parties’ affidavits. Counsel for the Appellant maintain that stay of execution pending appeal is warranted. The court is referred to case law in *RWW vs EKW* [2019] eKLR and *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 where it is restated that the court’s discretionary power whether or not to allow such an application is exercised depending on the peculiar facts and circumstances of each case.
8. On the issue of substantial loss, the Appellant’ advocates submit that the appeal would be rendered nugatory if execution is allowed to proceed. Reference is made to the judicial determination in *Shell Ltd V. Kiburu & Another* (1986) KLR 410 in which it was famously postulated that;-

“substantial loss in its various forms is the cornerstone of the court’s jurisdiction to grant stay pending appeal. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”
9. The Appellant further submits that going by the record, this application was brought without unreasonable delay.
10. Regarding security for costs to be deposited, the Appellant’s Counsel urges the court determine the appropriate security saying that it is the exclusive jurisdiction of the court.
11. Learned Counsel for the respondent submit that the appeal is an academic exercise in light of the decree of the lower court having been fully satisfied. Nevertheless, the Appellant is faulted for not providing security for costs. The Respondent urges the court to direct the Appellant to deposit security for costs in the sum of Kshs. 150,000/= in a joint bank account to be opened in the names of the advocates for the parties to cushion him against litigation costs.



12. Order 42 rule 6(1) (2) of the [Civil Procedure Rules 2010](#) governs disposal of an application such as before me for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-
- “a. unless 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.”

13. In [James Wangalwa & Another vs Agnes Naliaka Cheseto](#) [2012] eKLR, “Substantial Loss” in the context of an application for stay of execution pending appeal was defined thus;-

“It is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory or of no consequence.”

This is similar to the holding in the case of Shell Ltd supra relied upon in the Appellant’s submissions.

14. The Appellant contends that he has brought the Motion without unreasonable delay. The impugned order was issued on 9th October 2024 while this application was filed on 11th October 2024 or thereabouts, about two days later. The delay is not long but has not been explained. It is should be noted that even delay of one day, if unexplained, is bad enough. It is, however, found that the application was not brought after undue or unreasonable delay.
15. The Respondent insists that security for costs should be given to cushion him against litigation costs in the event the appeal fails..
16. Based on its affidavit evidence, the Appellant has not offered the necessary security for costs or expressed willingness and readiness to deposit such security. This crucial condition precedent to grant of an order of stay of execution pending appeal has not therefore been satisfied. Perhaps the reason is the Respondent’s stance that he has already levied execution and his decree has been satisfied. Be that as it may, this is a mandatory legal requirement that has not been complied with. As the Appellant’s submissions, the court has power to determine the appropriate security for costs but the applicant must first express willingness and readiness to offer security. In [John Odungo vs Joyce Irungu Muhatia](#) [2014] eKLR the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows “preparedness as well as readiness to provide security should one be called upon to do so”.
17. The Appellant has not therefore satisfied the requirement for offer and/or deposit of security for costs to merit the discretionary order of stay of execution pending appeal.
18. Determination of the application turns on the question of substantial loss, if any, the Appellant might suffer if stay of execution is not ordered. The case of [Nyatera vs Nyakundi](#) (Civil Appeal E033 of 2022) [2023]KEHC 3086 KLR) (16 March 2023) (Ruling) is relevant for the proposition that the Applicant ought to show the manner in which his appeal would be rendered nugatory if stay of execution is not ordered.. The court opined in the case that it is not enough to say that because the Respondent intends to proceed with execution, he should be stopped because of the appeal. The court is therefore required to tread a delicate balance of the parties’ interests. As it is now trite, this is the cornerstone of the court’s discretion to grant or refuse stay of execution pending appeal. The onus is on the Appellant to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds. In [Tropical Commodities Ltd. International \(in liquidation\)](#)



(2004) 2 EA 331 my senior brother (Ogolla J) explained that substantial loss is a qualitative concept. It refers to:-

“any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”

19. In Milimani HCMCA No. 1561 of 2007, *Century Oil Trading Company Ltd vs Kenya Shell Ltd*, this court again explained that:-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes when, it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

20. Regarding the burden of proof, the Court of Appeal held in *National Industry Credit Limited vs Aquinas Francis Wasike & Another* [2006] eKLR that:-

“once an applicant expresses a reasonable fact that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”

21. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including *Matata & Another vs Rono & Another* (Civil Appeal No. E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling).

22. Based on the affidavit evidence of the parties neither of them has stated their financial position. The Appellant has not made out a prima facie case of the respondent’s inability to pay back any decretal sum to warrant the respondent to debunk the claim.

23. The Respondent also asserts that execution has already taken place and the lower court’s decree has been fully satisfied. The question of substantial loss does not arise for determination in the circumstances.

24. In the particular circumstances of this case, therefore, the Appellant has not complied with all the legal conditions for stay of execution pending hearing and determination of the appeal. The onus was on the Appellant to meet all the conditions stipulated hereinabove. There is strictly no need to require the Appellant to provide security for costs, the decree having been fully satisfied.

25. The application is accordingly dismissed in its entirety save that the costs thereof shall abide the appeal.

J. M. NANG’EA, JUDGE.

RULING DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY , 2024 IN THE PRESENCE OF:

Mr. Mugo Advocate for the Appellant.

Mr. Matoke H. Advocate for the Respondent.

Court Assistant, Jeniffer



J. M. NANG'EA, JUDGE.

