



**Ayan Automobiles Limited v Muriithi & another (Civil Appeal  
E014 of 2024) [2025] KEHC 4738 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4738 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E014 OF 2024  
CM KARIUKI, J  
MARCH 13, 2025**

**BETWEEN**

**AYAN AUTOMOBILES LIMITED ..... APPELLANT**

**AND**

**BEATRICE WANJIKU MURIITHI ..... 1<sup>ST</sup> RESPONDENT**

**ALICE WAIRIMU MUNGAI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for stay of execution of the judgment and decree of Hon. P.L. Shinyanda (S.R.M.) delivered on 23/05/2024 in Narok CMCC NO. E213 OF 2022)*

**RULING**

1. The application dated 08/07/2024 seeks for stay of execution of the judgment entered on 23/05/2024 against the appellant pending the hearing and determination of the appeal and costs of the application.
2. The application is premised on Article 159(2)(d) of the *constitution*, sections 1A, 3, and 3A of the *Civil Procedure Act* and Order 42 Rule 6 And Order 51 of the Civil Procedure Rules.
3. The application is based on the grounds set out on the face of the application and the supporting affidavit of Nicholus Ngoli Inyangala, the appellant's sales manager sworn on 10/07/2024.
4. Judgment was entered against the appellant on 23/05/2024 in Narok MCCC No. E213 of 2022.
5. The appellant is apprehensive that the 1<sup>st</sup> respondent might execute the judgment since the appellant has already been served with a notice of tabulated costs.
6. The appellant contends that the appeal is arguable with a high probability of success.
7. The appellant contends that it stands to suffer irreparable loss since the subject matter of the judgment is substantial and the ability of the 1<sup>st</sup> respondent to refund the decretal amount is unknown.



8. The appellant avers that the application has been filed without delay.
9. The appellant averred that the respondents will not suffer any prejudice if stay of execution is granted.

#### **The response**

10. The 1<sup>st</sup> respondent opposed the application vide replying affidavit sworn by Beatrice Wanjiku Muriithi on 16/10/2024.
11. The 1<sup>st</sup> respondent contends that the 2<sup>nd</sup> respondent was not a party to the suit in the magistrate's court.
12. The 1<sup>st</sup> respondent contends that the appellant is trying to relitigate issues raised in the trial court and bring in a third party without third-party proceedings.
13. The 1<sup>st</sup> respondent averred that there is no basis for denying or delaying judgment as entered by this court as he will suffer prejudice.
14. In the end the 1<sup>st</sup> respondent averred that the application lacks merit and ought to be dismissed with costs to the respondent.

#### **Further affidavit.**

15. The appellant filed a further affidavit sworn by Nicholus Ngoli Inyangala on 06/12/2024.
16. The appellant contends that as at the time of the judgment, the third-party application was on record and was yet to be heard. Therefore, the trial court should not have proceeded without identifying the proper parties.

#### **Further replying to affidavit.**

17. The 1<sup>st</sup> respondent filed a further replying affidavit sworn on 05/02/2025 by Beatrice Wanjiku Muriithi.
18. The 1<sup>st</sup> respondent averred that the procedure for introducing a third party to a suit is set out in the Civil Procedure Rules Order 1 Rule 15 thereof
19. Further, the 1<sup>st</sup> respondent averred that the appellant was represented by a competent firm of advocates.
20. The 1<sup>st</sup> respondent averred that during cross-examination a relationship was established between the appellant and the purported third party as the seller in the hire purchase was Azan Motors and not the appellant.
21. The 1<sup>st</sup> respondent confirmed that the third-party application was filed after the conclusion of the hearing of the suit, and filing of submissions and the matter was pending delivery of judgment. Therefore, the facts do not amount to procedural technicalities.
22. The 1<sup>st</sup> respondent averred that the motor vehicle search indicated that the appellant was the registered owner of the suit motor vehicle.

#### **Directions of the court**

23. The application was canvassed by way of written submission.



### **The Applicant's Submissions**

24. The applicant submitted that the appellant has a good case and for it to be determined on its merits all the proper parties must be heard. The applicant relied on order 42 rule 6(1) of the Civil Procedure Rules, Patel V East Africa Cargo Handling Services Ltd [1974] EA 75, Lalji T/A Vakkep Building Contractors V Casousel Ltd [1989] KLR, Douglas Wambua Mutual V Kenya Ports Authority [2020] eKLR, Sabei District Administration V Gasyali & Others [1968] EA300, Mbaki & Others V Macharia & Another [2005] EA 2006, Belinda Muras & 6 Others Vs Amos Wainaina [1978] KLR, Phillip Chemwolo & Another Vs Augustine Kubede [1982-88] KLR At 1040, Article 159(2)(D) Of the [constitution](#), Apex International Limited & Aglo-Leasing And Finance International Limited Vs Kenya Anti-Corruption Commission [2012] eKLR, and Goodwill And Trust Investment Ltd And Another V Will And Bush Ltd.
25. The applicant submitted that the appellant has more to lose than the 1<sup>st</sup> respondent who will only suffer delay. The applicant relied on article 40 of the [constitution](#), Elizabeth Gathoni Thuk (Suing as the Legal Representative of the Estate of Charles Gitonga Wathuta) V Peter Kamau Maina & Another [2021] eKLR,

### **The 1<sup>st</sup> Respondent's Submissions.**

26. The 1<sup>st</sup> respondent submitted that the applicant has not proved that they will suffer any loss if the orders are not granted but the 1<sup>st</sup> respondent will suffer because she has been kept away from enjoying the fruits of her judgment. The 1<sup>st</sup> respondent relied on order 42 rule 6 of the Civil Procedure Rules, James Wangalwa & Another Vs Agnes Naliaka [2012] eKLR, and RWW VS EKW [2019] eKLR
27. The 1<sup>st</sup> respondent submitted that the application was filed way after the lapse of stay of execution, a clear indication of afterthought on the part of the applicant.
28. The 1<sup>st</sup> respondent submitted that the appellant has not offered any security for the due performance of the decree. The 1<sup>st</sup> respondent urged this court to order that the applicant pays the respondent one-half of the decretal sum and the other half be deposited in an interest-earning account held by joint advocates for the parties pending hearing and determination of the appeal. The 1<sup>st</sup> respondent relied on Samwel Kimutai Korir & Another Vs Nyanchwa Adventist School [2017] eKLR, and Port Reitz Maternity Vs James Karanga Kabia Civil Appeal No. 63 1997

### **Analysis and Determination.**

29. This court has considered the application, the supporting affidavit and annexures thereto, the replying affidavit, further affidavit and further replying affidavit, and the submissions by respective parties. The main issue for determination is;

#### **I. Whether the applicant has demonstrated that the order of stay of execution pending appeal is merited.**

30. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:-

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



(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.

31. Further, stay may only be granted for sufficient cause, and the Court in deciding whether or not to grant the stay and in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions. See sections 1A (2) and 1B of the Civil Procedure Act.
32. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (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 been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
33. 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]).
34. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed, to grant or refuse an application for the stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.

35. The judgment in the trial court was delivered on 23/05/2024. The Appellant filed a memorandum of appeal in this court on 11/06/2024 and This application was filed on 11/07/2024 thus I find that there was no inordinate Delay in filing.
36. the applicant has stated that it stands to suffer loss if the orders sought are not granted, the loss to be suffered must be demonstrated. 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.”

37. The applicant has alleged that the 1<sup>st</sup> respondent will not be able to refund the money as it is a substantial amount. The 1<sup>st</sup> respondent has not filed an affidavit of means to rebut this assertion.
38. On the issue of security, the applicant has not deponed its willingness and readiness to comply with the directions to be given by this court. The 1<sup>st</sup> respondent has proposed a half the decretal sum be



given to the 1<sup>st</sup> respondent and half be deposited in a joint interest-earning account. This court is not bound by the type of security offered by an applicant. It can make appropriate orders that serve the interest of justice.

39. The court has to balance the interests of the Applicant/Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the Appeal is not rendered nugatory and the interests of the Respondent considering that a successful litigant has a right to enjoy fruits of his/her litigation.
40. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.
41. Accordingly, this court is inclined to exercise its discretion in favour of the applicant and hereby allows the prayer for stay of execution in the following terms.
  - a. That an order of stay of execution in a judgment and decree issued in Narok CMCC No. E213 of 2022 is hereby granted pending hearing and determination of this appeal on condition that the applicant pays ½ of the decretal amount to the 1<sup>st</sup> respondent and ½ of the decretal amount deposited in a joint interest-earning account in the names of the advocates of the parties herein.
  - b. The applicant shall have 60 days within which to comply with order (a) above and in default the order staying execution of the decree shall lapse and the 1<sup>st</sup> respondent shall be at liberty to execute.
  - c. The costs of this application shall be in the cause.

42. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS  
13<sup>TH</sup> DAY OF MARCH, 2025.**

.....

**CHARLES KARIUKI**

**JUDGE**

