



**Wekscol Employees Sacco Limited v Mutanyi (Civil Appeal
E170 of 2024) [2025] KEHC 2668 (KLR) (5 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E170 OF 2024**

**AC BETT, J
MARCH 5, 2025**

BETWEEN

WEKSCOL EMPLOYEES SACCO LIMITED APPELLANT

AND

THOMAS MUTANYI RESPONDENT

RULING

1. The Applicants filed a Notice of Motion dated 13th November 2024 seeking the following orders:-
 - a. Spent
 - b. That this Honourable court be pleased to stay the execution of the decree issued on 8th May 2024 arising from an interlocutory judgment delivered on 29th September 2023 and all consequential orders pending the hearing and full determination of this application inter parties.
 - c. That this Honourable court be pleased to order for stay of execution in terms of prayer 2 above pending the hearing and determination of the Appeal in this matter.
 - d. That the costs of this application be provided for.
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on 13th November 2024 by the Applicants' secretary claiming that they were served with a letter dated 13th May 2024, notice of entry of Judgment dated 12th May 2024 and a decree dated 8th May 2024.
3. The Applicants aver that they were never aware that there were proceedings in the Tribunal over the matter and once they became aware, they appointed the firm of Omwando Mbaka & Co. Advocates to come on record for them.



4. They state that they had filed an application under certificate of urgency seeking stay of execution on 27th May 2024 and claimed that the Respondent attempted to execute despite service of the application necessitating them to file another application on 10th June 2024.
5. According to the Respondent, the Co-operatives Tribunal heard the application on 10th June 2024 ordered a temporary stay of execution of the decree but dismissed the application dated 27th May 2024 on 26th September 2024 with costs to them.
6. They claim that they have appealed against the ruling through the present appeal, however the Tribunal has failed to upload the copy of the ruling on the CTS.
7. The Applicants state that on 1st October 2024, the Respondent wrote to the Applicants requesting payment of Kshs. 487,225/- to avert execution and later on 7th November 2024, served the applicant with warrant of attachment, proclamation notice of attachment and auctioneers' fee note.
8. They claim that the execution might be carried out any time and aver that if the stay is not granted their appeal will be rendered nugatory.
9. The Respondent opposed the application. He claims that the bundle of documents dated 18th December 2022 together with summons to enter appearance dated 25th January 2023 were served to the Applicants through their secretary.
10. He avers that the Applicants were well aware of the claim but chose to ignore the summons and have not given a good reason to set aside the summary judgment other than the allegation that they were never served and were unaware of the case.
11. The Respondent contends that the application is meant to deny him the fruits of the judgment of the Tribunal and avers that the Applicants have not demonstrated the substantial loss it would suffer if the order of stay was denied.
12. The Respondent posits that the Applicants have not met the threshold for grant of stay of execution and prays that they be ordered to provide security as a condition of stay pending hearing of the application and appeal.
13. The Respondent further states that the Applicants should settle the auctioneer's charges since the proclamation was lawful.

Applicants' Submissions

14. The Applicants raised three issues. As to whether they have a prima facie case, they quoted the case of Robert Mugo was Karanja v Eco Bank (Kenya) Ltd & another [2019] eKLR where Justice Makan cited the decision in Mrao Ltd v First American Bank of Keya and 2 others [2003] KLR 125 which defined a prima facie case. They claim that their rights have been infringed by the Respondent when he carried out attachment.
15. On the second issue, they aver that they will suffer substantial loss if the decree is allowed and claim that their case is not only arguable but has a high chance of success.



16. On what would amount to substantial loss, they rely on the case of *Bonface Kariuki Wahome v Peter Nziokii Nyamai & Another* [2019] eKLR where Nyakundi J. quoted the case of *Anne Njeri Mwangi v Muzaffer Essajee & Another* [2014] eKLR where the court stated:-

“Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that Applicant is therefore forced to pay the decretal sum.”
17. The Applicants submit that the court should take notice that it is a Sacco with other stakeholders’ interests at risk such as the employees, members, lenders and creditors. They submit that attachment of their tools of trades, such as computers and furniture would impair their ability to conduct their business and cause them monetary loss.
18. On the balance of convenience, they cite the case of *Suleiman v Amboseli Resort Ltd* [2004] 2 KLR 589 where Ojwang AgJ quoted the English case of *Films Rover International v Cannon Films Sale Ltd* [1986] 3 All ER 772 where the court stated; “A fundamental principle is ... that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong.”
19. They submit that the balance of convenience tilts in favor of retention of status quo in case of any doubt.
20. They finally state that they have met the threshold for the court to grant them the order of stay.

Respondent’s Submissions

21. The Respondent submits that he is guided by order 42 rule 6 (2) of the Civil Procedure Rules and quotes the three requirements that the Applicants ought to demonstrate being;
 - a. Substantial loss he would incur.
 - b. The application made without undue delay.
 - c. The applicant has submitted security as the court orders for the due performance.
22. He relies on the celebrated Court of Appeal decision on stay of execution being *Butt vs. Rent Restriction Tribunal* [1982] KLR 417 and also on the case of *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others* eKLR.
23. On the first requirement of substantial loss, he submits that the Applicants have not demonstrated the substantial loss they would incur if the order of stay is denied. He quotes the case of *In James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR which stated 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.”



24. He further submits that the application is meant to delay the realization of the fruits of the judgment delivered by the Tribunal on 29th September 2023.
25. The respondent further quotes The Court of Appeal case of Absalom Dova v Tarbo Transporters [2013] eKLR, and Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat [2013] eKLR where the Court upheld the decision of Portreiz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1991 and stated that:-

“That right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”
26. According to the Respondent, the Applicants have not shown the damage they would suffer if the order of stay is denied or how the denial of stay would ruin their business.
27. On whether the application was made without unreasonable delay, he states that whereas the impugned ruling was delivered on 26th September 2024 and the ruling on its application to set aside the summary judgment delivered on 29th September 2024, the present application was filed on 13th November 2024, after one month had lapsed and that constitutes inordinate delay.
28. On the third requirement on security, the Respondent relies on the case of Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR and Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR.
29. The Respondent submits that in case the court allows the application, the Applicants should be ordered to deposit the full decretal sum and interest plus costs in a joint interest earning account in the names of the advocates of the parties as a condition of stay pending appeal.
30. On claim of whether the appeal is arguable, they claim that the grounds raised by the Applicants are not arguable.
31. In conclusion, he argue that the Applicants have not met the threshold for stay of execution pending appeal and hence should be dismissed with costs.

Analysis And Determination

32. I have considered the application for stay, grounds thereof, supporting affidavit, the replying affidavit and rival submissions together with case laws cited by both parties
33. The main issue for determination is whether the Applicants have demonstrated that the orders of stay of execution pending appeal are merited.
34. 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.”



35. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant has to satisfy this court that:
1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
36. The first issue for the court to determine is if the Applicants would incur substantial loss in case the stay was not granted.
37. The Substantial loss was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR where the court rendered thus:-
- “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.”
38. According to the Applicants, they are a SACCO and serve various stakeholders and in case the execution is allowed, their tools of trade such a furniture and computers would be attached hence they will suffer loss.
39. On perusal of the Applicants’ affidavit and submissions, I have noted that some of the items indicated to be auctioned were the furniture and computers which are the Applicants’ tools of trade which if auctioned would paralyse the SACCO. The Applicants would suffer great loss were stay orders not granted. On the other hand, the Respondent stated that he is yet to enjoy the fruits of his judgment. This Court while balancing these two interests, must satisfy itself that no party would suffer undue prejudice.
40. It is my considered view that if this Court were to deny the Applicants the order for stay of execution, it would place them at a more prejudicial position than the Respondent. While it is unfortunate that the Respondent has had to wait for long time to enjoy the fruits of his judgment, the Applicants have adequately demonstrated that they are likely to suffer loss should their properties be attached and sold off. In that case, I am satisfied that the Applicants have adequately demonstrated that they would suffer substantial loss.
41. On the second element of inordinate delay, I am also satisfied that there has been no inordinate delay in bringing the instant appeal as the ruling and decree being appealed against was delivered on the 26th September 2024 and the Memorandum of Appeal filed 26 days later on the 25th October 2024.
42. Lastly, the Applicants are required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail.



43. In *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR the court stated that:-

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground.”

44. The issue of security is discretionary and it is upon the court to determine the same. The Applicants have not offered any security for the performance of the decree, the Respondent urges the court to order the Applicants to deposit the full decretal sum and interest plus costs in a joint interest earning account in the names of the advocates of the parties as a condition of stay pending appeal.

45. Although the Applicants have not expressed whether they are ready to offer security of costs, this Court is of the opinion that the Applicants can be directed by the Court to do so. Thus, this court shall exercise its discretion regarding the security of costs to be offered by the Applicants and direct that they do so within the time to be stipulated in this ruling if they intend to proceed with the Appeal.

46. The upshot is that the application is allowed and a stay of execution of the judgment and decree of the Court in Nairobi Co-operative Tribunal Case No. E017 /984 is granted on the following conditions:

- a. The Applicant is hereby ordered to deposit in a fixed joint interest earning account in the names of both counsel for the parties the sum of Kenya Shillings Four Hundred and Forty-nine Thousand One Hundred (Kshs. 449,100/=).
- b. This condition is to be met within 30 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
- c. The costs of this Application will be borne by the Applicant.

47. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 5TH DAY OF MARCH 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Applicant

Mr. Onyari for the Respondent

Court Assistant: Polycap

