



**Pinefrost Limited & another v Nderitu (Civil Appeal
E026 of 2024) [2025] KEHC 4243 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL E026 OF 2024
LN MUTENDE, J
APRIL 2, 2025**

BETWEEN

PINEFROST LIMITED 1ST APPLICANT

MARTIN NJIHIA MWANGI 2ND APPLICANT

AND

JOHN KUNYUGA NDERITU RESPONDENT

RULING

1. The Applicants herein approached this court through a Notice of Motion dated 8th January, 2025 seeking stay of execution of judgment delivered on 23rd July, 2024 and all consequential orders arising therefrom pending hearing and determination of the appeal. That the court do lift and set aside the decree, warrants of attachment and sale issued on 11th December, 2024 together with proclamation notice dated 16th December, 2024; and an order be issued for provision of a Bank Guarantee of the entire decretal sum awarded by the trial court of Kshs.2,060,550/- as security pending hearing and determination of HCCA E026 of 2024.
2. The application is premised on grounds that the defence case upon being closed, judgment was reserved for delivery on 23rd July, 2024 and was delivered where the Defendants/Applicants were held 100% liable and special damages of Kshs.2,060,550/- entered plus costs and interest. And, being dissatisfied, the Applicants lodged an appeal on 20th August, 2024 which was filed through e-filing portal and also filed an application for stay of execution pending appeal dated 13th November, 2024 which is pending issuance of directions by the Deputy Registrar.
3. That despite being served with the application dated 13th November, 2024 and the directions with execution by proclaiming the Applicants' motor vehicle registration No. KDK 135V and other moveable items. That the Respondent is apprehensive that in event the decretal amount is paid to the



- Respondent and the judgment is overturned, the recovery of the amount may not be done; and if the application is not allowed and stay of execution is granted the property will be sold to their detriment.
4. That the appeal raises numerous triable issues and the Appellant is willing to furnish the court with a bank guarantee of the entire principle sum as security for performance of the judgment/decree pending hearing and determination of the appeal within the scope of the insurance company.
 5. In response thereto, the Respondent dismissed the application as a mere attempt to deny him the fruits of the Judgment. That the Applicants' advocates were served with judgment notices, party to party bill of costs, and, they failed to pay the decretal sum despite several reminders. That as at 21st November, 2025 the Applicants had not paid the sum hence they requested for a decree and certificate of costs for purposes of execution hence the instructions to the auctioneers to levy execution.
 6. That even after the Applicants moveable property being proclaimed no payment was made, but he was surprised to learn that an appeal had been filed but payments were made on 27th August, 2024 which was out of time. That there having been no stay of execution, the Applicants' motor vehicle was attached on 16th January, 2025 which prompted the Applicants to file the instant application. That no reason has been given why the Applicants failed to appeal within the stipulated time, and, even if the appeal had been filed within time, the chances of the appeal succeeding was minimal because evidence of the Respondent was not challenged by the Applicants during trial.
 7. That the application is an afterthought as there is inordinate delay, a period of 5 months, in bringing the application.
 8. The application was disposed through oral submissions. It is urged by Ms. Kagira learned counsel for the Applicant that the Applicants filed an application dated 13th November, 2024, an application that was served following directions of the court but prior to being heard, they were served with warrants of attachment by the Respondent who had instructed Crater Auctioneers who made the proclamation notice. That no reasons have been given why the bank guarantee is not sufficient.
 9. That when the application came up before the court, the order of status quo to be maintained was not addressed as the Applicants' motor vehicle was attached. And, when they engaged counsel for the Respondent it was alleged that the motor vehicle was attached in another suit.
 10. Ms. Chelangat, learned counsel for the Respondent relied on the replying affidavit in its entirety and pointed out that there was no order for status quo issued and the attachment was done on 16th January, 2025. And, after grant of stay of execution no sale was effected.
 11. I have duly considered the application in issue. Principles governing stay of execution are provided for in Order 42 Rule 6 of the Civil Procedure Rules that provides thus;
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 subrule (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.
12. The power seized of the court in determining the issue is discretionary. It therefore behoves the Applicants to demonstrate existence of sufficient cause requiring grant of the order sought.
13. In *Butt v Rent Restriction Tribunal* [1982] KLR it was held that;
- “ 1. 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.”
14. In *Hamisi Juma Mbaya v Amakecho Mbaya* [2018] eKLR it was held that;
- “The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:
- 1. Substantial loss may result to the applicant unless the order is made.
 - 2. The application has been made without unreasonable delay, and
 - 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.”
15. It was upon the Applicants to demonstrate to the court of existence of the conditions set for grant of stay of execution. On the question of the Applicant suffering substantial loss unless the order sought is granted. The argument put forth is that in case the judgment is overturned, the sum in question which is high may never be recovered. The Respondent was duty bound to show that he has adequate means of raising the sum awarded if the judgment is reversed by the court.



16. This fact was well stated in *Boniface Kariuki Wahome v Peter Nziki Nyamai & Another* [2019] eKLR thus;

“In view of the foregoing, the evidential burden resides with the Respondents to prove that he is not a man of straw as alleged. None of the two Respondents in the instant case has made any attempt to discharge this burden. It is expected that a respondent would depone and show the means she has to refund the decretal sum. It is enough for the applicant to depone that they are not able to refund. He cannot be expected to dig deep into the financial standing of the respondents, which is for the respondent to produce and prove.

The law is that as stated by the Court of Appeal in *National Industrial Credit Bank Limited -V- Aquinas Francis Wasike and Another* (UR) C.A. 238/2005, the evidential burden is on the respondent to prove that he is able to refund. I am of the view that the Respondent has not discharged the burden to prove that she has the resources to pay back the decretal sum. The Respondents merely stated that they are capable of repaying the decretal amount that the Court grants after hearing and determination of the Appeal if it exceeds the sum to be released to the Respondents.”

17. Notably the decree holder did not address the instant issue of the capability to refund the sum to be paid to the Respondent if the appeal is successful.
18. On the issue as to whether the application was made without undue delay. At the outset there was an application dated 13th November, 2024 that was placed before the court which directed that it be mentioned on 6th December, 2024. Apparently, it was not mentioned as directed. The judgment in the Lower Court matter was entered on 23rd July, 2024. Where after a memorandum of appeal was drawn dated 20th August, 2024 which was filed on 27th August, 2024 some four (4) days later than the requisite time. There is no evidence of leave to appeal out of time having been sought, a question that has also not been addressed. However, taking into consideration what the law provides may be addressed at a later time.
19. There is evidence of a judgment notice that was served and an amended one dated 26th July, 2024. This was followed by the decree and certificate of costs and finally warrants of attachment of 11th December, 2024. In as much as it cannot be said that there was inordinate delay in filing the instant application there was a trend of overlooking of the important fact of the case having proceeded and blatantly disregarded hence the question whether the appeal is arguable?
20. The judgment of the Lower Court is annexed to the application. The claim was for special damages. It was noted that the claim was unchallenged, there were receipts (a bundle) adduced to support the claim hence the award in question which this court is being called upon to re-assess.
21. In *Ujagar Singh v Runda Coffee Estates Limited* [1966] EA 263 it was held that;
- “It is not normal for a court to grant a stay of execution in monetary decrees but where there are special features such as the issue or the regularity of the judgment, the fact that the amount payable under the decree being substantial, and the fact that the plaintiff has no known assets within the jurisdiction from which the applicant can recoup in the event the appeal is successful.”
22. The only challenge I find is the fact of the Applicant having not deposed an affidavit to demonstrate that he is capable of refunding the money in event the appeal is allowed. This being the case, although the Applicant has proposed to provide a bank guarantee for the entire decretal sum awarded, in order



for the Respondent not be denied enjoyment of the fruits of the judgment, I order that there be stay of execution of the Judgment and consequential orders on condition that the Applicant pays the Respondent half (1/2) the decretal sum of money within 7 days of today; and, the balance of the sum awarded to be deposited in court pending regularization and hearing of the appeal in HCCA E026 of 2024. Upon payment of the stated decretal sum, motor vehicle Registration Number KDK 135V attached be released to the Applicants upon payment of the auctioneer's costs.

23. In default, the order shall stand vacated.

24. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF APRIL, 2025.

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L.N. MUTENDE

JUDGE

