



REPUBLIC OF KENYA



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West Keya Sugar Company Limited v Shikuku t/a Eshikoni Auctioneers (Miscellaneous Cause E022 of 2024) [2025] KEHC 4978 (KLR) (23 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CAUSE E022 OF 2024**

S MBUNGI, J

APRIL 23, 2025

BETWEEN

WEST KEYA SUGAR COMPANY LIMITED APPELLANT

AND

KENNEDY SHIKUKU T/A ESHIKONI AUCTIONEERS RESPONDENT

RULING

1. By way of a notice of motion application, the applicant moved this court seeking the following orders;
 - a. That the Application herein be certified urgent, service thereof be dispensed with and the same be heard ex parte in the first instance. (spent)
 - b. That pending the hearing and the determination of the Reference Application filled herein, the Honourable court be pleased to grant stay of execution of the certificate of stated costs dated 19th April, 2024 to the Auctioneers Bill of costs taxed on 23rd March, 2022 at Kshs. 320,600/=
 - c. That this Honourable court be pleased to grant an unconditional order of release of the motor vehicle registration number KCE 009 Y unlawfully attached concerning the certificate of stated costs dated 19th April 2024 in relation to the auctioneers Bill of costs taxed on 23rd March 2022 at Kshs. 320,600/=
 - d. That the Honourable court be pleased to grant such further or other orders as it may deem just and expedient in the circumstances of this case.
 - e. That the costs of this Application do abide the outcome of the application.
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same day by the applicant's legal manager on behalf of the applicant.



3. According to the applicant, the auctioneers unlawfully/illegally proclaimed and attached their motor vehicle registration number KCE 009 Y and intended to conduct a public auction on 10th May 2024.
4. They claim that the attachment was unlawful and illegal since the parties entered into a consent before Justice PJO Otieno and filed a reference application within 30 days of 8/2/2024.
5. They claim that the vehicle would be sold if the application is not allowed and that the reference would be an academic exercise.
6. They hold that they are willing to comply with the condition that the court may impose, including depositing a security.
7. In reply to the application, the Respondent holds that the application is a non-starter since the applicants failed to produce evidence in support of their case and pray that the court dismisses the application.
8. They submitted that they had filled submission opposing the respondent's auctioneers bill of costs since there was no proof to ascertain the value of the proclaimed goods, and further that there had been an order of stay of the sale of the attached goods, and hence the respondent was not entitled to the fee.
9. They hold that the decretal amount was Kshs. 240,000/= while the respondent proclaimed properties were worth Kshs. 12,000,000/=. They claim that the taxing master erred in assessing the fees based on the value of the proclaimed property, as opposed to the decretal amount, and further that there was no property attached at all. They relied in the case of Julius Mwale T/A Mwale Mart supermarket vs. Kennedy Shikuku t/a Eshikoni Auctioneers HCMISC App No. E006 of 2023.

Analysis and Determination

10. I have considered the application and its response, as well as the submissions.
11. The main issue arising for determination is whether the applicant has made out a good case for the grant of the order of stay of execution as envisaged Order 42 Rule 6 of the Civil Procedure Rules. That provision states thus:
 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 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.
 - c. Accordingly, for a party to succeed in an application for stay of execution, Order 42 Rule 6 (2) of the Civil Procedure Rules requires such party to fulfil three conditions, namely:



- a. that a 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.
12. It is also trite that the power of the court to grant or refuse an application for stay of execution is discretionary, and that the discretion should be exercised in such a way as not to entirely stifle an appeal.
13. The Court of Appeal in the case of *Butt V Rent Restriction Tribunal* [1979] eKLR made this point thus:

“...It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch. D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

14. The Court in *RWW V EKW* [2019] held that -

“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 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.”

15. Under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant has to satisfy this court that:
 - a. Substantial loss may result to him/her unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. 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
16. On the first requirement of substantial loss, it is the applicant's duty to demonstrate they will suffer substantial loss if the stay is denied and the appeal will be rendered nugatory.
17. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR it was 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.”

18. According to the applicant, the respondent auctioneers had attached their motor vehicle registration number KCE 009 Y and they intend to sell it at a public auction, and once sold the reference would be a mere academic exercise
19. On substantial loss, I note that the taxed amount in dispute is Kshs. 320,600/= which is a substantial sum by any standards.
20. The same position was adopted by Kimaru, J in Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from 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 where it appears the possibility is doubtful of the respondent refunding the decretal sum if 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 judgment.”
21. The respondent did file a replying affidavit to rebut the averments made by the applicant in the supporting affidavit, but never filed any affidavit of means to show or prove that indeed if they are paid the costs and the appeal is successful, they will be in a position to refund the decretal sum paid to them.
22. Guided by the above authorities and in the absence of the proof from Respondent that if paid the costs he can refund the same if the reference application is successful.
23. I find that the Appellant has satisfied this court that they will suffer substantial loss if the auctioneers taxed costs is paid to the Respondent before the appeal on the reference application is heard and determined. The Appellant has therefore fulfilled this condition.
24. On whether the application was filed without unreasonable delay, the auctioneers’ bill of costs was made on 10th November 2021 and the ruling on the Auctioneers Bill of costs was made on 23rd March 2022. The instant application was filed on 24th March 2020.
25. I find that explanation given for the delay in filing the application is plausible bearing in mind the fact that they have already filed their reference for determination.
26. The final consideration that the applicant ought to comply with before the stay is granted is on the issue of security.



27. In *Focin Motorcycle Co. Limited vs 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.”

28. The issue of security is discretionary and it is upon the court to determine the same. The applicant has not offered any security for the performance of the decree.

29. Although the applicant has not expressed whether he is ready to offer security of costs, this Court can direct. Thus, this court shall exercise its discretion regarding the security of costs to be offered by the Applicant and direct that he does so within the time to be stipulated in this ruling if he intends to proceed with the reference application

30. The upshot is that the Application is allowed and a stay of execution of certificate of stated costs dated 19th April, 2024 to the Auctioneer’s Bill of Costs taxed on 23rd March, 2022 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 three hundred thousand shillings (Kshs. 300,000/=).
- 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 in the cause.
- d) Mention 7.5.2025 for further directions on the reference.

Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF APRIL, 2025

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Albright Sunguti

