



**John M. Ngunjiri t/a Tango Auctioneers & General Merchants v Ngungi
(Civil Appeal E198 of 2024) [2025] KEHC 5726 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5726 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E198 OF 2024
SM MOHOCHI, J
MAY 9, 2025**

BETWEEN

**JOHN M. NGUNJIRI T/A TANGO AUCTIONEERS & GENERAL
MERCHANTS APPLICANT**

AND

DAVID MATHERI NGUNGI RESPONDENT

RULING

1. The Notice of Motion Application dated 23rd October, 2024 brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules seeks:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this Appeal there be a Stay of Execution of the judgment delivered on 26th August, 2024 in Nakuru CMCC No. 590A of 2018
 - d. Costs of this Application be in the cause

Applicant's Case

2. The Application was predicated on the grounds on its face, the Supporting Affidavit of John M. Ngunjiri sworn on the same date. It is averred that judgment was entered against the Applicant in favour of the Respondent in Nakuru CMCCC No. 590A of 2018 and being aggrieved, the Applicant preferred the instant appeal which he contends raised serious issues of law and facts.
3. That is stay of execution is not granted, the Applicant Respondent will proceed to execute the judgment rendering the appeal nugatory and which will be detrimental and prejudicial to him. That



he has offered title No. Dundori/Lanet Block 11/647 valued at Kshs. 3,800,000 as security for due performance of the decree.

4. It was also averred that the decree holder has no financial means to refund the decretal amount in the event the appeal succeeds and that the Respondent shall not suffer prejudice if the orders sought are granted.
5. The Application was unopposed despite service of the Application, related pleadings and orders of the Court.

Applicant's Submissions

6. The Applicant relied on the case of Kenya Shell Ltd vs Benjamin Karuga Kibiru & Another [1986] eKLR 410 to submit that it has been uncontroverted that the Respondent has no financial ability to refund the decretal amount which is substantial if the appeal succeeds.
7. As regards security, the Applicant submitted that the title deed of his own land offered is sufficient and the Respondent would not be prejudiced as any incidental costs have been secured.
8. On arguable appeal, it was submitted that the Trial Court overlooked the issue of jurisdiction under Section 34 of the Civil Procedure Act and placed reliance on an imaginary valuation report.
9. On delay it was put forth that the Application was filed within the 45 days stay given by the Trial Court

Analysis and Determination

10. The principles guiding the grant of a stay of execution pending appeal 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 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.
11. The Applicant has to satisfy the following conditions:
 - i. that unless the order is issued substantial loss may befall the Applicant;
 - ii. that the Application has been made without unreasonable delay,
 - iii. 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.

Unreasonable Delay

12. The Trial Court granted the Applicant 45 days stay of execution pending filing of appeal on 17th September, 2024 following the Application for stay dated 16th September, 2021. The 45 days were to lapse on 1st November, 2024. The Memorandum of Appeal was filed on 16th September, 2024, the Record of Appeal and the Instant Application were filed on 28th October, 2024. The application was filed within time. This limb has been satisfied.



Security

13. The decree of the Court has not been attached but the judgment shows that the Respondent was awarded Kshs. 780,000 as well as costs and interests from time of filing the suit. The security offered by the Applicant is his title deed for title No. Dundori/Lanet Block 11/647. The official search dated 11th September, 2024 shows that the Applicant is the registered owner. The annexed valuation report dated 16th September, 2024 puts the value of the property at Kshs. 3,800,000.
14. The authenticity of the documents has not been challenged. Indeed, the Respondent has offered sufficient security and the property offered can be translated to money when required as it is valued more than the whole decretal amount plus incidental costs. This limb has also been satisfied.

Substantial Loss

15. According to the Applicant, he would suffer substantial loss since:
 - a. the Respondent would commence execution rendering the appeal nugatory and that execution of the judgment would be detrimental and prejudice the Applicant
 - b. the Respondent has no financial means and would not be able to refund the decretal amount should the Appeal succeed and
16. Execution is a legal process sanctioned by Court and Courts have held time without number that fear of execution does not in any way amount to substantial loss. Without proper reasons of the substantial loss to be suffered the Court cannot rightfully stop a legal process.
17. In the celebrated case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, the Court stated;

“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. Secondly, the Applicant has alluded to the Respondent’s having no financial means to refund the decretal amount. Those allegations have not been substantiated. It is simply not sufficient to allege and then fail to back up those allegations. Allegations do not convince the Court but evidence does.
19. Be that as it may, having that the enforcement of one party’s rights to enjoy the fruits of his judgment should not be to the detriment of another party’s right to challenge the decision of a Court in a Higher Court. The Respondent having failed to put a response to the Application failed to rebut the allegation by the Respondent. The financial position of a decree holder when being put to question cannot simply be wished away.
20. The rights of each individual have to be weighed and in balancing those rights, the Court has to consider what is justice dictates. If there is no guarantee of the decretal amount being refunded, the



Respondent should not have to toil in order to be refunded his decretal amount should his appeal succeed.

21. Odunga J (as he then was) stated in *John Maina Mwangi & another v Samuel Mbugua Kagai* [2021] eKLR

“Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him being barred from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

22. The Court further went on to state that:-

“...In matters dealing with one’s financial status, the law appreciates that it may not be possible for the applicant to know the respondent’s financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum. See *Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001*; *ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002*.”

23. In view of the above and in the interest of justice, I find it just and reasonable to allow the application for stay of the execution conditionally pending the hearing of the appeal.

- a. Stay of execution of the judgment delivered on 26th August, 2024 in Nakuru CMCC No. 590A of 2018 be and is hereby issued on condition that the Applicant shall deposit the original deed for title No. Dundori/Lanet Block 11/647 registered to John Muthee Ngunjiri, with the Court within 30 days of this Ruling.



- b. The Applicant shall prosecute the Appeal within 90 days from this Ruling.
- c. Since the Application was undefended, there shall be no orders as to costs.
- d. In default of (a) and (b) the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 9TH DAY OF MAY 2025.

MOHOCHI S. M.

JUDGE

