Kinyua t/a Kinyua & Co Auctioneers v Industries & another (Civil Appeal E082 of 2023) [2025] KEHC 12069 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 12069 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E082 OF 2023

F WANGARI, J

MAY 22, 2025

BETWEEN

PETER KINYUA T/A KINYUA & CO AUCTIONEERS ..... APPELLANT

AND

JOHN NDIRANGU T/A NDIMBU ENTERPRISES STRATEGIC INDUSTRIES ..... 1ST RESPONDENT

BEAUTY COLLECTION LIMITED ..... 2ND RESPONDENT

RULING

1. This is a Ruling on an Applications dated 29/11/2023. The Application seeks the following Orders:
   i. Spent
   ii. Spent
   iii. That there be stay of execution of the Judgment entered against the Appellant on 30/08/2016 in Mombasa CMCC No. 2168 of 2014.
   iv. That the Appellant do deposit the title deed for Plot No. Kiine/ Rukunga/ 1769 as a variation of the security ordered by the court.
2. The Application is premised on the grounds inter alia that should the Respondent proceed with execution, and the appeal becomes successful, the appeal would be rendered nugatory, as the Respondent would not be in a position to refund the money thus suffering irreparable loss.
3. He also stated that he be allowed to deposit as security the above mentioned title deed in place of Kshs. 3,000,000/= which had been ordered by the lower court for reasons that he did not have that kind of money.

4. The Respondents opposed the Application materially on the ground that the application was res judicata, as a similar application had been made I the lower court where a conditional stay of a deposit of Kshs. 3,000,000/= as security.

5. Further, it was state that the Appellant was a man of means and he had the capacity of paying the deposit as ordered by the court. No proof had been submitted by the Appellant to show that he did not have the capacity to make the deposit.

6. The court directed that the application be canvassed by way of written submissions. Both parties complied by filing rival submissions. I have considered the submissions and authorities relied upon.

Analysis

7. I have analyzed the Application, response and the submissions and authorities filed by the parties in support and opposition to their respective positions. The issue for determination is whether the Appellant has satisfied the conditions for the grant of stay of execution pending Appeal.

8. 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 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.

9. The Appellant must therefore satisfy the following;

   (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.)

10. I have to ascertain whether the Applicant has demonstrated loss that it stands to suffer if the order of stay is not granted. From the affidavit in support of the Application, it is deposed that should the order be declined, the Applicant stands to suffer substantial damage after execution takes place. The Applicant states that he does not have the money as ordered by the lower court hence stands to be sent to civil jail, thus suffering substantial loss.

11. On security, the title deed being proposed to be deposited was valued more than the amount of Kshs. 3,000,000/= as it was valued at Kshs. 6,000,000/=. The purpose of depositing of security is to ensure that the successful party can recover the decretal award.

12. In this case, even though the land is said to have a higher value than the cash deposit, it would take an entire process to have the land sold by way of auction and the success of the sale is not guaranteed hence further delaying the successful party from enjoying the fruits of its judgment. I find that Kshs. 1,000,000/= would be sufficient as security considering that the matter has been pending for almost 2 years.

13. On whether the application was res judicata, the grant of stay orders is discretionary. The lower court exercised its discretion by directing that Kshs. 3 million be deposited as security. The application for stay does not fall within the ambit of section 7 of the *Civil Procedure Act*.

14. Having considered the Application vis-à-vis the response thereto, I am of the considered view that the Applicant has demonstrated that it will suffer substantial loss in the event that the Appeal succeeds.

Determination

15. The upshot of the foregoing is that I allow the Notice of Motion dated 25/10/2023 as follows:

    a. That there be stay of execution of the Judgement on the following conditions

        i. The Applicant shall deposit Kshs. 1,000,000/= into a joint interest earning account in the name of both counsels on record for the parties within 30 next days.

        ii. In default of (i) above, execution to proceed.

    b. That the Record of Appeal be filed and served within next 30 days and the same be filed together with the written submissions.

    c. The Respondent to file its submissions within 14 days upon service.

    d. Matter be mentioned on 22/07/2025 for directions

    e. Costs shall abide the outcome of the Appeal.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 22ND DAY OF MAY, 2025.

.....

F. WANGARI

JUDGE

In the presence of;

N/A by the Applicant

N/A by the Respondent

M/S Norah, Court Assistant

NB: Typed ruling released to the registry. Parties be notified.