



REPUBLIC OF KENYA



**Kimondo & another v Progressive Credit Ltd (Civil Appeal
49 of 2023) [2025] KEHC 7297 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 49 OF 2023
PN GICHOHI, J
MAY 21, 2025**

BETWEEN

PETER KINYUA KIMONDO 1ST APPELLANT

SUSAN WANGUI GIKUNJU 2ND APPELLANT

AND

PROGRESSIVE CREDIT LTD RESPONDENT

RULING

1. Before this Court for determination is the Appellants/Applicants' Notice of Motion dated 20th March, 2023, brought pursuant to Order 42, Rule 6 and Order 22 Rule 22 of the Civil Procedure Rules, Section 63(e) of the [Civil Procedure Act](#) and all the enabling provisions of the Law, seeking for Orders that:
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of this Appeal, there be a stay of Proceedings in Nakuru CMCC NO.E033 of 2023.
 4. Pending the hearing and determination of this Appeal, there be a stay of Execution in Nakuru CMCC NO.E33 of 2023.
2. The application is supported by the grounds on the face of the application and by the Affidavit of the 1st Appellant sworn on even date.
3. He states that a ruling was delivered in Nakuru CMCC No. E033 of 2023 on 9th March, 2023 dismissing the application dated 26th January, 2023, which had sought to restrain the Respondent from



selling motor vehicles registration numbers KCG 524L and KBZ 365B. Further, he states that the entire suit was dismissed alongside that application.

4. It is his case that in dismissing the application and the entire suit, the Applicants have been muted from prosecuting their case against the dictates of natural justice and the right to be heard.
5. He states that he is apprehensive that unless the orders of stay sought herein are granted, the subject motor vehicles will be sold to their detriment and also that the Appeal will be rendered nugatory.
6. The Respondent has opposed the application by the Replying Affidavit sworn on 11th April, 2023 by Collins Muhia, its legal officer. According to him, the application herein is incompetent, bad in law and an abuse of Court process as the application and the suit in the lower court were properly dismissed.
7. He states that in any event, that the application has been overtaken by events since the Respondent has proceeded to realize the securities herein immediately following the dismissal and striking out of the application and the suit in the lower Court.
8. On that basis, he urges this Court to also dismiss the application herein, arguing that a Court cannot issue Orders in vain, in instances such as this one, where the subject matter to be preserved has already been severed.

Applicants' Submissions.

9. They urge this Court, from the onset, to allow the application herein arguing that in allowing it, they would be granted a chance to proceed to the hearing of the Appeal that would be rendered nugatory if stay is denied. In support of this request, reliance is placed in the case of *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR), the Court of Appeal held that:-

“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.”
10. While defining what substantial loss is, reliance is placed on the decision in *Tropical Suppliers Ltd & Others Vs international Credit Bank Ltd* [2004] 2 EA 331, where Ogolla J, held that: -

“Substantial loss does not represent any particular mathematical formula, rather it is qualitative concept. It refers to any loss great or small that is of real worth or value as distinguished from loss or value without value or a loss that is merely nominal.”
11. Further reliance is placed on the case of *James Wangalwa & Another V Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR) where F. Gikonyo J Court held 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 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.”
12. Lastly, it is submitted that taking all relevant factors into consideration and in order not to render the intended appeal illusory, the application should be allowed.



Respondent's Submissions.

13. On stay of execution, the Respondent submits that an applicant must satisfy three conditions set out under Order 42 Rule 6 before stay of execution Orders are granted, that is; the Applicant will suffer substantial loss; the Applicant must move the court timeously and that he must provide security for due performance of the decree. In support of this, reliance is placed on the case of Kiplagat Kotut Vs Rose Jebor Kipngok [2015]eKLR, and the case of Kenya Shell Limited V Kibiru [1986] KLR 410.
14. He therefore, argues that it is not enough for the Applicants to merely state that they will suffer substantial loss, rather that they must prove specific details and particulars where no pecuniary or tangible loss is shown, to the satisfaction of the Court.
15. Arguing that the application herein has been overtaken by events, the Respondent submits that the trial court was justified in dismissing the Appellants' application for injunction on the basis that their right to realise the securities tendered was ripe and also, the Appellant did not demonstrate that they had a prima facie case to be granted injunction against the sale of the subject motor vehicle, which had been given as securities.
16. Consequently, he submits that as soon as the injunction was disallowed and the main suit struck out, they sold the subject motor vehicles as evidenced in the Annexure CM-1 , thus the current application has been overtaken by events in light of the fact that the subject vehicle has been sold out to third parties.
17. In support of this argument, reliance is placed in the case of Shah Rekhavanti Pankaj v Bank of Baroda & another [2021] KEHC 3180 (KLR) where A.W Mwangi, J held that:-

“In regard to the prayer for an injunction, it is evident that the same was overtaken by events as the property in issue was transferred to a 3rd party on 8th January, 2021... Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that an applicant seeking an order for stay of execution pending appeal must demonstrate the following: -a. Substantial loss may result to the applicant unless the order was made; b. The application was made without unreasonable delay; and c. Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.

The above 3 prerequisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The word “and” is used conjunctively and not disjunctively. It connotes that all three (3) conditions must be met simultaneously. The respondents also submitted that the order by Hon. P.J. Otieno was a negative order since it dismissed the applicant's application dated 16th September, 2020. In the case of Milcah Jeruto vs Fina Bank Ltd [2013] eKLR, the Court declined to issue conservatory orders since the order issued therein by Judge Ogola, was a negative order. Under Section 2 of the *Civil Procedure Act*, the definition of a decree alludes to an order that is capable of being executed. In the present case, there was and there is still no order to be executed. The exercise of statutory power of sale was not an order emanating from the Court. It is a right that crystallizes by operation of the law when borrowers default in repaying loans advanced to them. In the case of Sonalux Limited & another v Barclays Bank of Kenya Limited & 2 others [2008] eKLR, the Court of Appeal addressed its mind on whether an order for stay of execution can be granted against a negative order and held as follows- “As regards the matter before us all we can say is that the ruling of the superior Court (Kasango, J.) in no way ordered any of the parties to do anything or to abstain from doing anything or to pay any sum of money. Consequently, it is incapable of execution. It therefore follows that no order of stay can properly issue relating to that ruling.”



In view of the foregoing this Court finds, that it cannot grant such orders for stay of execution and proceedings since the order issued by Judge P.J. Otieno on 27th November, 2020 was a negative order incapable of being executed. This Court's finding is that the applications dated 11th January, 2021 and 9th February, 2021 are devoid of merit and the same are hereby dismissed with costs to the respondents."

18. Based on the foregoing, the Respondent submits that it's clear that the Applicants have not demonstrated any substantial loss they will suffer and moreover, no justification has been tendered to the fact that the Respondent will not be in a position to refund the decretal sum in the event the Appeal succeeds.
19. In demonstrating its ability to satisfy the decree, in the event the Appeal succeeds, the Respondent argues that they are in the business of issuing loans and thus capable of repaying the value of the subject vehicles if the Appeal succeeds. Conversely, that the Appellants are the ones that were unable to pay the loan given to them. In support of this arguments, reliance is placed in the case of David Mwenja V Jubilee Insurance Co. Ltd [2005] eKLR and the case of David Kihara Murage V Jacinta Karuana Nyangi & Another [2015] eKLR.
20. In regard to security, the Respondent submits that the Appellants have not offered any security for due performance of the decree. On that note, it urges this Court to order for security to be provided in the unlikely event it finds any merit in the application herein.
21. In conclusion, the Respondent urges this Court to dismiss the application herein with costs to it. In support, it cites the case of Francis Kirwa Magut & Another V Grace Agiso [2015] eKLR, where CW Ngenye J (as she then was) relied on the case of M/S Portreitz Maternity vs James Karanga Kabia Civil Appeal No.63 of 1997 that held that:-

“That right of appeal must be balanced against an equally weighty right, that 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.”

Analysis and determination.

22. The Appellants' prayer for stay of execution and all proceedings before this Court pending appeal, is brought under Order 42 Rule 6 (1) and (2) and Order 22 Rule 22. Order 42 Rule 6 of the Civil Procedure Rules provides that; -

“(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”.

23. Order 22 Rule 22 of the Civil Procedure Rules on the other hand provides that;-

“(1)The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.(2)Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.(3)Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.”

24. It is trite that the power of the Court to grant stay of execution of a decree pending appeal is discretionary. However, the discretion should be exercised judicially as rendered in the case of *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR) where the Court of Appeal held:-

“A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings. 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...”

25. It follows therefore that, in order to succeed in an application for stay of execution or proceedings pending appeal, an applicant must demonstrate;

- a. That the application has been brought without undue delay.
- b. That substantial loss may result unless the order of stay is issued, and;
- c. The Applicant must give security for the due performance of any decree or order that may ultimately be found to be binding on the applicant.

26. In the present case, the impugned ruling was rendered on 9th March, 2023, while this application was filed on 20th March, 2023, that is Eleven (11) days later. In the circumstances, this application was filed timeously.

27. As regard substantial loss, the Applicants argue that they are apprehensive that the subject motor vehicles KCG 524L and KBZ 365B will be sold out in Public Auction and the Appeal will be rendered nugatory.

28. On the other hand, the Respondent states the subject motor vehicles which are sought to be preserve have been sold out and therefore, the application is overtaken by events.



29. This Court has noted the annexure to their Replying Affidavit being certificates of sale and the Auction Release Letter addressed to NTSA in regard to the two vehicles and they are all dated 28th March, 2023 evidencing the said sale.
30. From that evidence, the two subject vehicles for preservation in the application for stay Orders, have already been sold, hence there is nothing to preserve.
31. The trial court's Ruling of 9th March, 2023 is a negative Order as it reads:- "... the Plaintiff's Notice of motion dated 26/1/2023 is dismissed with costs to the Respondents. The main suit is also dismissed with costs to the defendant/Respondent."
32. It is trite that stay of execution cannot be ordered against negative Orders. In this case, the trial court did not order parties to undertake any action or refrain from doing anything except awarding costs which have not been ascertained and therefore, the prayer for stay of execution is untenable.
33. Faced with a similar application in *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] KECA 15 (KLR) the Court of Appeal stated thus:-

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”
34. Further, in *Jennifer Akinyi Osodo v Bonface Okumu Osodo & 3 Others* [2021] eKLR, the Court of Appeal held that a negative order cannot be the subject of a stay order.
35. In the circumstances the Notice of Motion dated 20th March, 2023 lacks merit and therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 21ST MAY , 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Bosire for Appellants

Ms Karanja holding brief for Mr. Matiri for Respondent

Ng'eno, Court Assistant

