



**Kurgat t/a Cheronok Wholesalers & another v Turbo Highway Eldoret Ltd
(Civil Appeal E196 of 2024) [2025] KEHC 7470 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E196 OF 2024**

**E OMINDE, J
MAY 21, 2025**

BETWEEN

**JOHN KIPKURGAT KURGAT T/A CHERONOK WHOLESALERS 1ST
APPELLANT**

SET LIMITED 2ND APPELLANT

AND

TURBO HIGHWAY ELDORET LTD RESPONDENT

RULING

1. This Ruling is with respect to the Applicants' Notice of motion dated 24/09/2024. The Applicant seeks the following orders
 - i. Spent
 - ii. Spent
 - iii. There be a stay of execution in Eldoret CMCC 869 of 2012 – Turbo Highway Eldoret Ltd v John Kiprugut Kurgat t/a Cheronok Wholesalers & Set Limited pending the hearing and determination of the Appeal herein.
 - iv. The costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the contents of the Affidavit sworn by the 1st Applicant. In his Affidavit, the Applicant deposed that on 23/08/2024 the Trial Court delivered Judgement against the Applicant. Further, that he is aggrieved with the decision and has filed an Appeal that raises germane issues which constitute sufficient cause. He stated that if the orders herein sought are not granted, the Respondent will execute the Judgement and render the success of the Appeal pyrrhic. He urged that the Application was made without unreasonable delay and that he is ready to deposit a title as security for due performance of the decree.



Respondents' Replying Affidavit

3. The Respondents opposed the Application vide a Replying Affidavit dated 07/10/2024 sworn by the Respondents' Finance Officer, Panna Dilip Chauhan. She stated that the Application is made in bad faith and is filed with the sole aim of preventing the Respondent from enjoying the fruits of the Judgement. That further, that the Applicants have not met the threshold for the grant of orders of stay. She urged that the Applicants filed a similar Application on 17/09/2024 before the Trial Court and that they did not comply with the orders given on 20/09/2024.
4. She urged that the Application is an abuse of the court process and further, that the Respondent is a going concern and in a position to refund the decretal sum. Further, that the Applicants should be compelled to deposit the Judgement sum and the interest into a joint interest earning account in the name of both counsel on record. She prayed that the Court dismiss the Application with costs.

Hearing of the Application

5. The Application was canvassed by way of written submissions and the Applicant filed submissions dated 03/02/2025 through the firm of Messrs. Wambua Kigamwa & Associates whereas the Respondent filed submissions dated 08/11/2024 through the firm of Messrs. J.M Kimani & Co Advocates.

Applicants' Submissions

6. Learned counsel for the Applicant submitted that the law governing stay of execution pending Appeal is codified by Order 42 Rule 6 of the Civil Procedure Rules. Further, that this provision lays down the essential elements that the appellant ought to fulfill to warrant the grant of the stay orders sought to wit; BULLETSThe Applicant may suffer substantial loss unless the order is madeThe Application has been made without unreasonable delay; andThe Applicant furnishes such security for the due performance of the decree as the Court may order.
7. Counsel submitted that the Appellant has fulfilled the first requirement to merit the grant of the orders. He cited the case of *RWW v EKW* [2019] eKLR and urged 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. He submitted that the Appellants have raised a contestation as to the ability of the Respondent to refund the sums in the Judgement in the event that the Appeal succeeds. He invited the Court to note that the Respondent has not made an attempt to demonstrate to the Court, by way of evidence, that it indeed has the capacity to refund the sums in the event of the success of the Appeal.
8. On substantial loss, Counsel invited the Court to note that the Appellants' have met the threshold laid down in *Kenya Shell Kenya Ltd v Kibiru & Another* [1986] KLR 410 as they have demonstrated the loss that they stand to suffer unless the orders sought are granted, being the loss of a sum that they may not possibly recover from the Respondent without great difficulty in the event they succeed in the Appeal.
9. On the second requirement, Counsel invited the Court to note that the instant motion was filed timeously. The impugned Judgement was delivered on 23/08/2024 and the motion herein was filed on 24/09/2023, 30 days after the delivery of the decision.
10. On the final limb, being the issue of security, Counsel urged that the Appellants are willing to abide by such conditions for the grant of the orders issued by the court. That as a show of good faith, the



Appellants have proposed to deposit a title to property in Court to act as security. He urged the court to allow the application as prayed.

Respondents' submissions

11. Counsel submitted that the Application was made with unreasonable delay as the Judgment sought to be appealed against was delivered on 23/08/2024 while the instant Application was filed on 24/09/2024, after lapse of one month after the Judgement. That no explanation was given for the delay and the same is clearly an afterthought and an abuse of the Court process and therefore, it should be rejected.
12. As to whether substantial loss will ensue if the order of stay is not granted; Counsel urged that the answer is in the negative. He submitted there is no mention anywhere that the Applicants stand to suffer substantial loss in the Affidavit in support of the Application. Further, that this being a money decree and in absence of tangible loss, there is no basis whatsoever of granting stay of execution taking into account the fact that the Respondent has, at paragraph 13 of the Replying Affidavit, demonstrated that it is a going concern with ability to refund the decretal dues. Counsel cited the case of Peter Ndung'u Ngae & 2 Others v John Mugane Karomo [2015] eKLR in support of these submissions. He urged that the Judgement giving rise to the Appeal relates to breach of contract wherein the Applicants issued cheques that were dishonoured and as such the Appeal is an abuse of court process and, further, that no loss will be occasioned if stay is denied given the Respondent's ability to refund decretal dues. He referred the Court to the case of Machira t/a Machira & Co Advocates v East Africa Standard [2002] eKLR.
13. On security, counsel urged that although proffered, it is insufficient to meet the decree, not to mention the fact that the Respondent has expressed ability to refund all decretal dues in the highly unlikely event the Appeal succeeds. In view of the foregoing, the ends of justice tilts in favour of rejecting the Application for Stay. Counsel referred the court to the decision in the case of Shem David Mukumbi v Alice Nzula Kilonzo [2021] eKLR where he said other than the conditions for stay, the court ought to be informed by overriding objective and in rejecting an Application for stay where security had been proffered. He urged the Court to dismiss the Application with costs.

Analysis & Determination

14. 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 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.”
15. In the case of G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another [2018] eKLR, the Court stated as follows: -
 - “It was the considered view of this Court that substantial loss does not have to be a lot of money. It was sufficient if an Applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the



decretal sum if paid to a Respondent in the event his or her Appeal was successful. Failure to recover such decretal sum would render his Appeal nugatory if he or she was successful.”

16. The purpose of security was clearly enunciated in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the Court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

17. In *Antoine Ndiaye v African Virtual University* [2015] KEHC 6783 (KLR) the Court held;

Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the Appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back. The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the Appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the Court to show that the Respondent is not able to refund the decretal sum should the Appeal succeed.

18. In *Nairobi HCC No. 32 of 2010, Utalii Transport Company Limited & 3 Others v NIC Bank Limited & another* [2014] eKLR, the Court in considering what amounted to inordinate delay had this to say;

“Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable”

19. In light of the above cited statutory provisions and case law and having carefully considered the Application, the pleadings in support and against as well as the submissions made by Counsel for the parties, I am satisfied that the applicant has met the requirements set out in Order 42 of the Civil Procedure Rules herein cited. In this regard, I find merit in the application and the same is allowed as follows;

- a. That an order of stay of execution of the decree in *Eldoret CMCC 869 of 2012 – Turbo Highway Eldoret Ltd v John Kiprugut Kurgat t/a Cheronok Wholesalers & Set Limited* pending the hearing and determination of the Appeal herein be and is now hereby issued.
- b. That the Applicant is to deposit the entire decretal sum in an interest earning account in the joint names of the Advocates on record in within 45 days from today’s date failure to which the orders herein granted in their favour shall be deemed to have lapsed and the Respondent shall then be at liberty to execute.
- c. The Record of Appeal is to be filed within 60 days from today’s date. Mention on 16th September for Pre-Trial Conference.



d. The Applicant is to bear the costs of the Application

READ DATED AND SIGNED AT ELDORET ON 21ST MAY 2025.

E. OMINDE

JUDGE

