



**Matendechere & another v Atac (Civil Appeal E1120 of 2024)
[2025] KEHC 12188 (KLR) (Civ) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1120 OF 2024

TW CHERERE, J

MAY 22, 2025

BETWEEN

CAROLYN RACHEL MATENDECHERE 1ST APPELLANT

EDWIN OBIERO 2ND APPELLANT

AND

BENARD SHIVEGA ATAC RESPONDENT

RULING

1. This ruling relates to the Appellants' notice of motion 20th January 2025, in which they seek mainly two orders:
 1. Stay of execution of the judgment delivered on 15th January 2024 in MCCC E3356 of 2022 pending the hearing and determination of this appeal
 2. An order to strike out, terminate and/or nullify the proclamation dated 14th January 2024 issued to Interfield Auctioneers together with the warrants of attachment and sale.
2. The application is supported by the affidavit of the 1st Appellant sworn on the 20th January 2025 and on the grounds that the delay in approaching court was caused by non-availability of copies of the lower court proceedings and judgment.
3. The Respondent opposes the application through a replying affidavit sworn on 08th February 2025. He argues that:
 1. The application is an abuse of the court process
 2. The application is intended to delay him from enjoying the fruits of the judgment delivered in his favour on 15th January 2024



3. The execution is lawful

Issues for Determination

4. From the pleadings and submissions of the parties, the following issues arise for determination:
 1. Whether stay of execution of the judgment delivered on 15th January 2024 in MCCC E3356 of 2022 pending the hearing and determination of this appeal should be granted
 2. Whether the proclamation and the warrants of attachment and sale ought to be lifted

Analysis and Determination

Whether a stay of execution of the judgment delivered on 15th January 2024, should be granted

5. The Appellants seek a stay of execution, implying an intention to appeal the judgment delivered on 15th January 2024. The grounds for seeking this stay include the reason for their delay in challenging the judgment, specifically the "non-availability of copies of the lower court proceedings and judgment."
6. A stay of execution is an equitable remedy granted at the court's discretion, primarily under Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010. For such an order to be granted, an applicant must satisfy the court that:
 - a) Substantial loss may result to the applicant unless the order is made.
 - b) The application has been made without unreasonable delay.
 - c) 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.
7. These principles were authoritatively laid down in the locus classicus cases of *Kenya Shell Ltd v. Kinyanjui & another* [1986] KLR 441 and *Butt v. Rent Restriction Tribunal* [1982] KLR 417. The Court of Appeal has consistently affirmed that all three conditions must be met for a stay to be granted.
8. In assessing the condition of "unreasonable delay," the court must consider the explanation provided by the Appellants. The impugned judgment was delivered on 15th January 2024. The Appellants filed this Notice of Motion for a stay of execution on 20th January 2025, a full year after the judgment. The affidavit in support attributes this delay to non-availability of copies of the lower court proceedings and judgment.
9. The record demonstrates that the letters requesting for the proceedings and judgment are dated 25th September 2024 and 28th October 2024. These dates are significant as they fall long after the statutory period of thirty days for filing an appeal, as prescribed by Section 79G of the *Civil Procedure Act* (Cap 21 Laws of Kenya), had already lapsed.
10. This court therefore finds that the explanation provided for the delay is not credible or satisfactory. The very action of requesting documents months after the deadline for filing an appeal cannot serve as a good and sufficient cause for the prior inaction.
11. A party wishing to appeal must demonstrate diligence from the outset in obtaining the necessary documents. The Appellants' reliance on requests made so belatedly undermines their claim of diligent pursuit and points to an inordinate and unexplained delay in bringing this application.
12. Furthermore, the Appellants have not demonstrated what substantial loss would result if the stay is not granted.



13. Finally, the Appellants have not made any offer of security for the due performance of the decree, which is a mandatory condition under Order 42 Rule 6(2)(c).
14. Consequently, given the inordinate and inadequately explained delay in bringing this application relative to the judgment date, as evidenced by the late requests for documents, and the failure to satisfy the other conditions for a stay of execution, the court finds that the Appellants have failed to meet the threshold for the grant of a stay of execution under Order 42 Rule 6 of the Civil Procedure Rules, 2010.

Whether the proclamation and the warrants of attachment and sale ought to be lifted

15. The Appellants seek to strike out, terminate, and/or nullify the proclamation dated 14th January 2024, and the accompanying warrants of attachment and sale. These instruments are tools of execution, issued under the provisions of Order 22 of the Civil Procedure Rules, 2010, which governs execution of decrees.
16. The legality of these execution proceedings directly stems from the validity of the judgment delivered on 15th January 2024. The Respondent has a lawful judgment in his favour, and is entitled to enjoy its fruits. The law provides for methods of execution, and the proclamation and warrants are standard procedure for attachment and sale.
17. To nullify these instruments, there must be a compelling legal or equitable reason to do so. Such reasons typically arise from a successful appeal, or a strong prima facie case that the judgment itself was obtained irregularly or that the execution process itself is flawed or illegal. In this case, the prayer to lift the proclamation and warrants is premised on the grant of a stay of execution pending appeal. As determined above, the court has found no basis to grant a stay of execution due to the Appellants' failure to meet the statutory conditions.
18. In the absence of a valid stay order, or any other compelling evidence demonstrating the illegality or impropriety of the proclamation and warrants themselves (as distinct from the underlying judgment), there is no legal basis for this court to interfere with the ongoing lawful execution proceedings. The Respondent's right to enjoy the fruits of his judgment cannot be indefinitely postponed or thwarted without a proper legal challenge to the judgment itself, which, as noted, has been delayed for over a year without sufficient and credible explanation.

Disposition

19. For the reasons stated above, this court makes the following orders:
 1. The Appellants' prayer for a stay of execution of the judgment delivered on 15th January 2024, in MCCC E3356 of 2022, is hereby denied.
 2. The Appellants' prayer for an order to strike out, terminate, and/or nullify the proclamation dated 14th January 2024, issued to Interfield Auctioneers, together with the warrants of attachment and sale, is likewise denied.
 3. Costs of this application shall be borne by the Appellants.
 4. Mention before the Deputy Registrar on 01st July 2025 to confirm filing and service of the record of appeal

DELIVERED AT NAIROBI THIS 22ND DAY OF MAY 2025

WAMAE.T. W. CHERERE



JUDGE

Appearances:-

Court Assistant - Ruth

For Appellants - Mr. Ombati for B.M. Mutie & Co. Advocates

For Respondent - Mr. Khafumi for Musili Mbiti Advocates LLP

