



REPUBLIC OF KENYA



**Ochich v Mburugu (Civil Appeal E266 of 2024) [2025] KEHC 5948 (KLR) (7 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5948 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E266 OF 2024**

**E OMINDE, J**

**MAY 7, 2025**

**BETWEEN**

**GEORGE OCHICH ..... APPELLANT**

**AND**

**MARY MBURUGU ..... RESPONDENT**

**RULING**

1. What is pending before this court is the Applicants' Notice of Motion dated 09/12/202 seeking the following orders;
  - i. Spent.
  - ii. Spent
  - iii. This Honourable Court be pleased to stay the execution of the warrant of arrest issued on November 13, 2024 by the Chief Magistrate's Court at Eldoret (per Hon. D. Mikoyan, CM) in CMCC Misc. Civil Suit No. E029 of 2022 pending the hearing and determination of the appeal that appellant/applicant has filed herein.
  - iv. Spent.
  - v. This Honourable Court be pleased to stay further proceedings in Eldoret CMCC Misc. Civil Suit No. E029 of 2022 pending the hearing and determination of the appeal that appellant/applicant has filed herein.
  - vi. The costs of this application.
  - vii. This Honourable Court be pleased to grant any other or further orders as may be deemed just in the circumstances.
2. The application is premised on the grounds on the face of it and the contents of the supporting affidavit sworn on 09/12/2024 by George Ochich, the applicant.



3. In his affidavit, the applicant stated that on 13<sup>th</sup> November 2024, the Chief Magistrate's Court in Eldoret CMCC Misc. Civil Suit No. E029 of 2022 issued a warrant of arrest against him as a result of the execution of the decree in the said case. Further, that he is dissatisfied with the issuance of the said warrant of arrest and has instituted an appeal before this court vide a Memorandum of Appeal dated 09/12/2024.
4. He stated that the total debt on the warrant of arrest being Kshs 214,500/- is at variance with the said figure of Kshs 234,500/= stated on the face of the Notice to Show Cause on the strength of which the said warrant of arrest was issued. In light of the foregoing, the exact amount of the debt that he is required to pay to avert being arrested pursuant to the said warrant of arrest remains grey and clouded. Further, that this renders the said warrant of arrest susceptible to abuse.
5. The deponent stated that the execution of the warrant of arrest will be prejudicial to him and is likely to render the said appeal nugatory and merely academic. Further, that it is in the interest of justice that the execution of the said warrant of arrest and further proceedings be stayed pending the hearing and determination of the appeal.
6. The deponent averred that the application was filed timeously and offered to furnish security in the sum of Kshs 20,000/= or such security as the court may direct. He prayed the court allow the application.
7. Despite being served with the Application (See Affidavit of Service Dated 11<sup>th</sup> February 2025), the Respondents did not enter any Appearance and also did not file any response to the Application. They also did not file any submissions.

### **Applicants' Submissions**

8. The applicant filed submissions dated 10/02/2025. He submitted that the application is unopposed as it was served upon the respondent on 16/12/2024 as per the affidavit of service sworn by the applicant on 10/02/2025. As at the time of preparing submissions, the respondent had not filed a response. He urged that the court should arrive at the conclusion that the said application is unopposed and should be allowed as prayed.
9. The applicant submitted that the law governing applications for stay of execution and stay of proceedings is contained in Order 42 Rule 6 of the Civil Procedure Rules 2010. Further, that the law on stay of execution has been interpreted by the Court of Appeal in Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others [2013] eKLR. In that case, the Court of Appeal interpreted the law as requiring the applicant to establish only two things, namely:
  - i. That the applicant's appeal or intended appeal is arguable, that is to say it is not frivolous; and
  - ii. That the appeal, were it to succeed, would be rendered nugatory.
10. He additionally cited the case of Mursal Guleid & 2 others v Daniel Kioko Musau [2016] eKLR, where the High Court pointed out that the primary consideration in an application for stay pending appeal is that the court should avoid a situation where the appellant will "be prejudiced and the appeal rendered nugatory if he eventually succeeds". He urged that the application satisfies the above requirements.
11. The appellant reiterated that he has filed an appeal against the decision delivered on 13/11/2024 in Eldoret CMCC Misc. Civil Suit No. E029 of 2022 and further, that on the date of the ruling, he filed requests for copies of the order and proceedings in the said Eldoret CMCC Misc. Civil Suit No. E029 of 2022. He is apprehensive that there will be warrants of arrest issued was the appeal is pending due to the fact that the file is still active.



12. The appellant submitted that the appeal is arguable and further, that all that is required of the applicant is to demonstrate, at least, one arguable point. He urged that he has demonstrated that he has already filed an appeal that is now pending before this Honourable Court and additionally, that the Memorandum of Appeal contains up to nine (9) grounds of appeal. All the nine (9) grounds of appeal raise arguable issues. He maintained that the said appeal is not frivolous, is arguable, has merits and overwhelming chances of success.
13. The applicant reproduced the contents of his affidavit on the potential for the abuse of the warrants of arrest, which he attributed to the variance of the debt claimed in the Notice to Show Cause and the decree. He urged that if the orders are not granted, the appeal will be rendered nugatory.
14. The applicant urged that he risks to suffer irreparable and/or substantial prejudice, loss and detriment if the orders sought are not granted. He cited the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR in support of his submissions. He reiterated that the application was instituted expeditiously and without unreasonable delay. That the impugned ruling was delivered on 13/11/2024. He was issued with certified copies of the proceedings and ruling on 06/12/2024 and filed the application on 09/12/2024. He stated that therefore, the application as filed without unreasonable delay.
15. The appellant reiterated the offer of security in the sum of Kshs 20,000/= and cited the case of *Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu* - High Court of Kenya at Nyeri, Civil Appeal No. E030 of 2021) in support of his submissions. He urged the court to allow the application in the interests of justice.

### **Analysis & Determination**

16. Order 42 Rule 6 (1) of the *Civil Procedure Rules* 2010 stipulates as follows: -

No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 an application being made, to consider such application and to make such orders thereon as may to it seem just, 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 the orders set aside.

17. Order 42, rule 6(2) provides that: -

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.



18. In *Butt v Rent Restriction Tribunal* 1979 eKLR (Madan, Miller and Porter JJA) the court stated as follows when considering an application for stay of execution: -

- i. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- ii. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
- iii. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.
- iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirement.

19. In *James Wangalwa & another v Agnes Naliaka Cheseto* Misc. Application No 42 of 2011 [2012] eKLR the court stated as follows regarding what amounts to substantial loss;

“...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.”

20. In *Arun C Sharma vs. Asbana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, 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.”

21. I have considered the Application in light of the Statutory legal provisions and case law as herein laid out. I have also taken into account the fact that the Application is unopposed. I am satisfied that the Application has merit and the same is accordingly allowed as follows;

- a. That the warrant of arrest issued on 13<sup>th</sup> November 2024 by the Chief Magistrate's Court at Eldoret (per Hon. D. Mikoyan, CM) in CMCC Misc. Civil Suit No. E029 of 2022 be and is now hereby stayed pending the hearing and determination of the appeal that appellant/applicant has filed herein.
- b. That further proceedings in Eldoret CMCC Misc. Civil Suit No. E029 of 2022 be and are now hereby stayed pending the hearing and determination of the appeal that appellant/applicant has filed herein.



- c. That the Applicant is to furnish security in the sum of Ks. 100,000/-which amount is to be deposited in Court within 21 days from the date of this Ruling.
- d. That the Record of Appeal is to be filed and served within the next 60 days' failure to which the orders herein granted in a) and b) above shall be deemed to have lapsed
- e. That the Applicant is to bear the costs of the application.

**READ DATED AND SIGNED AT ELDORET ON 7<sup>TH</sup> MAY 2025**

**E. OMINDE**

**JUDGE**

