Shah v Waithira & 2 others (Civil Appeal E360 of 2024)
[2025] KEHC 6337 (KLR) (15 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6337 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E360 OF 2024

FN MUCHEMI, J

MAY 15, 2025

BETWEEN

SANJAY VELJI SHAH ..... APPLICANT

AND

BEATRICE WAITHIRA ..... 1ST RESPONDENT

KELVIN NDERITU ..... 2ND RESPONDENT

NUR GARANE MOHAMMED ..... 3RD RESPONDENT

RULING

Brief Facts

1. The application dated 19th December 2024 seeks for orders of stay of execution against the ruling in Ruiru Small Claims Court SCCC No. E354 of 2023 delivered on 25th November 2024 pending the hearing and determination of the appeal.

2. The 1st respondent opposed the application and filed a Replying Affidavit dated 21st January 2025.

Applicant's Case

3. The applicant states that the ruling in Ruiru SCCC No. E354 of 2023 was delivered on 25th November 2024 where the trial court dismissed his application dated 18th October 2024 that sought for orders to set aside the judgment delivered against him on 19th September 2024. The applicant avers that unknown to him, the 1st respondent instituted a claim before the lower court on 18th July 2024 and interlocutory judgment was entered against him on 22nd August 2024. The matter proceeded to formal proof hearing and judgment was delivered on 19th September 2024. Being aggrieved with the said ruling, the applicant lodged an appeal which has high chances of success.

4. The applicant avers that despite his efforts and numerous requests including letters of 5th December 2024 and 13th December 2024, a copy of the said ruling has not been availed to him or uploaded on the judiciary CTS platform.

5. The applicant further states that in the event stay of execution is not granted, the 1st respondent may proceed to execute the impugned ruling rendering the appeal nugatory. The applicant avers that the 1st respondent's financial position is not known and therefore attempts to reverse the impending execution may be futile and an academic exercise in the event the appeal succeeds.

The 1st Respondent's Case

6. The 1st respondent states that her advocate on record, Mr. Hussein Kusow personally made the suit known to the applicant soon after the claim was filed by calling the applicant on 5th August 2024 through his mobile number 0715167365 where after having a conversation, the applicant requested her advocates to serve him with the court documents on WhatsApp. The 1st respondent avers that not only were the court documents served to the applicant but he claimed to have authority to receive the court documents on behalf of the 1st and 3rd respondents. The 1st respondent argues that the applicant made a deliberate choice to abscond the court sessions despite being notified of the same by her advocates a second time. Thus, the applicant is misleading the court by stating that he only came to know of the suit after the same had been completed.

7. The 1st respondent states that although the applicant claims that he was admitted in hospital at the time of filing the claim in the trial court, he did not produce any evidence to support the same. The 1st respondent argues that the applicant is only interested in delaying the payment of the decretal sum awarded to her as he is aware that his appeal is not merited and the same is an abuse of the court process.

8. The 1st respondent states that the applicant annexed an admission record which indicates that he was admitted on 15th August 2024 yet he was served with the Statement of Claim on 5th August 2024 and thus he had ample time to appoint an advocate to defend the claim on his behalf. Thus, the applicant by claiming that he was unable to instruct an advocate while at the same time denying that he was aware of the suit from its inception is a clear indication that the applicant is lying to the court and has not approached the court with clean hands.

9. The 1st respondent states that although the applicant has stated that at the time of the accident he was neither the owner nor in possession of the motor vehicle, he has not provided any proof to support his claim and only makes mention of an agreement for sale dated 4th January 2024. Furthermore, the applicant has not annexed any document from the Registrar of Motor Vehicles indicating that the motor vehicle registration number KAQ 871Y, the subject of the suit is registered to one Angela Njeri Ngugi thus making her the registered owner.

10. The 1st respondent avers that she attached a copy of motor vehicle search which clearly indicates that as at 19th April 2024 the suit motor vehicle was jointly owned by the applicant and the 3rd respondent herein. The 1st respondent states that she conducted a further motor vehicle search as at 28th October 2024 after the applicant filed his application to set aside the judgment delivered in her favour, whose result still indicated that the suit motor vehicle was owned by the applicant.

11. The 1st respondent argues that pursuant to Section 8 of the *Traffic Act*, the person in whose name a vehicle is registered shall unless the contrary is proven, be deemed to be the owner of the vehicle. The contrary has not been proved.

12. The 1st respondent further states that the applicant's appeal does not raise any triable issues with high chances of success. The 1st respondent further states that the applicant is in contempt of court orders as he has not deposited in court the sum of Kshs. 200,000/- as security ordered by the current court.

13. The 1st respondent argues that she will be greatly prejudiced if the court allows the application as she has suffered immensely both physically and emotionally from the accident and it is clear that the applicant only wants to deny her the fruits of a successful litigation.

14. The applicant has filed a Further Affidavit dated 6th March 2025 and states that he became aware of the primary suit through a message sent to him by the judiciary informing him of the conclusion of the same sometime in September 2024 while he was recuperating from a surgery he underwent in the month of August 2024 that involved an amputation of part of his leg. The applicant avers that he is highly diabetic and he has been on and off hospital since the year 2024. The applicant further avers that at the time of the prosecution and conclusion of the matter, he was unwell and bedridden and at some point he was admitted in the High Dependency Unit after undergoing the amputation surgery.

15. The applicant states that at the time of the accident he had already sold the suit motor vehicle to Angela Njeri Ngugi which fact he disclosed to the trial court in his application. The applicant further states that what had remained was the effecting of the transfer and the delay in the transfer had been occasioned by his unwellness but he had already paid for the same and produced the NTSA generated receipt.

16. The applicant argues that it would be just and fair for the trial court to allow him to litigate his case to a logical conclusion and allow him to enjoin the rightful owners of the suit motor vehicle as at the time of the accident. The applicant further states that his defence raises triable issues which the trial court failed to consider.

17. The applicant states that he has deposited the sum of Kshs. 200,000/- in court as security. The applicant states that it is not known whether the 1st respondent who is the judgment decree holder is a person of means and thus should the orders for stay not be granted and she proceeds to execute against him, the appeal will not only be reduced to an academic exercise but he will end up suffering grave injustice and irreparable loss with no recourse to law.

18. The applicant avers that the 1st respondent will not suffer any prejudice should the prayers be allowed.

19. Parties put in written submissions.

The Applicant's Submissions.

20. The applicant relies on Order 42 Rule 6(2) of the Civil Procedure Rules and the cases of Nation Media Group Limited vs Faith Muthoni Njiru [2021] eKLR and Purity Nyatera vs David Angwenyi Nyakundi KEHC 3086 [2023] KLR and submits that he has demonstrated that he has sufficient cause for seeking orders of stay of execution as his appeal raises triable issues with high chances of success. The applicant further submits that in the event stay of execution is not granted the appeal will be reduced to an academic exercise occasioning him substantial loss and reducing him to an unfortunate sacrificial lamb forced to bear the grave injustice of satisfying the judgment in an accident that he had nothing to do with as the suit motor vehicle belonged to and was in possession of someone else.

21. The applicant further relies on the cases of Matata & another vs Rono & Another [2024] KEHC 2799 (KLR); Century Oil Trading Company Limited vs Kenya Shell Company Limited Nairobi (Milimani) HCMCA No. 15561 of 2007 and National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another [2006] eKLR and submits that it would be a grave injustice to deny him his day in court

and the chance to bring the rightful owner of the suit motor vehicle at the time of the accident who would bear the burden of settling the decretal sum. The applicant submits that he is exposed to suffer substantial loss and irreparable damage should the court not grant the orders sought and the 1st respondent proceeds to execute against him and the appeal is heard and is successful. The applicant argues that the financial position of the 1st respondent is not known and therefore should the court proceed and not issue stay and the 1st respondent proceeds with execution, he will have no recourse.

22. The applicant submits that the application was filed on 19th December 2024 and the ruling was delivered on 25th November 2024 thus the application was filed timeously. On the issue of security, the applicant relies on the case of Elijah Njagi & Another vs Yvonne Ndunge [2021] eKLR and submits that he has deposited security as directed by the court on 24th December 2024.

The 1st Respondent's Submissions

23. The 1st respondent refers to Order 42 Rule 6 of the Civil Procedure Rules and the cases of Michael Munyi & Another vs Diamond Trust Bank Kenya Limited & Others Nairobi HCCA No. E016 of 2024 and Machira t/a Machira & Co. Advocates East Africa Standard (No. 2) (2002) eKLR and submits that a successful party is entitled to the fruits of his judgment and thus urges the court to protect her right to fair trial and to allow her enjoy her fruits of her judgment as the applicant is intentionally and maliciously manipulating and misrepresenting the facts of the case thus abusing the court's process.

24. The 1st respondent refers to the case of Wachira Karani vs Bildad Wachira [2016] eKLR and submits that the applicant has not provided sufficient cause why stay should be granted. The 1st respondent argues that the applicant has not approached the court with clean hands as he only makes allegations that either he was too ill to instruct counsel or he was never aware of the suit and that the suit was only brought to his attention after the same was concluded; whichever allegation will work better to persuade the court. The 1st respondent further submits that the memorandum of appeal raises issues that were aptly determined by the trial court and as such the grounds of appeal are not arguable.

25. The 1st respondent relies on the cases of Kamau vs Ruraya & 4 Others [2022] KEELC 13323 (KLR) and Machira t/a Machira & Co. Advocates East Africa Standard (supra) and submits that the applicant has not provided any proof of the alleged substantial loss he alleges to suffer. The 1st respondent argues that the applicant has not shown that he was not the registered owner of the suit motor vehicle neither has he shown any evidence to prove transfer of ownership or any document to show that the vehicle belonged to a third party. The 1st respondent argues that as at 28th October 2024, the motor vehicle search indicated that the suit motor vehicle was still owned by the applicant. The 1st respondent refers to Section 8 of the *Traffic Act* and the case of Cyprian Sibwoga Mokurumi vs Richard Mutwol Kipyegon [2021] eKLR and submits that the person in whose name a vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the vehicle. The contrary has not been proved.

26. The 1st respondent submits that the applicant has not been vigilant from the commencement of the suit to warrant the court's assistance. The 1st respondent further submits that the applicant has not provided sufficient reason why the court should use its discretion to aid his indolence. The 1st respondent submits that the applicant only filed the present application and appeal with an aim of delaying her from enjoying the fruits of justice. To support her contentions, the 1st respondent relies on the case of Purdy vs Cambrian [1999] ALL ER 1518.

27. On the issue of security, the 1st respondent urges the court not to consider the question of security deposited in court but instead direct that the same be released to her.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

28. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

    1. "No appeal or 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 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 orders 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 1st 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.

29. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

    1. Substantial loss may result to him/her unless the order is made;

    2. That the application has been made without unreasonable delay; and

    3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

30. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

> "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 applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...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.

31. The applicant argues that he stands to suffer substantial loss as the 1st respondent shall proceed to execute the decree and further that he does not know the financial capability of the 1st respondent and thus in the event the appeal succeeds, it may be futile to recover the decretal sum from her.

32. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect him or will alter the status quo to its detriment therefore rendering the appeal nugatory. In the instant case, the applicant has shown that he does not know the 1st respondent's financial capabilities and that he may not recover the said amount from the 1st respondent in the event the appeal succeeds. The evidentiary burden at that point shifted to the 1st respondent to show that she is a person of means and would be able to settle the decretal sum should the appeal succeed. The 1st respondent in this case failed to do so.

33. Additionally, the trial court dismissed the applicant's application dated 18th October 2024 which is in effect a negative order. Notably, the court cannot grant stay of the impugned judgment as it dismissed the applicant's application which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR where the court held as follows:-

> An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

34. Similarly in Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

> In Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-
>
> The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.
>
> The same reasoning was applied in the case of Raymond M. Omboga vs Austine Pyan Maranga (supra) that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-
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> > The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

35. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order.

36. Accordingly, it is my considered view that the applicant has not demonstrated that he stands to suffer substantial loss.

Has the application has been made without unreasonable delay.

37. The ruling was delivered on 25th November 2024 and the applicant filed the instant application on 20th December 2024. Thus the application has been filed timeously.

Security of costs.

38. The purpose of security was explained in the case of Arun C. Sharma vs Ashana 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 the 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.

39. Evidently, the issue of security is discretionary and it is upon the court to determine the same as well as the terms applicable where parties have not agreed. The court on 24th December 2024 directed that the applicant deposits Kshs. 200,000/- in court within 30 days. On perusal of the record, the applicant annexed proof of payment of Kshs. 200,000/- as security, on 21st January 2025.

40. Additionally, grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicant's unfettered right to file an appeal to fully ventilate her grievances. This was well stated in the case of M/s Porteitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997 where the court held:-

> That the 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.

41. Does the appeal have high chances of success the applicant has annexed evidence of service through WhatsApp which is an accepted mode of service under the Civil Procedure Rules. The applicant was served ten (10) days before he was admitted in hospital. He has not explained why he failed to act before he fell sick. This situation limits the chances of success of his appeal.

42. Bearing the said balance in mind and considering the provisions of Order 42 Rule 6 of the Civil Procedure Rules, it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.

43. Accordingly, the application dated 19th December 2024 lacks merit and is hereby dismissed with costs to the 1st respondent.

44. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 15TH DAY OF MAY 2025.

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F. MUCHEMI

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JUDGE