



REPUBLIC OF KENYA



Ali v Nyang'ao (Civil Appeal E010 of 2024) [2025] KEHC 8735 (KLR) (19 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA**

CIVIL APPEAL E010 OF 2024

WA OKWANY, J

JUNE 19, 2025

BETWEEN

HEZRON ONGARO ALI APPELLANT

AND

MARY NYAKAMBI NYANG'AO RESPONDENT

*(Being an Appeal against the Judgment delivered in the Chief Magistrate's Court at Nyamira
CMCC No. E181 of 2022 by Hon. W.K. Chepseba, Chief Magistrate on 26th March 2024)*

RULING

Background

1. The trial court issued an order of permanent injunction against the Appellant/Applicant herein, who was the Defendant before the said court, barring the Appellant from using Motor Vehicle Registration No. KDC 356C Toyota Probox (the Suit Motor Vehicle). The Appellant was also ordered to surrender the suit motor vehicle to the Plaintiff/Respondent within 30 days from the date of the judgment.
2. Aggrieved by the said Judgment, the Appellant lodged an before this Court seeking orders to set aside the said judgment and to be declared the rightful owner of the said motor vehicle.
3. The Respondent, on the other hand, filed an Application dated 20th May 2024 seeking orders to direct the Appellant/Applicant to release the suit motor vehicle to the safe custody of the OCS Magwagwa Police Station pending the hearing and determination of the intended appeal. In a Ruling delivered by this Court on 11th July 2024, the Court allowed the Respondent's Application and directed that the suit motor vehicle be released to the OCS Magwagwa Police Station within 7 days from the date of the Ruling.
4. When the parties appeared before me on 24th July 2024 for Mention to confirm compliance with the orders issued on 11th July 2024, Mr. Ondima, Learned Counsel for the Appellant/Applicant, informed the Court that they were unable to comply with the said orders because the subject motor vehicle was



no longer registered in the Appellant's name. Counsel proposed that the Court could instead issue an order for security for costs.

5. Mr. Onyancha, Learned Counsel for the Respondent, on his part, sought orders for a warrant of arrest to issue against the Appellant herein for contempt of court orders. The Court directed Respondent to file a formal Application for contempt but the Respondent herein filed a Notice to Act in person and dismissed her legal counsel.

The Application

6. The Application that is the subject of this ruling is dated 27th September 2024. The Appellant/Applicant seeks orders as follows: -
 - i. Spent
 - ii. Spent
 - iii. That the Honourable Court be pleased to grant an order of stay of execution of the Judgment delivered on the 26th March 2024 in *CMCC 181 of 2022* in the Chief Magistrate's Court at Nyamira before Hon. Chepseba, pending the hearing and determination of the Appeal.
 - iv. That costs of and incidental to this Application be provided for.
7. The Application is brought under Order 42 Rule 6 of the *Civil Procedure Rules* and is supported by the Applicant's affidavit in which he avers that he is apprehensive that the Respondent may proceed to execute the judgment thereby rendering the intended appeal nugatory if the said judgment is not stayed. He also avers that the 30-days stay that was granted by the trial court was not adequate to enable him lodge the appeal and have it determined. He added that he stands to suffer substantial loss and that the Respondent will not be prejudiced in any manner if the Court grants the prayers sought.
8. The Appellant added that he had already sold off the suit motor vehicle to a third party due to financial constraints involving catering for the school fees needs of the minors that he had sired with the Respondent herein. He explained that there was no order barring him from disposing the said vehicle at the time of the sale.
9. The Respondent did not file a Response to the Application. Parties were directed to dispose of the Application by written submissions which I have considered.
10. That main issue for my determination is whether the Application for stay of execution is merited.
11. The principles governing the granting of orders for stay of execution pending appeal are codified under Order 42 rule 6 of the *Civil Procedure Rules* which provides as follows: -
 - (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 subrule (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.
- 12. A party seeking an order for stay execution of a judgment pending appeal must satisfy the court as follows: -
 - a. That they are likely to suffer substantial loss unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. That they are willing and have given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
- 13. In the present case, the Applicant states that he is likely to suffer substantial loss if the said prayers sought are not granted. He also revealed that the suit motor vehicle, which is the subject of the judgment of the trial court that he sought to stay, had already been sold off to a third party. Indeed, it became apparent to this Court that the Appellant could not comply the court orders issued on 11th July 2024 to release the suit vehicle into the custody of the OCS Magwagwa Police Station because he had already sold it to one Naomi Chelang’at.
- 14. I have considered the first parameter for stay orders being substantial loss. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR the Court explained the issue of substantial loss thus:-

“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.”
- 15. In this case, I find that the Appellant’s only reason for claiming that he would suffer substantial loss was the fact that the suit motor vehicle had already changed hands and its ownership was now vested in a third party. I note that the Motor Vehicle Search Record attached to the Application “HOA-2” shows that as at 25th May 2024, the suit vehicle had already been registered to the said third party. A perusal of the trial court’s Record reveals that the Respondent herein, who was the Plaintiff before the trial court had sued the Appellant vide Plaint dated 9th November 2022 and that the proceedings commenced on 14th November 2022. It is also noteworthy that judgment was delivered on 26th March 2025. While it was not clear at which point of the proceedings or which specific date the suit vehicle was sold and transferred to a third party, it is evident to this Court that the Appellant/Applicant disregarded the pending court proceedings by selling the suit vehicle in full knowledge of the existence of the suit over the same.
- 16. I am not satisfied that the reasons advanced by the Appellant for selling the vehicle are plausible as he opted to interfere with the subject matter of the trial court’s proceedings. I further find that the mere fact that there was no court order barring him from selling the vehicle did not mean that he could dispose of it in the manner that he did.



17. For the reasons stated hereinabove, I find that the Appellant approached this Court with unclean hands as he took the trial court through an academic exercise to hear and determine a dispute in which the subject matter was no longer in his physical or legal custody. I further find that there is a valid judgement for which, without orders of stay of execution, would warrant the Respondent to proceed with execution.
18. While this Court appreciates that the Appellant is entitled to his right to appeal, it is my firm finding that he did not approach the Court with clean hands. It would appear that he only filed the present Application and the subsequent appeal in order to sanitise his action of disposing off the suit vehicle while the matter was either still in court or had been determined. I find that the Applicant has also not demonstrated the loss that stands to suffer if the orders sought are not granted when it is the Respondent who has been deprived of the use of the suit motor vehicle as the rightful decree holder.
19. For the reasons stated in this ruling, I find that the Applicant has not satisfied the parameters set for the granting of orders of stay of execution. He has not even given any proposals for security for the due performance of the judgement/decree appealed from. I therefore find that the Application lacks merit and I therefore dismiss it with costs to the Respondent.
20. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 19TH JUNE 2025.

W. A. OKWANY

JUDGE

