Oddera v Achieng (Civil Appeal E050 of 2025) [2025] KEHC 7861 (KLR) (5 June 2025) (Ruling)

Neutral citation: [2025] KEHC 7861 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E050 OF 2025

A MABEYA, J

JUNE 5, 2025

BETWEEN

MICHAEL ABONGO ODDERA ..... APPELLANT

AND

DICKSON MBOGO ACHIENG ..... RESPONDENT

RULING

1. This ruling is in respect of the application filed on the 4/5/2025. In it, the applicant sought an order for the stay of execution of the judgment/decree delivered on the 5/1/2025 in the *Ksm Small Claims Court No. E704 of 2024* pending the hearing and determination of the instant appeal.

2. The applicant did not cite the provisions under which he moved the Court. However, the application was premised on the ground that the applicant will suffer irreparable loss if the orders sought were not granted as the respondent was in the process of executing the decree. That his appeal had high chances of success.

3. The application was opposed by the respondent vide his replying affidavit sworn on 20/5/2025. He deposed that the impugned judgment was delivered on the 30/11/2024 and not on 5/1/2025 as averred by the applicant. That both parties attended court on the latter date to give proposals on how the applicant was to satisfy the decretal sum.

4. That the applicant had been given 30 days stay of execution but still failed to satisfy the decree. He was subsequently served with three notices to show cause but failed to attend court or make good of his own proposals.

5. That the application was therefore frivolous, vexatious and an abuse of court process, meant to delay, evade and/or cause hindrances to the decree made by the court.

6. The parties made oral submissions in support of their respective cases. The applicant submitted that following the judgment on 30/11/2024, he applied to be allowed to settle the decretal sum in

installments of Kshs. 3,000/-. However, on the 5/1/2025, the court increased the installments to Kshs. 25,000/-.

7. He submitted he is a peasant farmer and had paid the respondent Kshs.10,000/- on 2/12/2024. That he had been paying the proposed sum of Kshs. 3,000 and proposed to pay Kshs. 5,000/- per month.

8. On his part, the respondent submitted that he supplied materials after which the applicant disappeared to Mumias after receiving the pay and had since been hiding from him.

9. The main issue for determination is whether the Application is merited.

10. Order 42 rule 6 of the *Civil Procedure Rules* provides for stay of execution pending appeal. The principles applicable are that the supplicant must demonstrate that he would suffer substantial loss if stay is not granted, give security for the performance of the decree or order that would ultimately be binding on him and that the application should be made timeously. See *Elena Doudoladova Korir v Kenyatta University* [2012] eKLR.

11. In exercising its discretion, the Court must balance an appellant's right to appeal with the right of a decree-holder to the fruits of his decree. In striking this balance, the court must consider that a decree holder should not be unduly prejudiced or precluded from enjoying the fruits of their judgment. See *RWW v EKW* [2019] eKLR.

12. It is not clear whether the applicant was appealing against the judgment of 30/11/2024 or the order of 5/1/2025. Since the parties were acting in person, I will consider both the judgment of 30/11/2024 and the ruling of 5/1/2025 if only to do justice to the parties.

13. The impugned judgment was passed on the 30/11/2024. The present application was made on 4/5/2025, about 6 months later. It is clear that the application was not made timeously. In any event, that was way out of the time for appealing.

14. In the event the order being appealed against is the one o 5/1/2025, still the applicant came to court after 4 months later. That was not timeous. There was inordinate delay in bringing the application.

15. On that ground only, the application is for dismissal. I say so because, the applicant only came to court after the process of execution was put in place. He did not have the intention of appealing against either the decree or the order. Indeed he had been in the process of trying to settle the decretal sum by bits and pieces until he was jolted by the execution process.

16. Be that as it may, I will still consider the other principles for granting a stay pending appeal. It was the applicant's case that he stands to suffer irreversible loss should the appeal succeed when execution has already occurred. It is the duty of an applicant in an application for stay of execution to establish the substantial loss to be suffered if the orders sought are not granted.

17. In *Machira t/a Machira & Co. Advocates v East African Standard* (No 2) (2002) KLR 63, the Court of Appeal held: -

> " 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."

18. In the present case, the decretal sum against the applicant is Kshs. 127,792.43. Save for stating that he is a farmer and can only afford to pay Kshs. 5,000/- per month, the applicant has not indicated how and what loss he would suffer if the stay is not granted.

19. The other consideration is security. In *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates* (2014) eKLR the Court held that: -

> " 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."

20. In the present case, the applicant did not offer any security as a pre-requisite for grant of the orders sought. He only stated that he is a farmer and cannot afford instalments of Kshs. 25,000/- per month as ordered by the trial court.

21. On his part, the respondent contended that the applicant was merely delaying his enjoyment of the judgment as he had previously obtained stay of execution and still did not fulfil the instalments he had proposed. That the applicant had been served with three notices to show cause but failed to attend court or make good of his own proposals.

22. The three (3) conditions for granting stay of execution pending appeal must be met simultaneously. They are conjunctive and not disjunctive. It is my finding that the applicant has not met any of the conditions for grant of stay of execution. He did not explain the delay in filing the application or adequately demonstrated the substantial loss that he would suffer and has failed to furnish security as stipulated by sub-rule 2b aforesaid.

23. The orders made by the trial court on 5/1/2025 were discretionally. The Court has not been shown how wrong they were in order to be interfered with. Justice looks at both sides. Debts are for payment and not otherwise. The applicant did not show how the monthly instalments of Kshs.25,000/- ordered by the trial court was onerous.

24. The other issue is that the record shows that the applicant had not endeavoured in any way to settle the decretal sum. Had he been paying the amount he was proposing of KShs.5,000/- per month, he would have by now paid in excess of Kshs.30,000/-. That would have reduced the decretal sum by over a third. However, because of his lethargy in settling the decretal sum, the same is still huge. I think justice demands that ascertained debts, such as this one, be settled.

25. In the circumstances, the Court finds the application dated 4/5/2025 to be unmerited and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF JUNE, 2025.

A. MABEYA, FCI Arb

JUDGE