



Diocese of Embu - Trustees Registered The Administrator Consolata Hospital Kyeni v Mugo (Civil Appeal E029 of 2023) [2025] KEHC 11124 (KLR) (23 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E029 OF 2023
RM MWONGO, J
JULY 23, 2025**

BETWEEN

**DIOCESE OF EMBU - TRUSTEES REGISTERED THE ADMINISTRATOR
CONSOLATA HOSPITAL KYENI APPELLANT**

AND

SIMON MUCHANGI MUGO RESPONDENT

RULING

The Application

1. Through an application dated 12th December 2024, the applicant is seeking the following orders:
 1. Spent:
 2. Spent;
 3. That there be stay of execution of the decree of this court dated 29th October 2024 (emanating from the judgment delivered on 28th August 2024) pending hearing and determination of the appeal filed at the Court of Appeal against the said decree; and
 4. That the costs of this application be provided for.
2. The application is supported by the grounds set out on its face and in the supporting affidavit thereof. The applicant stated that following the judgment of the first appellate court, the respondent has moved to execute for the decretal amount through auctioneers. That the stay orders are necessary because otherwise, the hospital will lose critical facilities if they are seized by the auctioneer, thus it will suffer substantial loss. The applicant produced a copy of the Notice of Appeal dated 29th August 2024 as well as execution documents served upon it by Viewline Auctioneers which the applicant termed as defective.



Response

3. The respondent filed a replying affidavit stating that the application is calculated to deny him enjoyment of the fruits of his judgment. He acknowledged that the auctioneer's documents are based on the trial court's decree and not the first appellate court's decree. This, he said, was a simple oversight and it does not invalidate the execution process. He stated that the applicant has not filed a proper appeal before the Court of Appeal by merely filing the notice of appeal.

Parties' Submissions

4. The court directed that the application be canvassed by way of written submissions.
5. The applicant submitted that the execution is based on the wrong decree; That the auctioneer's fee charged is unsubstantiated and should be borne by the decree-holder. It submitted that a proper second appeal has been filed through the notice of appeal and it urged the court to grant stay of execution in line with to Order 42 Rule 6 of the [Civil Procedure Rules](#).
6. On his part, the respondent relied on Order 42 Rule 6 of the [Civil Procedure Rules](#) and the cases of *Consolidated Marine v Nampijja & Another*, Civil App.No. 93 of 1989 (Nairobi) and [Rboda Mukuma v John Abuoga](#) [1988] eKLR. He argued that the applicant has not met the requirements for granting of stay of execution. That 8 months after filing the notice of appeal, the applicant has not lodged the substantive appeal at the Court of Appeal, thus it is evident that it is not serious about appealing.

Issue for Determination

7. The issue for determination is whether or not an order should be made staying execution

Analysis and Determination

8. Stay of execution is governed by Order 42 Rule 6(2) of the [Civil Procedure Rules](#) as follows:

- “(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.”

9. The impugned judgment was delivered on 28th August 2024. The applicant has shown that it filed a notice of appeal in the Court of Appeal the following day. However, it did not seek stay of execution. As such, the respondent moved to execute for the decretal amount. Once the applicant saw the respondent's efforts to execute through an auctioneer, it moved this court in December, 2014 through the application herein.
10. Given the circumstances of the case, it appears that there is a definite delay in seeking stay orders. The respondent contended that a substantive appeal has not been lodged at the Court of Appeal 8 months after the notice of appeal was filed. Luckily for the applicant, under Rule 77 of the [Court of Appeal Rules](#), an appeal is lodged in that court through a notice of appeal filed in the manner stipulated under that provision. Therefore, it is taken that a proper appeal has been lodged in that Court, and any other



issues arising from that fact will be determined before that superior court, including the issue of filing the substantive memorandum of appeal.

11. The 4-month delay in filing the application is not adverse, especially considering that a proper appeal has been lodged before the Court of Appeal. The court is also tasked with considering whether substantial loss will result if the stay order is denied. The applicant has pleaded that if the respondent is allowed to execute, it will lose important hospital equipment through sale which will hinder it from providing medical services to other patients.
12. As the successful party in the first appeal, the respondent has every right to execute for the decretal amount. In fact, execution remains a lawful process, meaning that the judgment-debtor's loss in the process of execution is not unfair because judgment was entered against it. These were the sentiments of the court in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR) where it was held that:

“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.”
13. In this case, the applicant has failed to demonstrate what substantial loss it would suffer, loss that is likely to render its intended appeal nugatory.
14. The third element for consideration is security for costs. The applicant has not offered any security for performance provided under Order 42 Rule 6(2)(b) of the *Civil Procedure Rules*, neither has it considered the matter in its pleadings. While the applicant has a right to pursue a second appeal, the respondent has a definite right to execute for the decretal amount. Security provides the necessary goodwill that both parties will pursue their rights without impunity. Stay of execution is a discretionary relief that must be applied judiciously. That means, one party's rights must be balanced against the other party's.

Conclusion and Disposition.

15. On the strength of Sections 1A, 1B and 3A of the *Civil Procedure Act* and the Court's discretionary powers, I will grant the stay order on condition that the applicant secures the full decretal sum.
16. Accordingly, it is hereby ordered that the applicant shall deposit the full decretal amount into an interest earning account to be held in the names of the advocates for both parties. The said sum shall be deposited into such account within 30 days of this order, failing which the stay order herein shall stand vacated.
17. Each party shall co-operate in the opening of the said joint account and shall maintain a written record of such co-operation.
18. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 23RD DAY OF JULY, 2025.



R. MWONGO

JUDGE

Delivered in the presence of:

Chepkorir holding brief for Morris Njage for Appellant

No Representation for Respondent

Francis Munyao - Court Assistant

