



Jeremiah K. Muchendu t/a Icon Auctioneers v Ndirangu & another (Civil Appeal E098 of 2024) [2025] KEHC 10044 (KLR) (2 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E098 OF 2024
JM NANG'EA, J
JULY 2, 2025**

BETWEEN

JEREMIAH K. MUCHENDU T/A ICON AUCTIONEERS APPELLANT

AND

PATRICK KABBY NDIRANGU 1ST RESPONDENT

BONFACE THUO GUTU 2ND RESPONDENT

RULING

1. Notice of Motion 23rd July, 2024.
 1. Spent.
 2. Spent.
 3. That pending hearing and determination of this appeal, the Honourable Court be pleased to stay the order dated 15th May 2024 issued in the Small Claims Court at Nakuru in Small Claims Court Case No. E225 of 2022.
 4. That this Honourable Court be pleased to enlarge time within with the 1st Respondent/Applicant can file the Memorandum of Cross-Appeal.
 5. That this Honourable Court be pleased to deem the Cross-Appeal dated 12th June 2024 as duly filed.
 6. That this Court be pleased to make and/or issue such orders as it may deem fit to grant in the circumstances.
 7. That costs be provided for.



2. The Claims Manager of Madison General Insurance Kenya Ltd (Joan Kibiku) swore an affidavit in support of the application stating that they filed the Nakuru Small Claims Court Case No. E225 of 2022 through the 1st Respondent under the insurance doctrine of subrogation having indemnified the latter under an insurance policy they executed between them for some loss he incurred.
3. Judgement was entered in favour of the Applicant on behalf of the insurer and the ensuing decree successfully executed by Auctioneer, the Appellant herein. A surplus of Kshs. 681,556 realized from a public auction of property belonging to the 2nd Respondent who was the judgement debtor was forwarded to him.
4. The 2nd Respondent is then said to have made an application praying that the Applicant does instead remit to him a sum of Kshs. 1,681,556 which was the correct surplus due to him, which prayer was granted by order of the lower court issued on 15/5/2024. The Applicant maintains through his insurer that he in fact fully accounted for proceeds of the auction sale received from the Auctioneer which according to him was the sum of Ksh. 681, 556, which sum he transmitted to the 2nd Respondent. Notwithstanding, the 2nd Respondent's Auctioneers are threatening to execute for the sum in contention.
5. The Applicant further avers that he has filed a Cross-Appeal out of time against the lower court's order and Cross-Appeal raises issues that have not been brought out of the Appellant Auctioneer, hence the delay to file the Cross-Appeal.
6. The Applicant continues to tell the court inter alia that the proposed Cross-Appeal raises fundamental issues relating to the work of an Auctioneer as an officer of the court, adding that he was not present at the time of the auction in question and only remitted what was given to him by the Appellant.
7. The 2nd Respondent opposes the application vide an affidavit in reply. While confirming the relevant facts as given by the Applicant, he laments that he had learnt from the Appellant that his vehicle registration number KDA 238 X was on 12/6/2023 sold off for a paltry sum of Kshs. 2,000,000/- to satisfy the decree issued against him. The Appellant is said to have unilaterally deducted a sum of Kshs. 541,716/- as his fees leaving an ostensible surplus of Kshs. 681,556/= after paying out the deretal sum of Kshs. 776,728/=.
8. Later, the 2nd Respondent obtained a Memorandum of Sale and Certificate of Sale in respect of the auction showing that the vehicle was in fact sold off for a sum of Kshs. 3,000,000/= and, therefore, the surplus that ought to have been paid to him should have been Kshs. 1,681,556/=.
9. The Appellant is in the premises accused of dishonesty, the 2nd Respondent stating that the lower court rightly found that he was entitled to the sum of Kshs. 1,681,556/=.
10. The 2nd Respondent suggests in the alternative that if the Applicant craves stay of execution pending appeal, then the sum of Kshs. 1,000,000/= he demands together with the contested amount of Kshs. 541,716 in purported Auctioneer fees be deposited into court. Otherwise the 2nd Respondent deposes that the application which is also said to be belated lacks in merit.
11. The parties filed written submissions on the application. The 1st Respondent contends that the Appellant as the Auctioneer who conducted the auction in question acted as an Officer of the court and was not his agent in the auction. He therefore seems to distance himself from any irregularities or illegalities committed by the Appellant. In support of his stance , the 1st Respondent references inter alia judicial determinations in Stephen Mwallyo Mbondo vs County Government of Kilifi (2021) KEELRC 42 (KLR) and Sitienei & Another vs Lang'at T/A Kaloto Auctioneers (2023) KEELRC



- 2815 (KLR) which underscore the independent role of an Auctioneer in legal processes as an Officer of the Court.
12. The 2nd Respondent reiterates the averments in his affidavit by his submissions. He faults the Appellant for failing to file an Itemized Bill of Costs for assessment of his fees and for dishonesty in accounting for the auction. Reliance is placed on various decisions including the case of Margaret Wanjala T/A Mako Auctioneers Bungoma H.C Civil 68 of 2020 { 2024 eKLR } KEHC 2881 (KLR) (19 March 2024) (Judgement).
 13. I have read through the rival affidavit evidence and submissions in relation to this application. Section 79 G of the Civill Procedure Act provides that an appeal;

“ may be admitted out of time if the appellat satisfies the court that he had good and sufficient cause for not filing the appeal in time”.
 14. Case law in Edith Gichungu vs Stephen Njagi Thoithi (2014) eKLR lists the following factors among others to be considered before determining whether or not to grant leave to file an appeal out time;

“ the period of delay; the reasons for the delay; the degree of prejudice to the respondent if the application is granted , and whether the matter raises issues of public importance” .
 15. The court is also enjoined to consider the overriding objectives of civil litigation to ensure a just, expeditious, proportionate, and affordable resolution of disputes (see case law in Kamlesh Mansukhalal Damki Patni vs Director of Public Prosecutions & 3 Others (2015) eKLR).
 16. Regarding the relief of stay of execution pending appeal, the court is further obliged to consider the competing interests of the parties to such an application with an eye to ensuring that the appeal is not rendered nugatory thereby exposing the Applicant to substantial loss , and the Respondent also gets consideration having a valid judgement in his favour . In [Daniel Chebutul Rotich & 2 Others vs Emirates Airlines, Civil Case No. 368 of 2001](#), substantial loss was explained as hereunder;

“ subsatantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum”.
 17. In Tropical Commodities Ltd. International (in liquidation) (2004) 2 EA 331 my brother (Ogolla J)explained that substantial loss is a qualitative concept. It refers to;-

“ any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.”
 18. The question of “ substantial loss” is therefore the cornerstone of the court’s jurisdiction and discretion to grant an order for stay of execution pending appeal as observed in many cases including in Rhoda Mukuma vs John Abuoga (1988) KLR.
 19. The issues for determination are whether the Applicant has shown that he deserves exercise of the court’s discretion in his favour to enlarge time to file appeal aganst the impugned judgement and obtain an order for stay of execution pending appeal.



20. In *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 Others* (2015) eKLR the following principles are laid down as guiding the court's discretion whether or not to enlarge time;
- “a) Extension of time is not a right but an equitable remedy only available to a deserving party.
 - b. A party seeking extension has the burden of laying the basis to the satisfaction of the court.
 - c. The court's discretion depends on the circumstances of each case.
 - d. The question of any prejudice that may be suffered by the respondent should be taken into account.
- And
- e. The court should also consider whether the application was brought without undue delay.”
21. In *Mohsen Ali & Another vs Priscillah Boit & Another*, E& LC Case No. 2000 of 2012 (2014) eKLR the court explained “unreasonable delay” as dependent on the surrounding circumstances of each case.
22. The Applicant has not satisfactorily explained the long delay of around 2 months to bring this application. The Applicant appears to explain the delay by stating that he expected the Appellant to raise all the relevant issues in the Appeal but he failed to hence his decision to bring a Cross-Appeal.
23. The reason is hardly convincing since the Applicant is personally responsible for taking care of his interests rather than depending on another litigant. This observations notwithstanding, I find that no prejudice would be caused to the other parties if leave is granted to file the intended Cross-Appeal out of time as costs are a suitable remedy.
24. I would accordingly grant leave to bring the Cross-Appeal out of time.
25. Order 42 rule 6 (1) (2) of the Civil Procedure Rules 2010 governs disposal of an application such as before me for stay of execution pending appeal. The legal provisions stipulate that such order may not be granted;-
- “a. unless 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.”
26. The delay to bring this application has already been found to be unreasonable and inexcusable, therefore this legal condition has not been satisfied.
27. Provision of security for costs is a crucial condition precedent to grant of an order of stay of execution pending hearing and determination of an appeal. This is a mandatory legal requirement that has to be complied with. The court has power to determine the appropriate security for costs but the Applicant must first express willingness and readiness to offer security.



28. In *John Odungo vs Joyce Irungu Muhatia* [2014] eKLR the court observed that an Applicant does not have to actually make a deposit of security to obtain an order of stay of execution. It suffices if he shows “preparedness as well as readiness to provide security should one be called upon to do so”.
29. The Applicant has not satisfied the requirement for offer security for costs, having not expressed willingness and readiness to comply.
30. Determination of the application turns on the question of substantial loss, if any, the Appellant might suffer if stay of execution is not ordered. The case of *Nyatera vs Nyakundi* (Civil Appeal E033 of 2022) [2023]KEHC 3086 KLR) (16 March 2023) (Ruling) is relevant for the proposition that the Applicant ought to show the manner in which his appeal would be rendered nugatory if stay of execution is not ordered.. The court opined in the case that it is not enough to say that because the Respondent intends to proceed with execution, he should be stopped because of the appeal. The court is therefore required to tread a delicate balance of the parties’ interests. As it is now trite, this is the cornerstone of the court’s discretion to grant or refuse stay of execution pending appeal. The onus is on the Appellant to show on a balance of probability that the Respondent would not be able to refund the decretal sum if paid out and the appeal eventually succeeds.
31. In *RWW vs EKW* [2019] eKLR and *Re Global Tours & Travel Ltd HCWC No. 43 of 2000 In Milimani HCMCA No. 1561 of 2007, Century Oil Trading Company Ltd vs Kenya Shell Ltd*, this court again explained that;-
- “Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes when, it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory, and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”
32. In *Shell Ltd vs Kibiru & Another* (1986) KLR 410 it was famously postulated that “substantial loss in its various forms is the cornerstone of the court’s jurisdiction to grant stay pending appeal. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”
33. Regarding the burden of proof, the Court of Appeal held in *National Industry Credit Limited vs Aquinas Francis Wasike & Another* [2006] eKLR that;-
- “once an applicant expresses a reasonable fact that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”
34. The legal position elucidated in the cited Case Law has been reiterated in several recent cases including *Matata & Another vs Rono & Another* (Civil Appeal No. E034 of 2024) [2024] KEHC 2799 (KLR) (19 March 2024) (Ruling) and *Muinde Mulatya & Another* (2021) eKLR and *Kenya Commercial Bank Limited vs Sun City Properties Limited 7 & 5 Others* (2012) eKLR.
35. Based on the affidavit evidence of the parties neither of them has stated their financial position. The Applicant who shoulders the burden of proof has in particular not made out a prima facie case of the 2nd Respondent’s inability to pay back the sum in contention to warrant the latter to debunk the claim.



36. In the particular circumstances of this case, therefore, the Applicant has not satisfied the key substantial loss test as well as the requirements to institute such application without inordinate or unreasonable delay and offer of security for costs. The onus was on the Applicant to meet all the conditions stipulated hereinabove.
37. In the end, the Applicant is granted leave to institute a Cross-Appeal out of time and the draft Cross-Appeal dated 12th June 2024 is deemed as duly filed upon payment of any requisite court fees. The relief of stay of execution pending hearing and determination of the Cross-Appeal is, however, dismissed.
38. The costs of the application are granted to the 2nd Respondent.

J. M. NANG'EA, JUDGE.

RULING DELIVERED THIS 2ND DAY OF JULY, 2025 IN THE PRESENCE OF:

Appellant's Advocate, Absent.

1st Respondent's Advocate Mr. Ogara.

2nd Respondent's Advocate, Mr Karanja.

Court Assistant(Jeniffer)

J. M. NANG'EA, JUDGE.

