



**Nyambura v Thomas (Civil Appeal E043 of 2025)
[2025] KEHC 10740 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E043 OF 2025
FN MUCHEMI, J
JULY 17, 2025**

BETWEEN

JAMES NDUNG’U NYAMBURA APPELLANT

AND

PAULINE WANJIKU THOMAS RESPONDENT

RULING

Brief facts

1. The application dated 27th February 2025 seeks for orders of stay of execution in respect of the ruling in Thika SCCCC No. E770 of 2023 delivered on 14th February 2025 pending the hearing and determination of this appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 12th March 2025.

Appellant’s /Applicant’s Case

3. The applicant states that the trial court rendered its ruling in Thika SCCC No. E770 of 2023 on 14th February 2025 ordering that the suit motor vehicle registration number KBZ 716S be unconditionally released to the respondent and that the OCS Ruai Police Station to ensure compliance with the said order. Being aggrieved by the ruling, the applicant states that he has lodged an appeal against the said ruling and order.
4. The applicant states that the matter arose from a road traffic accident between his motor vehicle registration number KBZ 948G and the respondent’s motor vehicle registration number KBZ 716Z. The matter proceeded for assessment of damages arising from the damage caused to his vehicle but the respondent failed to enter appearance or file a response. The trial court rendered its judgment on 14th December 2023 in his favour and upon receiving warrants of attachment in respect of motor vehicle registration number KBZ 716S Mamalo Auctioneers proceeded to sell the vehicle vide public auction.



5. The applicant avers that the trial court did not grant stay of execution leaving him and the buyer of the said motor vehicle, one William Mwangi Gathoni, in an awkward position as the buyer had paid the amount at the fall of the hammer and proceeded to transfer the motor vehicle in his name. Furthermore, the applicant avers that he received the purchase price and utilized the same. Thus, the applicant argues that if the orders are complied with, both he and the buyer will suffer irreparable harm and he shall be forced to refund the decretal sum which he obtained legally.
6. The applicant states that the respondent then filed an application on 24th August 2024 which the trial court rendered its ruling on 9th January 2025 declaring the sale to be illegal for lack of valid warrants for sale. Upon delivery of the ruling, Mamalo Auctioneers regularized the sale by taking out valid warrants of sale and proceeded to advertise the sale of the said motor vehicle. However on 14th February 2025, the trial court ordered for the release of the motor vehicle.
7. The applicant states that the appeal is arguable and has reasonable chances of success as it is based on law on the legality of the sale.

The Respondent's Case

8. The respondent states that she was never served with the judgment, decree or any subsequent warrants of attachment and sale in the trial court. The respondent states that her motor vehicle registration number KBZ 716S was covered under a comprehensive insurance policy issued by Xplico Insurance Company Limited under policy number 070/ZDIA/COMP/HQ/23/E00056. Notwithstanding the claim by Xplico Insurance Company Limited that she was in breach of the policy conditions, the said insurer proceeded to undertake the repair of the said motor vehicle following the accident.
9. The respondent states that the applicant and his auctioneers proceeded to attach and sell the suit motor vehicle without any proper service of the decree or warrants of attachment and sale contrary to Order 5 Rule 2 of the Civil Procedure Rules. Furthermore, the auctioneers executed the sale of the suit motor vehicle within 10 days contrary to Section 15 of the *Auctioneers Act* which requires a minimum of 14 days' notice before any sale by public auction. Thus, the respondent argues that she was denied an opportunity to challenge the attachment or seek a stay of execution thereby violating her right of hearing.
10. The respondent argues that the application for stay of execution should be dismissed as the decretal sum was partly settled and the second sale of her motor vehicle was conducted illegally. Furthermore, the applicant has not demonstrated any substantial loss that he would suffer if the stay is lifted.
11. The respondent states that the applicant's auctioneers Mamalo Auctioneers conducted the sale of her motor vehicle in a manner that was not only illegal but also highly irregular. The auctioneer purported to conduct a public auction but the sale was done to the same purchaser, William Mwangi Gathoni who had previously purchased the motor vehicle in an earlier illegal sale which raises questions about the legitimacy of the auction process and suggests collusion between the auctioneers and the purchaser.
12. The respondent avers that she made a partial payment of the decretal sum on 28th January 2025 for Kshs. 8,650/- and on 31st January 2025 for Kshs. 250,000/-. The respondent argues that despite her partial compliance with the ruling dated 9th January 2025, the applicant and his auctioneers proceeded unlawfully executing her vehicle without serving her with the warrants of sale.
13. The respondent avers that Mamalo Auctioneers conducted the second sale without a valid auctioneer's license contrary to Section 12 of the *Auctioneers Act* thus rendering the entire process illegal and void. Furthermore, the valuation conducted by Stantec Automobile Valuers constitutes a gross undervaluation which is evidenced by the most recent Motor Vehicle Valuation and Section on



Certificate issued by Ukumbi Motor Valuers and Assessors Ltd where the vehicle was insured by Trident Insurance at an assessed value of Kshs. 1,500,000/-.

14. The respondent avers that she stands to suffer irreparable loss and damage if the application is not struck out as the applicant continues to enjoy the decretal sum paid and the proceeds from the sale of her motor vehicle.
15. The applicant filed a Supplementary Affidavit dated 27th February 2025 and states that the respondent was duly served with all the court documents including the decree and notice of entry of judgment. Furthermore, the respondent has never challenged service of court documents and in her applications in the trial court she admitted having been served with the court documents and taken them to her insurer.
16. The applicant states that Stantec Automobile Valuers did a professional valuation having assessed the physical motor vehicle at the auctioneer's yard and made a report based on the findings.
17. The applicant avers that he received a total of Kshs. 258,650/- from the respondent, Kshs. 8,650/- which was paid before the sale and Kshs. 250,000/- which was paid after the sale. The applicant further states that the total decretal sum is Kshs. 347,946/- and out of the sale he got Kshs. 250,000/- the outstanding decretal sum is therefore Kshs. 97,946/- which he is ready and willing to refund.
18. The respondent filed a Supplementary affidavit dated 1st April 2025 and states that on 19th March 2025, she sent a further payment of Kshs. 30,000/- to the applicant's advocates as part of the decretal sum bringing the total payment to Kshs. 288,650/-.
19. The respondent states that she is making diligent efforts to settle the remaining decretal sum and requests the court to consider those payments as evidence of her good faith and compliance with orders of the trial court.
20. The respondent argues that the applicant's continued insistence on stay of execution despite the payments is unjust and undermines the principles of fairness and equity.
21. The respondent filed a Further Supplementary Affidavit dated 27th May 2025 and states that she made additional payments towards the decretal sum on 19/04/2025 for Kshs. 30,000/- and 22/05/2024 for Kshs. 31,000/- culminating in the full settlement of the outstanding amount. The total payments currently amount to Kshs. 349,650/- which constitutes full satisfaction of the decretal sum. Thus, the respondent urges the court to cease all execution proceedings and order restoration of her motor vehicle in its pre-attachment condition.
22. The respondent avers that the applicant's continued retention of her motor vehicle despite full payment constitutes unlawful conversion of property and violates her rights under Article 40 of the *Constitution*. The respondent prays that the honourable court do find and hold that the appeal and the instant application are now moot as the substratum of the dispute which was recovery of the decretal sum no longer exists.
23. Parties put in written submissions.

The Applicant's Submissions

24. The applicant relies on Order 42 Rule 6(1) of the Civil Procedure Rules and the case of *Butt vs Rent Restriction Tribunal* [1982] KLR 417 and submits that he has satisfied the conditions to warrant been granted stay of execution.



25. Relying on the cases of *Commissioner of Customs vs Anil Dosbi* [2007] eKLR and *Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others*, Civil Application No. NAI 31/2012, the applicant argues that the appeal herein is arguable and has reasonable chances of success as the trial magistrate misdirected herself on the period of notice given to the respondent before the sale was undertaken which period ran from 4th July 2024 to 17th August 2024. Having found in her ruling dated 9th January 2025 that the proclamation and subsequent attachment of the said motor vehicle was lawful and the only thing missing was a warrant of sale, the period for notification was therefore not reversed to start a fresh but the same was continuing.
26. The applicant refers to the case of *Regnoil Kenya Limited vs Winfred Njeri Karanja* [2019] eKLR and submits that he stands to suffer substantial loss as the suit motor vehicle was already sold at the time of issuing the order for unconditional release. Further, if he is to comply with the said order, he will have to accrue extra costs of tracing the purchaser and compensating him for the inconveniences notwithstanding the decretal sum has been outstanding for over a year now.
27. The applicant argues that he has already been paid the proceeds of the sale which he used to settle his debts accruing from the repair of the motor vehicle and thus if the release is actualized, it will open a plethora of suits thereby occasioning substantial loss and rendering the appeal nugatory.
28. The applicant relies on the cases of *Aron C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates* (no citation given) and *Charles Kariuki Njuri vs Francis Kimaru Rwara (Suing as administrator of the Estate of Rwara Kimaru alias Benson Rwara Kimaru) (Deceased)* [2020] eKLR and submits that he is willing to deposit a total of Kshs 190,704/- to the respondent directly being the amount she has paid to him after the sale of the said motor vehicle.
29. The applicant submits that the memorandum of appeal was filed on 27th February 2025 together with the instant application and the impugned ruling was delivered on 14th February 2025. Thus, the applicant argues that a delay of 13 days is not unreasonable.

The Respondent's Submissions.

30. The respondent relies on the case of *Nguruman Ltd vs Shompole Group Ranch & Another* [2014] eKLR and submits that the applicant did not comply with Order 5 Rule 2 of the *Civil Procedure Rules* and Section 15 of the *Auctioneers Act*.
31. The respondent further submits that her rights under Article 47 and 50 of the *Constitution* were breached as the lack of notice, opportunity to be heard and the unlawful sale of her motor vehicle amount to administrative injustice. To support these contentions, the respondent relies on the case of *Republic vs Capital Markets Authority ex parte Joseph Mumo Matheka* [2008] eKLR.
32. Relying on the case of *Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 Others* [1995] eKLR, the respondent argues that the applicant suppressed information about payments made in breach of the duty of candor.
33. The respondent submits that the applicant has not demonstrated any substantial loss whereas she stands to suffer the greater injustice. Furthermore, the trial court's ruling was sound and legally justified. To support these contentions, the respondent refers to the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others* [2003] eKLR.
34. The main issue for determination is 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.



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.

35. 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.
36. 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.
37. 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.
38. The applicant states that he stands to suffer substantial loss as the suit motor vehicle has already been sold and tracing the vehicle will incur him further costs. Furthermore, the applicant argues that he already spent the proceeds from the sale of the motor vehicle.



39. It is trite law that an applicant is required to show that execution shall irreparably affect him or will alter the status quo to his detriment thereby rendering the appeal nugatory. In the instant case, the suit motor vehicle has already been sold to a third party and yet the applicant has failed to disclose that the respondent has been remitting the decretal sum in installments. The respondent has paid to the applicant a sum of Kshs. 349, 650/- which constitutes the full decretal sum. Thus, it would be unfair and unjust for the applicant to hold both the decretal sum and the respondent's motor vehicle. The applicant has not demonstrated that he will suffer substantial loss in the event that the orders sought are not granted. In fact, the respondent stands to suffer irreparably as she has settled the decretal amount and yet her motor vehicle has not been released to her.
40. Accordingly, it is my considered view that the applicant has not demonstrated the substantial loss he stands to suffer.

Has the application has been made without unreasonable delay

41. The ruling was delivered on 14th February 2025 and the applicant filed the instant application on 27th February 2025. Thus, the application has been filed timeously.

Security of costs

42. 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.

43. Evidently, the issue of security is discretionary and it is upon the court to determine the value and the terms. The applicant has stated that he is ready and willing to abide by any directions by the court. It is only in his submissions and after the respondent averred in her affidavit that she had partially paid the decretal sum that the applicant stated that he is ready and willing to deposit the sum of Kshs. 190,704/- to the respondent directly being the amount she paid after the sale of the motor vehicle.
44. 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 Porteit 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.

45. Bearing in mind the balance of the rights of the parties herein as well as 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.
46. Accordingly, it is my considered view that the application dated 27th February 2025 lacks merit and is hereby dismissed with costs.



47. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 17TH DAY OF 2025.

F. MUCHEMI

JUDGE

