



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v Owino (Civil Appeal E1242 of 2024)
[2025] KEHC 10177 (KLR) (Civ) (15 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1242 OF 2024

LP KASSAN, J

JULY 15, 2025

BETWEEN

STEPHEN ANTHONY ONYANGO OTIENO APPELLANT

AND

VICTOR BRIAN OWINO RESPONDENT

RULING

1. Before this court is the Appellant’s Application dated 30.10.2024 brought under sections 3A, and 3B of the *Civil Procedure Act*, Order 42 Rule 6 (1,2 & 6), Order 43, Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking orders to wit:
 - a. Spent
 - b. Spent
 - c. The Honourable Court be pleased to stay the execution of Judgment obtained in MCCOMMSU No. E871 of 2022 Victor Brian Owino-vs-Stephen Anthony Onyango Otieno pending the hearing and determination of the Appeal filed herein.
 - d. Costs of this Application be provided be in the cause.

Background

2. The grounds for the notice of motion are primarily based on the fact that a judgment was issued on 4th October 2024 against the Applicant for Kshs. 1,000,000.00 plus costs and interest, with a 30-day stay of execution set to expire on 4th November 2024. The applicants are aggrieved by this judgment, asserting that the lower court’s decision was made without proper consideration of facts and evidence, potentially relying on a non-existent contract, and they believe their appeal has a very high chance of



success. It is argued that executing the judgment upon the stay's expiration would render the intended appeal nugatory, causing significant prejudice to the Applicant. Furthermore, the application for a stay has been filed promptly, and the Applicant is willing to provide security, such as depositing half the judgment amount, assuring that the Respondent will not be prejudiced since the decretal amount continues to accrue interest.

3. The Respondent's replying affidavit primarily opposes the Applicant's request for a stay of execution, contending that the applicant's claims of future prejudice are unfounded. The Respondent asserts that the trial court ordered the Applicant to refund Kshs. 1,000,000 plus interest and costs to the Respondent, with the total amount due reaching Kshs. 4,744,994 as of 9th October 2024. He deponed that the Applicant has already been prejudiced by losing possession of both the disputed motor vehicle and the Kshs. 1,000,000 they paid, and that the application for a stay is an abuse of court process because it fails to demonstrate that the Applicant would suffer substantial loss, a crucial condition for granting a stay. Consequently, the Respondent believes the application lacks merit and should be dismissed, but alternatively proposes that if a stay is granted, the applicant deposit half the amount due into an interest-earning account to secure the Respondent's interests.
4. The further affidavit reiterates the Applicant's supporting affidavit and responds directly to the Respondent's opposing arguments, specifically contesting the claim that the application for a stay is an abuse of process or that the Applicant would not suffer substantial loss. The Applicant asserts that the instant appeal must be heard and determined to prevent prejudicing the court's review of the judgment and underlying facts, emphasizing their right to appeal the lower court's decision. Crucially, the Applicant highlights that to balance the rights of both parties and prevent prejudice, they have already deposited Kshs. 500,000 as security in court as directed, thereby fulfilling a key condition and ensuring the respondent's interests are protected while the appeal is pending and urged to be heard expeditiously.

Issues for determination:

- a. Whether the judgment/decree delivered on 4th October 2024 should be stayed pending hearing and determination of the Appeal?
- b. Who should bear the costs?

Applicant's submissions

5. The Applicant seeks a stay of execution of the lower court's judgment, pending the full hearing and determination of their appeal. He submits that he has fully satisfied the conditions required for such a stay, specifically highlighting that their application was filed without unreasonable delay. He submitted that he would face substantial loss if the judgment is executed. To address the Respondent's interests and demonstrate good faith, the Applicant has already deposited Kshs. 500,000 as security with the court. Furthermore, he emphasized that the appeal is arguable and raises significant issues that warrant the higher court's consideration, and he has already taken steps to ensure its timely prosecution by filing the Record of Appeal.

Respondent's submissions

6. The Respondent did not submit.

Analysis and Determination

7. The issue as to whether there ought to be stay of execution of the judgment/decree delivered on 4th October 2024 pending the hearing and determination of the appeal are based upon principles in which



such a prayer can be allowed are now well settled from the authorities from this court and from the superior courts. See *Halai & Ano.-vs-Thornton & Turpin (1963) Ltd [1990] eKLR, Butt-vs-Rent Restriction Tribunal p1982] KLR 417.*

8. Generally, a stay of execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 which provides:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

9. For orders of stay of execution to be granted, the Applicant must satisfy the conditions to wit that substantial loss may result to the Applicant unless the order is made; that the application has been made without undue delay; and that 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 See *Amal Hauliers Limited-vs-Abdulnasi Abukar Hassan (2017) eKLR.*
10. The court ought to fairly take into account the interests of the Respondent, who has been deprived of the benefits of his judgment, in addition to the Appellant's right to ventilate their case, which the court should not be quick to deny. See *Kenya Shell Ltd. v. Kibiru & others (Supreme); Attorney General v. Halal Meat Produces Limited, Civil Application No. Nairobi 270 of 2008; and Mukuma v. Abuoga (1988) KLR 645.*
11. Where the Applicant is successful, he or she shouldn't be in a position where he or she can't obtain their money back. Additionally, if the Applicant ultimately fails in his intended appeal, the Respondent who has a decision in his favour shouldn't find it difficult or impossible to enforce the decree. This is the guarantee security of costs gives to parties. See *Nduhiu Gitahi & Ano.-vs-Anna Wambui Warugongo (1988) 2 KLR 100.*
12. On the limb of substantial loss, the Applicant asserts that they will suffer irreparable loss if execution proceeds. However, no specific loss has been demonstrated beyond the general assertion that the appeal will be rendered nugatory. The burden of proving substantial loss lies with the Applicant. See *Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR.* In the present case, the Applicant has not provided evidence to substantiate this fear or show the Respondent's inability to refund the decretal sum.
13. On the limb of delay, the application was filed on 30.10.2024, 26 days after the judgment was delivered. There is no delay attributable to the Applicant. This condition is satisfied.
14. On the limb of security, the Applicant has provided security of Kshs 500,000/= which was deposited in court as per the Court's directions on 05.11.2024. This limb has also been satisfied.
15. Lastly, on the limb of arguable appeal, an arguable appeal need not be one that will necessarily succeed but must raise bona fide points. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR.* The memorandum of appeal dated 29.10.2024 a perusal of the same shows there are triable issues.
16. Taking all relevant factors into consideration, I do order that;
- i. There be a stay of the execution of the Judgment obtained in MCOMMSU No. E871 of 2022 *Victor Brian Owino-vs-Stephen Anthony Onyango Otieno* pending the hearing and determination of the Appeal filed herein.



ii. The costs of this Application will be in the cause.

17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF JULY 2025

LINUS P. KASSAN

JUDGE

In the presence of:-

Karanja for Applicant

Koso Respondent

Carol – Court Assistant

