



**Omole v Wachira; Communist Party of Kenya (CPK) & another (Interested Parties); Anyango (Objector) (Civil Appeal E298 of 2022) [2025] KEHC 10014 (KLR) (Civ) (11 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10014 (KLR)

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

**CIVIL**

**CIVIL APPEAL E298 OF 2022**

**AC MRIMA, J**

**JULY 11, 2025**

**BETWEEN**

**BOOKER NGESA OMOLE ..... APPLICANT**

**AND**

**BENEDICT WACHIRA ..... RESPONDENT**

**AND**

**COMMUNIST PARTY OF KENYA (CPK) ..... INTERESTED PARTY**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION ..... INTERESTED PARTY**

**AND**

**MAUREEN ODHIAMBO ANYANGO ..... OBJECTOR**

*(Being an appeal from the Judgment and Order of Hon. Erastus Orina, Hon. Theresa Chepkwony and Hon. Daniel Kagache delivered on the 8th May 2022 at Nairobi in Nairobi PPDT Complaint No. E051 of 2022)*

**RULING**

1. This ruling relates to two applications. They are a Chamber Summons dated 11<sup>th</sup> December 2024 and a Notice of Motion dated 20<sup>th</sup> January 2025, both instituted by Booker Ngesa Omole, the Applicant herein.
2. In the Chamber Summons [hereinafter referred to as ‘the Summons’], the Applicant sought the following reliefs;



1. Spent
  2. That this Honourable Court be pleased to grant stay of execution of the decree issued pursuant to the Ruling delivered on 21<sup>st</sup> May 2024 by Hon. E. Wambo taxing the Respondent's Party and Party Bill of costs dated 16<sup>th</sup> May 2024 at Kshs. 1,411,733.33/- pending the hearing and determination of this application inter partes.
  3. That this Honourable Court be pleased to grant stay of execution of the decree issued pursuant to the Ruling delivered on 21<sup>st</sup> May 2024 by Hon. E. Wambo taxing the Respondent's Party and party bill of costs dated 16<sup>th</sup> May 2024 at Kshs. 1,411,733.33/- pending the hearing and determination of reference filed out of time.
  4. That the Applicant herein is granted leave to file reference out of time against the decision of the taxing master.
  5. That the draft reference annexed to the present application be deemed to have been filed upon payment of the requisite fee.
  6. That the costs of this application be provided for.
3. In the grounds in support of the Summons, the Applicant asserted that a Notice objecting to the taxing master's decision was filed on 23<sup>rd</sup> May 2024 in line with Order 11 Rule (1) of the Advocates Remuneration Order. It was his case that he disputed the taxed off amount of Kshs. 1,411,733.33/- on the grounds that it was excessive and unjustified. He claimed that the 45-day given by the Court has since lapsed and the Respondent is in the process of extracting a decree for purposes of execution, hence, the need for stay of execution until this application is heard. It was also his case that the time within which a reference is to be filed has since lapsed, hence, the need for enlargement of time.
  4. In the Supporting affidavit, Amos Wandago, the Learned Counsel for the Applicant, deposed that the delay was occasioned by the failure of his Associate, one Christopher Makori, who has since left the firm, to notify him of the delivery of the ruling. Consequently, on 10<sup>th</sup> December 2024, he was called by his client that he had received a notification from the Judiciary that an application for a decree against him had been made. He deposed that when he retrieved his office file, it was then that he realized that the ruling had already been received and the file filed away and the stay period and time within which to file a reference had already lapsed. He further deposed that an application for decree had already been filed and was apprehensive that execution may be instituted against his client anytime yet the delay was occasioned by his former Associate, a mistake which ought not be visited against him.
  5. He also deposed that whereas the Respondent shall not be prejudiced in any way, his client stands to suffer great financial loss if this Court declines to grant the orders sought. He urged the Court to extend time by virtue of Rule 11(4) of the Advocates (Remuneration)(Amendment) Order, 2014.
  6. In the Notice of Motion [hereinafter referred to as 'the Motion'], the Applicant sought the following orders: -
    1. Spent
    2. That this Court be pleased to grant stay of execution of the warrants of sale dated 19<sup>th</sup> December 2024 pending hearing and determination of the Application dated 11<sup>th</sup> December 2024.
    3. That this Honourable Court be pleased to set aside the attachment of the Objector's property proclaimed by Moran Auctioneers on 20<sup>th</sup> January 2025.



4. That costs of this Application be provided for.
7. In the grounds in support of the Motion, the Applicant stated that on 19<sup>th</sup> December 2024, warrants of attachment and sale of the judgment debtor's property were issued six days after directions were given and that on 20<sup>th</sup> January 2025, Moran Auctioneers visited the house of the Objector and purported to proclaim the property. The Applicant claimed that there is danger that the Objector's property will be carted away and sold unjustly and as such, it was important to issue an order of stay to preserve the status quo pending Court's intervention. The Applicant further deposed that on 11<sup>th</sup> December 2024, he instructed his Advocate to apply for stay and leave to appeal against the taxation of the Bill dated 16<sup>th</sup> June 2023.
8. The Applicant also stated that on 13<sup>th</sup> December 2024, the Court directed that the Motion be mentioned on 6<sup>th</sup> February 2025 since execution process had not commenced. However, six days later, on 19<sup>th</sup> December 2024, the Respondent applied and obtained warrants of attachment and on 20<sup>th</sup> January 2025 Auctioneers visited the Objector herein who is a friend to the Applicant, purporting to execute the warrants of attachment.
9. It was further deposed that it was very urgent and crucial that the order of stay is issued since execution will torpedo and render useless the serious issues raised in the motion and the summons. He argued that the taxed sum of Kshs. 1,411,733 for an appeal arising out of a ruling is excessive and does not represent the actual cost incurred. He urged the Court to allow the applications.
10. The Motion was further supported by one Maureen Anyango Odhiambo, the Objector herein who deposed her affidavit dated 20<sup>th</sup> January 2025. It was her case that she was the owner of House No. 7 located in LR No. 12715/5034 Unity Drive, off Community Road and the registered owner of motor vehicle number KCY 500R make Toyota Prado. She also deposed that on 20<sup>th</sup> January 2025, Jovan Kariuki trading as Moran Auctioneers purported to proclaim her household property and her motor vehicle even though there was no decree judgment against her. It was her case that the Applicant herein was just a friend and was in her house at the time of the attachment but he is not the owner of the properties attached. She urged the motion to be allowed.
11. The Respondent herein, Benedict Wachira, challenged the Motion through his Replying Affidavit deposed to on 12<sup>th</sup> February 2025. He claimed that the Objector was misleading the Court since she was married to the Applicant under Kenyan law. He deposed that he personally attended their marriage ceremony on the 7<sup>th</sup> May 2010 at Mamba Village in Karen and that they have four children. He further stated that the Applicant had shared on his X handle @Bookerbiro, that thugs had broken into his premises at Syokimau, the same house that he claims is his friend's. He asserted that the Applicant caused the incident to be aired on Citizen TV on 13<sup>th</sup> January 2025. The Applicant argued that in absence of a decree absolute evidencing termination of their marriage, it is still valid.
12. As regards the ownership of the land known as LR. No. 12715/5034, it was his case that the Objector scanned the Title Deed's first page in full and scanned half of the second page that bears her name, mischievously leaving out the upper half that bears the Applicant's name, an act tantamount to perjury on the part of the Objector.
13. It was his case that in the title deed, the Applicant, in a bid to hide his property, transferred to the Objector the property on 3<sup>rd</sup> November 2022, just three months after the judgment in the taxation was issued. It was his case that despite the transfer, the property remained matrimonial property. The Respondent deposed further that there are other numerous attempts by the Applicant to hide his property which can be used to satisfy the decretal sums by transferring them to other people thus



leaving Auctioneers to execute against the property in question. It was also pointed out that in spite of this Court orders on depositing of security as ordered on 20<sup>th</sup> January 2025, the Applicant has failed to comply. In the premises, the Applicant urged the Court to dismiss the motion with costs.

14. Arising from the two applications, this Court is now called upon to render on whether the applications are merited. This Court will begin with the Summons.
15. When a Court is considering an application for extension of time, it is being called upon to exercise its unfettered discretion. In such a scenario, the court simply assesses whether the Applicant has a justifiable cause. The Supreme Court in *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR articulated the principles applicable in an application for leave to appeal out of time. It observed thus: -

... The underlying principles a Court should consider in exercise of such discretion should include: -

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. the delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;

16. On the same principles, the Court of Appeal, in *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi*, rendered itself thus: -

... It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.

17. The impugned ruling was delivered on 21<sup>st</sup> May 2024. The Learned Taxing master granted the Applicant 45 days' stay of execution. As correctly captured by the Respondent in his submissions, the stay period lapsed on 6<sup>th</sup> July 2024. A computation of the time that elapsed before the Applicant was jolted into action returns a delay of over five months. The explanation put forth by the Applicant's Counsel is that, the Associate who handled the case received the Ruling and filed it away without his knowledge. He (the associate) then left the firm and did not appraise him of the status of the case hence the delay.
18. This Court is alive to the rigours of running law firms with the aid of Associate Advocates. Whereas the Proprietor or the Partners, as the case may be, shoulders the overall burden that the law firm runs above board, the reality is that many a times the Proprietor or the Partners rely on the services of Associates. Such Associates are fully-fledged Advocates and they also owe a duty to the Court towards expeditious



dispensation of justice. Essentially, an Advocate is an agent of a client and in the end, it is the client who is called upon to satisfy the decrees and orders of the Court. An Advocate, therefore, owes a duty of care to the clients and despite diligence, genuine mistakes and lapses often occur in law firms. Therefore, unless in obvious and the clearest of cases of negligence and lack of diligence, clients ought not to suffer for the mistakes and lapses on the part of their Advocates.

19. In a bid to fully realize the full intent of Article 50[1] of *the Constitution*, parties ought to be accorded space to ventilate their cases to the highest possible Courts. However, that is not to mean that there should be a carte blanche grant of any request for extension of time. Even in the height of the quest for constitutionalism, the guidance developed by the Supreme Court in Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others case [supra] among other decisions must be adhered to. In this case, the delay is of five months and was largely occasioned by the exit of an Associate from the Applicant's Advocates law firm. In this era of technology, it should not be a tall order to have a system in place that monitors progress of matters in a law firm. However, even with such a system in place, lapses and mistakes may occur, but such a system serves as a good mitigating initiative.
20. Delays occur in many ways and several decisions have discussed different scenarios including the Supreme Court in Kiarie & 2 others -vs- Administrator of the Estate of John Wallace Mathare (Deceased) & 2 others (Application 1 of 2014) [2019] KESC 85 (KLR) (17 December 2019) (Ruling), where a delay of 27 days to file an application for extension of time from the time copies of proceedings and a ruling were given to a party was found to be inexcusable. That said, the most profound underlining principle in applications for extension of time is the explanation for the delay and since no two cases are factually similar, there is no fast rule on this subject. It all depends on the peculiar circumstances of a case.
21. In this case, this Court finds favour with the explanation given by Counsel. Whereas the period at hand is long, the explanation is genuine since even the name of the Advocate who was in conduct of the brief and who left the law firm was disclosed. The delay can be solely attributed to the Applicant's Counsel and as such this Court finds that the Applicant should not be a partaker of his Counsel's bitter herbs, so to say, with his Associates. The Summons is, therefore, merited.
22. Next is a consideration as to whether the Motion be allowed. Order 42 of the Civil Procedure Rules provides the three conditions appurtenant to granting or refusing to grant stay of execution orders. Courts have, times without number, also expounded on the conditions. The Court of Appeal in Butt -vs- Rent Restriction Tribunal [1979] KLR embellished the foregoing provision as hereunder: -
  - a. The power of the Court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.



23. In ascertaining whether the conditions were fulfilled in this matter, the term ‘substantial loss’ must be well understood. In *James Wangalwa & Another -vs- Agnes Naliaka Cheseto* [2012] eKLR, the Court expressed itself as hereunder: -

... 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.

24. The Applicant herein has not shed any light on the loss he stands to would suffer, let alone a substantial one, should the execution process ensue. His only concern is that the amount that was taxed off is excessive and unjustifiable in the circumstances of the case. Further, the Applicant has not expressed any concern that the Respondent will not be in a position to refund the decretal sum should the intended appeal be successful. In discussing this subject, the Court of Appeal in *National Industrial Credit Bank Ltd -vs- Aquinas Francis Wasike & Another* (2006) eKLR observed as follows: -

... 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....

25. The above is not the case here. The Applicant’s only concern is the amount the bill of costs was taxed at. That per se does not amount to substantial loss or at all. This Court now finds that the Applicant has not attained the required threshold by failing to demonstrate any loss he stands to suffer if the execution process is not stayed.
26. Turning to the issue of security, despite this Court’s direction that parties agree on the nature of security, the parties seem not to have agreed on any. The general trend in monetary decrees is that the sums or part thereof be secured. Even in cases where a party fails to demonstrate any substantial loss, a Court may nevertheless order the deposit of security in a bid to just have the matter determined on appeal. However, this must be in exceptional instances.
27. Finally, this Court will deal with the issue of the ownership of the attached property. The Respondent deposed in the first person that he attended the Applicant’s and Objector’s wedding in Karen and that since then the two have lived together and have four children. The Applicant and Respondent only retorted to such that they were just friends. Further, in a ruling of the Court, which this Court takes judicial notice of, in Civil Case E001 of 2020, *Odhiambo -vs- Omole* KEHC 6047, the Learned Judge observed that the Objector was married to the Applicant. Without any further rebuttal from the Applicant and the Objector, this Court finds that the Applicant and the Objector are married. However, according to the record, the attached property was solely registered in the name of the wife, the Objector herein. Whereas the Applicant and the Objector are spouses, since the attached property is registered in the sole name of the Objector then it cannot be the case that such property is open for execution on account of a decree passed against the husband. For that to happen, then the husband’s share in it, if any, is to be ascertained. It is that share which will then be open for attachment in execution of the decree passed against the husband and not more.



28. The above position has been severally held in various decisions including by the Supreme Court in JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment), Echaria -vs- Echaria [2007] eKLR among others. In the Echaria's case [supra], the Court held as follows: -

.... Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property.....

29. As there is no evidence of the Applicant's share in the attached property, then execution as initiated cannot be allowed to proceed. The decree holder was obligated to, in the first instance, ascertain the ownership of the property and upon finding that it was registered in the wife's name was to ascertain the husband's share. That was the only legal way to undertake proper execution of such a property. As a result, the objection is sustained.

30. On the basis of the foregoing discussion and having been persuaded to extend time to lodge a reference herein, this Court will, nevertheless, accord the Applicant an opportunity to deposit security in Court. Further, the attachment will be set-aside.

31. In the end, the following final orders hereby issue: -

- (a) Leave be and is hereby granted for the Applicant to file and serve a Reference within 7 days of this ruling.
- (b) There shall be a stay of execution of the taxed costs herein on condition that the Applicant shall deposit the sum of Kshs. 750,000/= [Kenya Shillings Seven Hundred and Fifty Thousand Only] in COURT within 14 days of today and in default the stay orders shall stand discharged and execution shall proceed.
- (c) The attachment of the property known as L.R. No. 12715/5034 registered in the name of Maureen Adhiambo Onyango is hereby set-aside.
- (d) The costs of the objection proceedings shall be borne by the Respondent whereas the costs of the Chamber Summons dated 11<sup>th</sup> December 2024 shall be borne by the Applicant.

Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JULY, 2025.**

**A. C. MRIMA**

**JUDGE**

Ruling virtually delivered in the presence of:

Mr. Kimeu, Learned Counsel for the Respondent.

Amina/Abdirazak – Court Assistants.

